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## Keepers of the Night: The Dangerously Important Role of Resident Assistants on College and University Campuses

Christie M. Letarte\*

### INTRODUCTION

Institutions of higher education have a duty to provide reasonably safe environments for students and institutional responses to campus crimes have been widely watched and criticized.<sup>1</sup> An increase in campus crimes has been met with a greater focus on institutions' role in providing a safe community;<sup>2</sup> and federal mandates require that administrators report campus crimes to the student body, parents, and the Secretary of Education.<sup>3</sup> While administrators handle institutions' tactical responses,<sup>4</sup> on the ground level, a great deal of responsibility is placed on

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\* © 2013, Christie M. Letarte. All rights reserved. Research Editor 2012–2013, *Stetson Law Review*. J.D., *cum laude*, Stetson University College of Law, 2013; M.A., University of Connecticut, 2010; B.A., The College of the Holy Cross, 2008. Special thanks to Professor Peter F. Lake for his assistance and advice during the writing of this Article.

<sup>1</sup> Sara Lipka, *Longtime Watchdog for Campus-Security Group Looks for a New Role*, <http://chronicle.com/article/Longtime-Watchdog-for/130944/> (accessed Aug. 16, 2013).

<sup>2</sup> William A. Kaplin & Barbara A. Lee, *A Legal Guide for Student Affairs Professionals*, 383, Jossey-Bass 2009 (noting that increased concern of violent crimes has caused institutions of higher education to put more of a focus on campus security); Joseph Beckham & Douglas Pearson, *Negligent Liability Issues Involving Colleges and Students: Does a Holistic Learning Environment Heighten Institutional Liability?* 175 Ed. Law Rep. 379, 395 (2003) (stating that “institutions have become increasingly concerned with student welfare, in part because of societal awareness of activities like hazing and binge drinking on campus”); J.J. Hermes, *Virginia’s Governor Signs Laws Responding to Shootings at Virginia Tech*, <http://chronicle.com/article/New-Virginia-Laws-Respond-to/675/> (accessed Aug. 16, 2013) (listing the changes made to Virginia Laws, which include a requirement that institutions contact parents when a student seeks counseling; having an emergency-notification system, written emergency plans, and threat-assessment teams; and allow access to health records of students who are considered dependents for tax purposes).

<sup>3</sup> 20 U.S.C. § 1092(f) (2006); *See* Kaplin & Lee, *supra* n. 2, at 387–388 (describing the requirements of the “Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act,” commonly referred to as the “Clery Act,” that institutions report “(i) criminal homicide; (ii) sexual offenses, forcible or nonforcible; (iii) robbery; (iv) aggravated assault; (v) burglary; (vi) motor vehicle theft (vii) arson; (viii) arrests or persons referred for campus disciplinary action for liquor law violations, drug-related violations, and illegal weapons possession” among other reporting, prevention, and policy mandates); *See* 20 U.S.C. § 7102 (West 2006) (having the purpose of, among other goals, preventing underage alcohol consumption and creating drug-free academic environments with the assistance of communities and federal support).

<sup>4</sup> Kaplin & Lee, *supra* n. 2, at 383.

a group of student leaders hired as resident assistants (RAs).<sup>5</sup> Part of RAs' roles in creating a community environment conducive to academic success is the enforcement of institutional policies to keep residence halls secure and residents safe.<sup>6</sup>

Many incidents that result in litigation against an institution involve alcohol, sexual assault, or a suicidal student and, often times, the situations occur in residence halls.<sup>7</sup> Given the growing concern of campus safety and the nature of the RA role in taking the proper steps to identify safety concerns and notify professional personnel in emergencies, it is not surprising that RAs have increasingly been named in lawsuits.<sup>8</sup> The fact that RAs, as student leaders, are being named alongside institutions and administrators as defendants, or noted as having played a key role in an incident that resulted in a legal dispute, is of significant import. A great deal of responsibility and risk lies within the RA role and this Article acknowledges that RAs, who are some of the most important employees at institutions of higher education are often under-trained<sup>9</sup> and may negligently expose institutions to liability.<sup>10</sup> More importantly, this Article aims to address how standards and regulation of the RA position can provide a better snapshot of the RA role, nightlife on college campuses, and reasonable

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<sup>5</sup> Lelia B. Helms, Christopher T. Pierson, & Kathleen M. Streeter, *The Risks of Litigation: A Case Study of Resident Assistants*, 180 Ed. Law Rep. 25, 1–2, (2003).

<sup>6</sup> Gregory Blimling, *The Resident Assistant: Applications and Strategies for Working with College Students in Residence Halls* 5–6 (Kendall-Hunt 2003).

<sup>7</sup> See Peter Lake, *Foundations of Higher Education Law & Policy*, 163–168 (NASPA 2011); see *Freeman v. Busch*, 150 F.Supp. 2d 995 (S.D. Iowa 2001) (detailing a situation where a guest became ill due to alcohol consumption and was subsequently sexually assaulted by her host and his friends); *Delaney v. Univ. of Houston*, 835 S.W.2d 56, 60 (TX 1992) (explaining how an unfixed door lock resulted in an individual entering a residence hall and raping a female student); *Mullins v. Pine Manor*, 449 N.E.2d 331 (Mass. 1983) (describing a situation where a woman was raped in her residence hall).

<sup>8</sup> Helms, Pierson, & Streeter, *supra* n. 5, at 1–3.

<sup>9</sup> Blimling, *supra* n. 6, at 1 (describing RAs as “overworked and underpaid”); Peter Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 651 (2005) (stating that “[i]f the alcohol crisis on campus is the Vietnam of this generation, its first lieutenants are the overworked and often under-trained and under-equipped resident assistants”).

<sup>10</sup> Although not the topic of this Article, sovereign immunity may apply in some contexts, but not always. Lake, *supra* n. 9, at 154. “Sovereign immunity is by far the most significant residual immunity in higher education safety law. . . . [s]tates have only partially abolished sovereign immunity, although a very large range of routine tort lawsuits (e.g., slip-and-fall, negligen[t] security) are not barred by sovereign immunity rules. Even in states with strong sovereign immunity rules protecting public institutions, liability risk might be lower but accountability expectations might actually be higher. As an arm of the state, public institutions face double scrutiny—as both institutions of higher education and government entities—by the public, the press, parents, students, and legislators.” *Id.*

expectations for students, parents, and employees. Providing information, guidance, and regulation regarding the dangers of student nightlife and the emergency response role of the RA is the next step in increasing college-campus safety.

Part II of this Article will address institutions' responsibility to provide a reasonably safe campus environment and the role of resident assistants in creating a safe environment. Part III addresses the relationship of RAs to institutions through agency law, while Part IV discusses liability RAs may create via tort law. Lastly, Part V provides possible institutional actions and regulatory solutions that may offer greater guidance and reporting mechanisms for the RA position so that institutions are better informed and able to provide more support to residential life staff.

## BACKGROUND

### *Institutional Responsibility to Create a Reasonably Safe Campus*

The responsibility of providing a reasonably safe campus environment began approximately thirty years ago in the decision of *Mullins v. Pine Manor*.<sup>11</sup> *Mullins* was the first case to state that institutions have a legal obligation to provide students with a reasonably safe environment and protection from reasonably foreseeable criminal acts of third parties.<sup>12</sup> Additionally, the court in *Mullins* noted that the institution is in the best position to provide safety measures through security systems, guards, proper locks, and more; and students are in less of a position to provide safety measures because they only live in the room they occupy for approximately nine months at a time.<sup>13</sup> Campus safety was again

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<sup>11</sup> 449 N.E.2d 331 (Mass. 1983) (reaching the decision that students are entitled to a reasonably safe residential environment after a young woman was taken from her residence hall by an unidentified intruder and raped on campus).

<sup>12</sup> *Id.* at 337–339 (noting “deficiencies” in the security measures implemented on the campus that the director of student affairs testified that an attack on a female student was foreseeable given the location of the women’s college to a metropolitan area); Peter F. Lake, *The Rise of Duty and the Fall of in Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64. Mo. L. Rev. 1, 14 (1999). *Mullins* and *Tarasoff v. Board of Regents*, 551 P.2d 334 (Cal. 1976), are cited as two of the most important cases related to institutions’ duties in protecting students. *Mullins* relates to the duty to protect students from reasonably foreseeable criminal conduct while *Tarasoff* creates institutional duties “regarding persons on campus endangering off-campus non-students in similar circumstances” as a university counselor was found to have a duty to warn “a foreseeably endangered non-student off-campus victim from a patient who had expressed credible violent and dangerous intentions toward that person.” *Id.*

<sup>13</sup> *Mullins*, 449 N.E.2d at 335.

highlighted after the rape and murder of Jeanne Clery at Lehigh University.<sup>14</sup> The Jeanne Clery Act (Clery Act) was signed into legislation in 1990;<sup>15</sup> original legislation of the Act focused mainly on crime reporting and has transformed through a series of amendments to a greater goal of crime prevention on college campuses.<sup>16</sup> Now, the Clery Act requires institutions to provide yearly reports of campus crime statistics that are sent to campus community members, plans regarding emergencies, and notification systems for “any imminent threat to campus safety.”<sup>17</sup> Institutional liability has been extended to off-campus sites where an institution sends its students and—even if the student has knowledge of an off-campus site’s danger—the school is not alleviated from liability.<sup>18</sup> In recent years, emergency responses of institutions have been criticized and administrators are having to defend actions taken while managing emergencies.<sup>19</sup>

Tort law provides the legal framework in which most safety-related claims against institutions and administrators are grounded.<sup>20</sup> Some of the most common situations in which institutional negligence is alleged revolve around alcohol-related injuries or death, student suicide, and sexual assault.<sup>21</sup> While institutions may be sued for misfeasance,<sup>22</sup> malfeasance,<sup>23</sup> and nonfeasance,<sup>24</sup> navigating the

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<sup>14</sup> Lipka, *supra* n. 1 (describing that the Clery family began a group that has since developed into an entity known as Security on Campus, which has played an integral role in raising awareness about issues of campus safety).

<sup>15</sup> Judith Areen, *Higher Education and the Law: Cases and Materials*, 987 (Foundation Press 2009) (noting that the legislation was originally named the “Crime Awareness and Campus Securities Act of 1990,” then the “Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act,” which is now commonly referred to as the “Clery Act”).

<sup>16</sup> Lake, *supra* n. 7, at 115; *see generally* Clery Center for Security on Campus, *Summary of the Jeanne Clery Act* (available at <http://www.securityoncampus.org/summary-jeanne-clery-act>) (outlining the general requirements of reporting crime statistics, providing campus-wide timely warnings of certain crimes, and creating emergency response and notification systems among other responsibilities).

<sup>17</sup> Lipka, *supra* n. 1.

<sup>18</sup> *Nova Southeastern Univ. v. Gross*, 758 So.2d 86, 90 (FL 2000); Beckham & Pearson, *supra* n. 2, at 384–386 (reviewing recent cases that suggest “liability for sponsoring off campus programs can arise under circumstances in which a duty of care is applicable and the institution could or should reasonably foresee a risk of harm”).

<sup>19</sup> MSNBC, *Jury Says Virginia Tech Negligent for Delays in Warnings about 2007 Shootings*, [http://usnews.msnbc.msn.com/\\_news/2012/03/14/10688290-jury-says-virginia-tech-negligent-for-delays-in-warnings-about-2007-shootings](http://usnews.msnbc.msn.com/_news/2012/03/14/10688290-jury-says-virginia-tech-negligent-for-delays-in-warnings-about-2007-shootings) (finding in favor of the plaintiffs, under a gross negligence standard, that the institution failed to timely warn individuals as the Clery Act requires).

<sup>20</sup> Lake, *supra* n. 7, at 93–94.

<sup>21</sup> *Supra* n. 7 and accompanying text.

<sup>22</sup> John L. Diamond, Lawrence C. Levine & M. Stuart Madden, *Understanding Torts* 107 (3d ed., LexisNexis 2008) (quoting Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. Pa. L. Rev. 217, 219–220 (1908)).

proper response to situations has been difficult due to a lack of judicial guidance. Institutional responses to emergency situations have run the gamut and there is no clear litigation-proof answer to keep institutions from being sued;<sup>25</sup> but a solid understanding of actionable negligence combined with an effort to provide greater regulation, guidance, and training to residential staff can limit institutional risks.

### *The Role of Resident Assistants*

RAs are the eyes and ears of the university and have the incredible responsibility of simultaneously filling the roles of a student, role model, counselor, teacher, and administrator.<sup>26</sup> Much of the RA role is consumed by developing a community on the residence hall floor through educational and community-building programs,<sup>27</sup> and managing the relationships and tone of the floor.<sup>28</sup> As peers to their residents, RAs have the difficult job of being a fellow student, and often times a friend, of their residents while recognizing that they are always supposed to be cognizant of the fact that they are university employees; and sometimes described as being “part of the administration” because of the importance of their position as community developers and authority figures.<sup>29</sup>

Additionally, RAs must be able to identify when a resident may be struggling in a manner that requires referral to a professional staff member. They must not only recognize when a crisis is occurring but, most importantly, they must know and follow proper university protocol to manage the crisis.<sup>30</sup> Although the RA’s role as an administrator and emergency responder is not the main focus of the job description for student affairs professionals,<sup>31</sup> it is surely the most

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<sup>23</sup> Bryan A. Garner, *Black’s Law Dictionary* (3d ed., Thomson West 2006) (defining malfeasance as “[a] wrongful or unlawful act”).

<sup>24</sup> Diamond & Madden, *supra* n. 22, at 107.

<sup>25</sup> Marlynn H. Wei, *College and University Policy and Procedural Responses to Students at Risk of Suicide*, 34 J.C. & U.L. 285, 305–314 (2008) (noting that institutions have been sued for “inaction,” “inadequate action,” and “harmful action” further illuminating the idea that there is no fix-all policy).

<sup>26</sup> Blimling, *supra* n. 6, at 7–11; Helms, Pierson & Streeter, *supra* n. 5, at 36.

<sup>27</sup> Blimling, *supra* n. 6 at 292–306 (detailing the goals of programming and a commonly used “wellness programming model” that emphasizes a variety of programs that relate to physical, mental, and spiritual wellbeing).

<sup>28</sup> *Id.* at 167–168.

<sup>29</sup> Matthew Putnam, *Life in a Fishbowl* (available at [http://www.reslife.net/html/so-now\\_0803a.html](http://www.reslife.net/html/so-now_0803a.html)); Dana Severance, *Being Part of the Administration* ([http://www.reslife.net/html/so-now\\_0703a.html](http://www.reslife.net/html/so-now_0703a.html)) (describing that RAs are not just employees, but that RAs as “part of the administration,” in addition to being a role model and authority figures amongst peers).

<sup>30</sup> Blimling, *supra* n. 6, at 5.

<sup>31</sup> *Id.* at 10; *supra* n. 26 and accompanying text (describing the multitude of roles and responsibilities of RAs).

significant with regard to legal ramifications. This is especially true when many of the emergency situations to which RAs respond occur in the middle of the night after administrators have gone home and offices are closed. The responsibility of monitoring students and responding to crises during the nighttime, when students go out, drink, and return to their residence halls in the early morning hours often falls on the shoulders of RAs.

Legally speaking, this is the most important part of the RA job as the level of responsibility is great and straying from policy through improper action, or a lack of action, can result in dangerous situations and legal repercussions for institutions and administrators. Although RAs are identified as “student-employees,”<sup>32</sup> under agency law, they are agents and an extension of the principal university.<sup>33</sup> Their improper action, inaction, or detrimental action may be attributed as an action of the principal university and result in claims against their institutions and administrators.<sup>34</sup> While RAs are often the first to respond to medical and other emergencies, RAs, unlike professional first responders, do not have the benefit of immunity;<sup>35</sup> thereby exposing themselves to personal liability in response to situations. An institution’s least qualified employees, RAs, are being placed in positions of incredible responsibility and at risk of creating liability as agents acting on behalf of the institution.

#### **RESIDENT ASSISTANTS AS AGENTS OF INSTITUTIONS OF HIGHER EDUCATION**

An institution may be held liable, directly or indirectly through vicarious liability, for the acts of its RAs by way of agency law. Where the institution is the principal and the employee RA is the agent, the institution may be

(1) . . . subject to direct liability to a third party harmed by an agent’s conduct when

(a) . . . the agent acts with actual authority or the principal ratifies the agent’s conduct and (i) the agent’s conduct is tortious, or (ii) the agent’s

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<sup>32</sup> Courts have referred to RAs as “student employees” throughout opinions, as well. *See e.g. Freeman v. Busch*, 150 F. Supp. 2d 995, 997 (S.D. Iowa 2001).

<sup>33</sup> *See* Restatement (Third) of Agency § 7.05(1)(2006) (describing that “[a] principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent’s conduct if the harm was caused by the principal’s negligence in selecting, training, retaining, supervising, or otherwise controlling the agent”).

<sup>34</sup> *Id.*

<sup>35</sup> 16 A.L.R. 5th 605 (1993) (stating that “[a]mbulance attendants, paramedics, emergency medical technicians, and the like, are often called upon to render emergency medical treatment or first aid outside a hospital setting. When the emergency care provided by these persons appears to be the cause of a patient’s further injury or death, suits against the care providers and their employers are likely. Liability in such cases is often determined by the application of statutory provisions, designed to encourage the rendering of emergency medical treatment by granting immunity to care providers in the absence of gross negligence or willful and wanton misconduct”).

- conduct, if that of the principal, would subject the principal to tort liability; or
- (b) . . . the principal is negligent in selecting, supervising, or otherwise controlling the agent; or
  - (c) . . . the principal delegates performance of a duty to use care to protect other persons or their property to an agent who fails to perform the duty.
- (2) A principal is subject to vicarious liability to a third party harmed by an agent's conduct when
- (a) . . . the agent is an employee who commits a tort while acting within the scope of employment; or
  - (b) . . . the agent commits a tort when acting with apparent authority in dealing with a third party on or purportedly on behalf of the principal.<sup>36</sup>

Agency law allows for an institution to potentially be directly or indirectly liable for employee actions. Direct liability is a risk when the principal commits a wrong (or ratifies wrongful conduct), and indirect liability is a risk that occurs when an employee commits a wrong within the scope of employment.<sup>37</sup>

As the employer, the institution is liable for actions of employees that occur within the scope of the employment,<sup>38</sup> and sometimes, outside the scope of employment.<sup>39</sup> The phrase “within the scope of employment” is of particular issue with regard to RAs because, even though they are supposed to primarily be students, their position as RAs is described as a “24/7” job.<sup>40</sup> Generally, the scope of one's employment is “very broadly” defined, including “acting to further the employer's purpose, however attenuated, within reasonable time and space requirements.”<sup>41</sup> The broad language and definition of “within the scope of

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<sup>36</sup> Restatement (Third) of Agency § 7.03(1–2) (2006).

<sup>37</sup> Restatement (Third) of Agency § 7.03 (2006).

<sup>38</sup> Restatement (Third) of Agency § 7.07(2) (2006).

<sup>39</sup> Restatement (Second) of Agency § 219 (1–2) (1958) (stating that “(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. (2) A master is not subject to liability for the torts of his servants action outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servants purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation”); see Peter Lake, *Foundations of Higher Education Law and Policy* 156–158 (NASPA 2011) (describing the difference between “servants,” whose actions create responsibility in the employer, and “independent contractors,” whose actions do not create responsibility in the employer).

<sup>40</sup> Tawan Perry, *So You Wanna Be a Resident Assistant?*, Campus Talk Blog (Sept. 17, 2012) (<http://www.campustalkblog.com/so-you-wanna-be-a-resident-assistant/>).

<sup>41</sup> Lake, *supra* n. 7, at 158–159. Additionally, “further[ing] a master's purpose has been very broadly defined,” as well, and includes “[a]cts in contravention of policy or orders of superiors . . .

employment” has even led to a company being vicariously liable for the actions of its employee while staying in a motel for business, but not actively conducting work.<sup>42</sup> This example highlights the ability of the vague “within the scope of employment” language and its ability to extend to conduct that one may not believe to be directly related to employment.

While the application of being “within the scope of employment” provides difficulties within standard, hourly jobs, it is much more challenging to apply to a residential, live-in staff member. RAs (and hall directors) live within the residence hall, so it is not as easy to determine what “within the scope of employment” means by analyzing the timing or location of an incident because, in essence, the employee is always at work. For example, if an individual responds to an incident when they are not walking the halls on a night they are scheduled to be “on duty,” are they still acting within the scope of employment? If the individual is acting “to further a[n] [employer’s] purpose,”<sup>43</sup> then the employer institution can be held liable for the employee’s actions. Institutions may opt to tighten up the meaning of “within the scope of employment” by more readily defining RA job responsibilities and hours as an RA can be furthering a master’s (the institution’s) purpose even without instruction.<sup>44</sup>

Additionally, agency law allows for the actions of an agent to create liability in the principal (the institution) if “harm [is] caused by the principal’s negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.”<sup>45</sup> This is especially important with regard to RAs because of the enormous responsibility that is given to them and the fact that they are often the first to respond in residential emergencies—proper and efficient training is imperative. RAs are described as “over-worked” and “under-trained”<sup>46</sup> which is a recipe for institutional liability under agency law.<sup>47</sup> Institutions may choose to evaluate the training that is given to RAs, especially because it is usually provided in a one-week program before the beginning of the school year,<sup>48</sup> which is a large amount of vital information to handle at one time.

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if the employee acted to further some master’s purpose in their own mind, authorized or not.” *Id.* at 159.

<sup>42</sup> *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 13 (Minn. 1979) (finding Walgreen’s vicariously liable for the fire started by its employee’s cigarette while he stayed at the motel to open a new store).

<sup>43</sup> *Id.* at 159.

<sup>44</sup> *Supra* n. 41 and accompanying text.

<sup>45</sup> Restatement (Third) of Agency § 7.05(1) (2006).

<sup>46</sup> Blimling, *supra* n. 6, at 1; Lake, *supra* n. 9, at 651.

<sup>47</sup> Restatement (Third) of Agency § 7.05(1) (2006).

<sup>48</sup> Robert C. DeWitt, Ltr. To the Ed., *Proper Training Crucial for Resident Assistants*, The Chronicle of Higher Education, <https://chronicle.com/article/Proper-Training-Crucial-for/70087/> (accessed on Aug. 16, 2013) (noting the importance of proper training and criticizing the week-long training sessions at the start of the semester).

## LIABILITY CREATED BY RESIDENT ASSISTANTS THROUGH TORT LAW

Another avenue of analysis through which an institution may be held responsible for the actions of its RA employees is through tort law. The relationship between an institution and its residential students creates a landlord (the university)/tenant (the student) relationship, which is considered a special relationship that may give rise to a duty to protect students.<sup>49</sup> While university administrators are not necessarily interacting directly with residential students in their halls or monitoring the halls themselves, the university's agents—the student-employee RAs—are doing this work for the university under the direction of full-time hall directors.<sup>50</sup>

### *Malfeasance*

While it is possible that an RA could commit a wrongful or unlawful act (malfeasance)<sup>51</sup> that may lead to institutional liability, willful injury of another is outside the scope of this Article. Instead, the focus of this Article is negligence that may occur through a poorly or quickly made decision in the middle of the night, issues that may arise due to insufficient training, hiring, or supervision, and suggestions regarding regulation, training, and greater support of staff members.

### *Nonfeasance*

A duty is not normally found within situations of nonfeasance,<sup>52</sup> which is where an individual takes no action to assist another and has not contributed to the harm the individual is facing.<sup>53</sup> Nonfeasance is also described as “passive inaction,” which results in no change to the situation of another, and the individual in danger

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<sup>49</sup> Restatement (Second) of Torts § 314(A) (1965); *see* Lake, *supra* n. 9, at 648 (noting that the landlord/tenant relationship has been missed, but provides a means through which the school may be liable for an RAs actions because an RA acts as the agent of the landlord university); Beckham & Pearson, *supra* n. 2, at 380–386 (discussing an institution's extension of duty related to the landlord/tenant relationship, off-campus program sponsorship, and more).

<sup>50</sup> *See* Blimling, *supra* n. 6, at 1 (referring throughout the text to RAs reporting to, or consulting with, their hall directors, who are their supervisors).

<sup>51</sup> Garner, *supra* n. 23.

<sup>52</sup> Diamond, Levine & Madden, *supra* n. 22, at 107 (noting that “an actor typically is liable for affirmative acts that create an unreasonable risk of harm, but not for the failure to act”).

<sup>53</sup> *Id.* at 107; 57A Am. Jur. 2d Negligence § 13 (differentiating nonfeasance from misfeasance by defining nonfeasance as “negligence consisting of the failure to do an act that a person is under a duty to do and that a person of ordinary prudence would have done under the same or similar circumstances”; and defining misfeasance as “the improper doing of an act that a person might lawfully do or active misconduct that causes injury to another”).

is “merely deprived of a protection which, had it been afforded him, would have benefited him.”<sup>54</sup> While nonfeasance may not commonly create a duty, it is possible to incur a duty grounded in nonfeasance based upon a special relationship,<sup>55</sup> or through creating the peril an individual is experiencing,<sup>56</sup> even if by an innocent action.<sup>57</sup>

*1. A Duty to Rescue Based on the Landlord/Tenant Special Relationship*

The landlord/tenant relationship is the relevant special-relationship hook in tort law for residential students and the institutions they attend.<sup>58</sup> As previously discussed, RAs play a role in this relationship and act as an agent, and therefore an extension, of the landlord university through their employment and services provided to residential students. Therefore, an RA’s action or inaction within their role may create liability for an institution.

Although no liability was placed on Simpson College in *Freeman v. Busch*,<sup>59</sup> the language of the court’s reasoning provides insight into how, and when, responsibility may be incurred by universities for the actions of their RAs. Carolyn Freeman, a guest of Simpson College student Scott Busch, consumed alcohol provided by Busch and became intoxicated and ill.<sup>60</sup> Busch told the RA on duty, Brian Huggins, that Freeman had been sick and was now unconscious and “passed out” due to alcohol consumption.<sup>61</sup> The RA did not make arrangements for Freeman to go to the hospital, nor did he ask any questions about who was drinking or how much was consumed despite Busch living on a “dry” floor of the residence hall.<sup>62</sup> Huggins instructed Busch to watch Freeman and let him know if she became ill again so that she may be taken to the hospital.<sup>63</sup> Busch did not contact RA Huggins the rest of the night, RA Huggins did not check on Freeman himself, nor did he document the scenario in an incident report.<sup>64</sup> Later that night, Busch had sex with Freeman and “allegedly invited [two other males] to fondle [Freeman’s] breasts.”<sup>65</sup> The facts of the case

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<sup>54</sup> *Id.* (internal quotes omitted).

<sup>55</sup> *Id.* at 111.

<sup>56</sup> *Id.* at 110.

<sup>57</sup> Restatement (Second) of Torts §322 (1965); Diamond, Levine & Madden, *supra* n. 22, at 110.

<sup>58</sup> Lake, *supra* n. 7, at 108.

<sup>59</sup> 150 F. Supp. 2d 995 (S.D. Iowa 2001).

<sup>60</sup> *Id.* at 998.

<sup>61</sup> *Id.* at 998 (telling Huggins that Freeman had also vomited blood at one point that night after consuming alcohol).

<sup>62</sup> *Id.* at 998–999. Additionally, Huggins did not address the policy violation of someone of the opposite sex staying over in the residence hall. *Id.* Any report to a supervisor or emergency personnel member would have brought attention to Freeman’s status at this stage rather than after she was assaulted.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 999.

get worse when it is noted that both Busch and Huggins worked for campus security, but Busch was not on duty and Huggins was serving in his capacity as an RA.<sup>66</sup>

Freeman claimed that Simpson College was vicariously liable for her injuries as Busch and Huggins were both employees of the institution.<sup>67</sup> Freeman had the burden of proving that Busch and Huggins were employees, that her injury happened within the scope of their employment, and once those factors were shown, she needed to prove that the act at issue constituted negligence.<sup>68</sup> The Court determined that Huggins was indeed an employee of the institution and that his actions (and lack thereof in not calling for medical assistance) were within the scope of his employment because he was on duty.<sup>69</sup> Huggins actions, however, were not deemed negligent because the Court reasoned that he did not have a legal duty to Freeman as a guest.<sup>70</sup> The Court distinguished Freeman from students and other cases because she was a non-student, and she was not a business invitee, which would have given rise to a special relationship and a duty on behalf of the institution.<sup>71</sup>

The Court acknowledged that landlords do owe a duty to tenants, but not guests.<sup>72</sup> This line of analysis strongly suggests that in a similar situation, where the individual is a resident (and possibly just a student), an RA would owe a duty to the resident; and failure to call for medical assistance may result in liability for an institution related to injuries associated with a student's known illness due to intoxication. Although Simpson College was not found liable for additional

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<sup>66</sup> *Id.* (emphasizing that both Busch and Huggins had received training regarding alcohol poisoning, emergency situations, and Huggins had additional RA training that informed him about rape and sexual assault).

<sup>67</sup> *Id.* at 1000.

<sup>68</sup> *Id.* at 1000; *see Lake, supra* n. 7, at 94–146 (discussing the elements of negligence (a legal duty, breach of that duty, evidence of proximate and cause in fact causation, and actual damages) and noting that negligence “dominates the higher education safety law landscape”).

<sup>69</sup> *Freeman*, 150 F. Supp. 2d at 1001. The Court reasoned that Busch, on the other hand, was not acting in his capacity as a student employee of campus security, so his actions were not within the scope of employment and, therefore, the institution could not incur liability from his actions. *Id.* at 1004.

<sup>70</sup> *Id.* at 1001.

<sup>71</sup> *Id.* at 1001–1002 (citing cases to specifically note that the Freeman situation differed from other cases where duties were found because she was not on campus for business and, with regard to a landlord/tenant relationship, Freeman was a guest and landlords only owe a duty of care to tenants, not guests).

<sup>72</sup> *Id.* 1001–1002 (saying that “[c]olleges are not insurers of the safety of their students, much less their guests”); *but see Mullins*, 449 N.E. 2d at 337 (finding that institutions of higher education owe a duty of reasonable care to students in protecting them from foreseeable criminal acts). Therefore, the statement that colleges are not “insurers of safety” is not entirely accurate. *Freeman*, 150 F. Supp. 2d at 1002.

reasons,<sup>73</sup> the *Freeman* case is important to institutions of higher education because of the strong suggestions that it makes about potential liability had the facts been different with regard to Freeman's status as a student instead of a guest.<sup>74</sup> Lastly, the case clearly identified an "on duty" RA as acting within the scope of employment for purposes of future analysis.<sup>75</sup> The issue of whether an RA who responds to an emergency medical situation, but who is not on duty, could be considered as acting within the scope of employment remains unanswered.

## 2. *A Duty to Rescue Based on Creation of the Peril*

Common law has consistently acknowledged a duty when an individual's action has created the need for the rescue of another.<sup>76</sup> The increasing grasp of this rule would create a duty to rescue in situations like the facts presented in *Freeman* without an intervening action. Even "fault-free conduct" is means for imposition of a duty.<sup>77</sup> For example,

[a]t common law, if [a defendant's] vehicle was passing [a plaintiff's] vehicle on a narrow road with all due care, and [the plaintiff], to avoid [the defendant], swerved too sharply, lost control and went down an embankment, [defendant] traditionally would have no obligation to rescue [plaintiff], because [defendant] was not at fault. An increasing number of courts have imposed a rescue obligation on [defendant], because [defendant's] conduct, though innocent, gave rise to the need for rescue. Indeed there is movement toward imposing rescue obligations on those who are connected in any way to the need for rescue.

Applying this example and analysis to a situation like that of *Freeman*, it is not an unwarranted jump to conclude that actions like Busch's, of putting an

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<sup>73</sup> *Infra* n. 73.

<sup>74</sup> *Freeman*, 150 F. Supp. 2d at 1003 (explaining that Busch and the other two males committed independent actions that caused Freeman's negligence claim to fail and that the institution was not liable because the actions of the men were not foreseeable and served as an intervening cause). The liability that institutions may incur in similar situations would only be applicable without an intervening cause.

<sup>75</sup> *Id.* at 1000.

<sup>76</sup> Diamond, Levine & Madden, *supra* n. 22, at 110.

<sup>77</sup> *Id.* at 110–111; Restatement (Second) of Torts § 322 cmt. a (1965) (affirming that "the rule . . . applies not only where the actor's original conduct is tortious, but also where it is entirely innocent. If his act, or an instrumentality within his control, has inflicted upon another such harm that the other is helpless and in danger, and a reasonable man would recognize the necessity of aiding or protecting him to avert further harm, the actor is under a duty to take such action even though he may not have been originally at fault. This is true even though the contributory negligence of the person injured would disable him from maintaining any action for the original harm resulting from the actor's original conduct").

intoxicated and sick individual in the hands of another, creates the circumstance of that individual needing rescue. The broadened scope of imposition of a duty is of particular significance for residential life staff and RAs as they are making in-the-moment decisions about an individual's status and whether to call for assistance.

### 3. *A Landlord's Duty to Protect*

A landlord's duty to protect extends to tenants, but not necessarily guests,<sup>78</sup> and it has been clearly established that institutions of higher education owe a duty of reasonable protection to its residential students.<sup>79</sup> The reasoning for such responsibility lies in the reliance that residents put on the institution to provide such protection and the fact that the landlord institution is best equipped to provide measures that increase safety and protect residential students.<sup>80</sup>

The physical security of residential buildings is of great concern for institutions. Institutions install locks, doors that require swiping an identification card to access the building,<sup>81</sup> surveillance cameras,<sup>82</sup> and emergency phones for student access as means to keep students safe.<sup>83</sup> One of the common safety concerns on behalf of institutions that is instilled in resident assistants is that only individuals who live in the building, or who are otherwise authorized to be there, are allowed in the building.<sup>84</sup> This issue was the subject of *Delaney v. University of Houston*<sup>85</sup> where the university was liable for damages to a female student who was raped in her residence hall after the institution did not fix a broken lock.<sup>86</sup>

<sup>78</sup> Diamond, Levine & Madden, *supra* n. 22, at 120–121.

<sup>79</sup> *Mullins*, 449 N.E.2d at 336.

<sup>80</sup> See Diamond, Levine & Madden, *supra* n. 22, at 120 (describing landlords as being “the only party equipped to deal with third-party threats in common areas,” thereby incurring the responsibility to provide reasonably safe premises).

<sup>81</sup> Daniel Ramsbrock, Stepan Moskovchenko & Christopher Conroy, *Magnetic Swipe Card System: A Case Study of the University of Maryland, College Park*, 8 (available at <http://www.cs.umd.edu/~jkatz/THESES/ramsbrock.pdf>) (accessed Aug. 16, 2013) (describing and analyzing the card system used to access buildings at an institution and noting that they are used in residential facilities).

<sup>82</sup> John Fischman & Andrea L. Foster, *Campus Safety Gains Sharper Vision with New Breed of Surveillance Cameras*, <http://chronicle.com/article/Campus-Safety-Gains-Sharper/27499/> (accessed Aug. 16, 2013) (providing information regarding a school that installed “smart” cameras, which send alerts when the camera views suspicious behavior).

<sup>83</sup> See Jeffrey R. Young, *Forget “Blue Light” Safety Phones—Now Cellphones Can Ring Campus Security for Help*, <http://chronicle.com/blogs/wiredcampus/forget-blue-light-safety-phones-now-cellphones-can-ring-campus-security-for-help/4643> (accessed Aug. 16, 2013) (mentioning the emergency phones with blue lights located on college campus that have been used to call for assistance and new technology that allows for the same location-identifying features of where help is needed when an individual uses a similar system that is designed for cellphones).

<sup>84</sup> See *Delaney v. Houston*, 835 S.W.2d 56 (TX 1992).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 57.

The door was often left propped open with objects and was noted and reported as broken and in need of repair by residents of the building.<sup>87</sup> Removing props from doors, reporting the need for locks to be repaired, as well as reporting other aspects of a residential building that may need repair are part of an RA's job as well.<sup>88</sup>

Hypothetically, if a report were made to an RA (or an RA did not report the need to repair a safety measure) and then an unauthorized person gained access to the building and commits a crime, the RA may become part of a litigation. His or her actions may create liability for the institution. Minimally, the fact that institutions of higher education have a duty to provide reasonably safe residential environments, and can be held liable for injuries sustained by students if buildings are not safe and secure, provides another example of how important the role of RAs is in protecting institutions from preventable lawsuits.

### *Misfeasance*

Misfeasance, often confused with nonfeasance, has been defined as "active misconduct working positive injury to others."<sup>89</sup> Within the scope of higher education, it seems that students are not frequently injured as a result of misfeasance on behalf of administrators.<sup>90</sup> More often, other individuals are the actors in situations of misfeasance.<sup>91</sup> The decision in *Freeman* did not consider the actions of RA Huggins under a misfeasance analysis,<sup>92</sup> but it certainly could have done so.

The inactions associated with nonfeasance may easily be confused with, and rightfully argued as, direct actions of misfeasance.<sup>93</sup> In *Freeman*, RA Huggins

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<sup>87</sup> *Id.*

<sup>88</sup> *E.g.* Florida Atlantic University, *Fall 2012 RA Selection Information Packet* (2012), [http://www.fau.edu/housing/RA\\_Application/RA%20Application%20Package%202012-2013.pdf](http://www.fau.edu/housing/RA_Application/RA%20Application%20Package%202012-2013.pdf) (accessed Aug. 16, 2013); Marist Housing, *Resident Assistant Application Packet* (2012), <http://www.marist.edu/housing/pdfs/reapplication.pdf> (accessed Sept. 16, 2012); Northern Arizona University: Office of Residential Life, *Resident Assistant Agreement* (2012–2013), [http://nau.edu/uploadedFiles/Administrative/EMSA\\_Sites/Residence\\_Life/Work\\_With\\_Us/Resident%20Assistant%20Agreement%202012-2013%20for%20website.pdf](http://nau.edu/uploadedFiles/Administrative/EMSA_Sites/Residence_Life/Work_With_Us/Resident%20Assistant%20Agreement%202012-2013%20for%20website.pdf) (accessed Aug. 16, 2013).

<sup>89</sup> Diamond, Levine & Madden, *supra* n. 22, at 107 (quoting Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. Pa. L. Rev. 217, 219–220 (1908)).

<sup>90</sup> Lake, *supra* n. 7, at 104–105.

<sup>91</sup> *Id.* at 105.

<sup>92</sup> *Freeman*, 150 F. Supp. 2d at 1001 (focusing instead on the fact that Freeman was a guest to whom not duty was owed, according to the Court, because she was therefore not a part of the landlord/tenant relationship as a resident of the building would be).

<sup>93</sup> Diamond, Levine & Madden, *supra* n. 22, at 107 (citing a situation where an individual "cajoled" a person to jump into deep water, then did not rescue the person when he was drowning

did not check on Freeman nor did he call for medical assistance.<sup>94</sup> The inaction of not checking or calling for medical assistance despite his training (which would be classified as nonfeasance), may just as readily be described as direct action because it was an active choice to not check on Freeman and to not call for medical assistance. The argument for categorizing such an action (the active choice to not act) as misfeasance becomes stronger when responding to incidents involving alcohol (as well as crimes within residence halls) is a standard part of RA training.<sup>95</sup> Such a classification would categorize RA Huggins as having acted and those actions being misfeasance.

### ***Misfeasance through Taking Control***

An institution may incur liabilities through its agent RAs if the actions of an RA are determined to fit the definition of “taking control” of a situation where an individual is harmed.<sup>96</sup> The Restatement (Second) of Torts states that:

One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by

- (a) the failure of the actor to recognize reasonable care to secure the safety of the other while within the actor’s charge, or
- (b) the actor’s discontinuing his aid or protection, if by doing so he leaves the other in a worse position than when the actor took charge of him.<sup>97</sup>

Caselaw has provided some situations within which an RA did not act in a manner that constituted “taking control,” therefore, other general cases may need to be analogized or applied to hypotheticals to determine where an institution runs into liability concerns. *Freeman* again provides another point of reference, and a bit of guidance. The Court determined that RA Huggins had not taken charge of Freeman (or her condition) by providing instructions to Busch to keep him informed of her status and choosing not to call for medical assistance.<sup>98</sup> Such a finding provides the guidance that an RA would have to be more heavily involved

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and a court determined the action to be nonfeasance even though it could also be construed as misfeasance with the pressuring of the individual to jump into the deep water as direct action that led to the harm of the deceased individual).

<sup>94</sup> *Freeman*, 150 F. Supp. 2d at 999–1000.

<sup>95</sup> See Blimling, *supra* n. 6, at 187–197, 207–218 (presenting chapters that list and discuss dangers associated with alcohol and how to respond, as well as acknowledging and discussing other crimes such as rape, robbery, burglary, and murder that occur on college campuses and how an RA may be involved and be aware of signs to increase residential safety).

<sup>96</sup> See Restatement (Second) of Torts §324 (1965) (providing the “taking control” language that may result in liability on behalf of an institution depending upon an RA’s actions).

<sup>97</sup> Restatement (Second of Torts) § 324 (1965).

<sup>98</sup> *Freeman*, 150 F. Supp. 2d at 1003.

or make more decisions in a situation to have those actions be considered taking control and worsening the harm of an individual within the residence hall.

Note that in another case, *Wakulich v. Mraz*,<sup>99</sup> occurring outside of a university setting, the same lack of calling for emergency personnel resulted in a finding that the defendants had created an “increased risk of harm” to the plaintiff.<sup>100</sup> In that situation, the hosts of a party provided alcohol to a minor who then became ill due to intoxication and the hosts did not provide medical attention.<sup>101</sup> *Wakulich* presents the question of why the same act of misfeasance (in not calling for emergency assistance) was not considered to increase the risk of Freeman; especially where one can argue that others were prevented from rescuing Freeman after she was placed in a residence hall room away from other individuals. Although the injuries of the plaintiffs differed as the plaintiff in *Wakulich* died due to intoxication<sup>102</sup> and Freeman was sexually assaulted which involved the acts of others,<sup>103</sup> the criminal intervening act of another does not necessarily protect an individual or institution from liability. If a student is injured after an institution’s failure to act, when proper safety protocol and policy require that the individual or institution act, the institution may still be liable for the resulting harm.<sup>104</sup>

The determination of responsibility and whether control was taken in situations also arises within the context of student suicides in residence halls.<sup>105</sup> In *Schieszler v. Ferrum College*,<sup>106</sup> an RA and campus police responded to an

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<sup>99</sup> *Wakulich v. Mraz*, 203 Ill.2d 223 (Ill. 2003).

<sup>100</sup> *Id.* at 244–245 (finding an “increased risk of harm” when individuals who hosted a party did not get medical assistance and prevented others from doing so for an intoxicated and unconscious minor at their home who later died).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 227.

<sup>103</sup> *Freeman*, 150 F. Supp. 2d at 999.

<sup>104</sup> *Delaney v. Univ. of Houston*, 835 S.W.2d 56, 60 (TX 1992). The decision referenced the Restatement (Second) of Torts Section 448 (1965) which states that, “the act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor’s negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created and that a third person might avail himself of the opportunity to commit such a tort or crime.” Using this as a backdrop, the Court was able to find the institution liable for the damages of a young woman who was raped in her residence hall after a lock mechanism was not fixed because the institution was aware, or should have been aware, that such a result could occur by not fixing the lock. *Id.* at 56.

<sup>105</sup> See *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602 (W.D. Va. 2002) (finding that the institution, nor any of the individuals who responded to the incidents involving the suicidal student, ever took legal control).

<sup>106</sup> *Id.*

argument between a resident and his girlfriend.<sup>107</sup> Subsequently, the RA (Odessa Holley) was aware of (and shown) a note that the student wrote to his girlfriend saying that he planned to commit suicide by hanging himself with a belt.<sup>108</sup> Upon going to the student's room, RA Holley and campus police found that the student had self-inflicted bruises on his head, of which they informed a dean at the institution.<sup>109</sup> None of the defendants acted upon knowledge of another note.<sup>110</sup> Then, a third note saying "only God can help me now" was reported and the student was found hanging in his room by his belt.<sup>111</sup> The RA was determined to not have taken any control nor could she have "taken any additional steps to aid or protect [the student] absent some direction" from administrators.<sup>112</sup> While the wrongful death suit was dismissed,<sup>113</sup> one may wonder what would have been the institution's responsibility had further instructions been given, but not followed, by the RA. RAs are closely involved in serious situations that involve the mental and physical health and safety of others, thus giving rise to the concern of not only what kind of liability RAs may incur, but what actions they may take to protect themselves and the institution from that liability, as well.

*Garofalo v. Lambda Chi Alpha Fraternity*<sup>114</sup> provides another avenue through which to evaluate what taking control means, or more accurately, what it does not mean. In *Garofalo*, a fraternity brother took care of the plaintiff, Garofalo (another brother), who was intoxicated by letting him "sleep it off" on his couch.<sup>115</sup> The older brother adjusted the intoxicated Garofalo throughout the night so he would not choke on his vomit and thought Garofalo was sleeping when he left for class in the morning.<sup>116</sup> Unbeknownst, to the older brother, Garofalo was not sleeping—he was dead.<sup>117</sup> The Court did not deem the older brother's actions as "taking control" because the brother had checked on Garofalo who was breathing and snoring throughout the night, so the brother had met the standard of "acting in 'good faith and common decency'" as required by the standard of taking control.<sup>118</sup>

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<sup>107</sup> *Id.* at 605.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 608.

<sup>112</sup> *Id.* at 610.

<sup>113</sup> *Id.*

<sup>114</sup> 616 N.W.2d 647 (Iowa 2000).

<sup>115</sup> *Id.* at 650–651.

<sup>116</sup> *Id.* at 651.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 656. It is of note that the brother who monitored Garofalo was not potentially liable for Garofalo's death, however, the brother who purchased the alcohol was named as a defendant. *Id.*

The actor in *Garofalo*, who had not received any noted special training regarding alcohol poisoning, chose to monitor an intoxicated and ill individual for whom he was not responsible.<sup>119</sup> On the contrary, RA Huggins was trained (as was resident Busch) in the signs of alcohol poisoning, date rape, and more as an RA, and was aware of the institutional policies of which he “had no discretion in the discharge of his duties.”<sup>120</sup> Although RA Huggins was less involved physically with the intoxicated plaintiff (so one may argue that he did not take control in that sense),<sup>121</sup> he knew the symptoms of alcohol poisoning<sup>122</sup> and was approached by resident Busch, arguably because of his position and role in controlling situations and knowing what to do because of his specific training. Yet, RA Huggins did not call for assistance. Arguably, RA Huggins had control of the situation because his decision to not check on an individual who was clearly described as having alcohol poisoning and not calling for assistance was exercising control—and in a manner that he did not have the discretion to do so.<sup>123</sup>

Given that most injuries and incidents on college campuses tend to involve alcohol, it should not be considered a stretch of analysis to say that a trained individual is aware that a highly intoxicated person is at risk for injury, sexual assault, or even death.<sup>124</sup> The actions of the brother in *Garofalo* are not uncommon on college campuses,<sup>125</sup> and, likely, the actions of RA Huggins are not out of the ordinary either; but RA Huggins actions are an extension of the institution because he is an employee.<sup>126</sup> Therefore, actions of an RA in not calling for assistance, or in monitoring an individual in the way Garafalo’s brother monitored him, should be of great concern for institutions as potential claims resulting in liability.<sup>127</sup>

RAs are specifically trained to respond to situations involving alcohol, supposedly trained on the dangers of alcohol poisoning and the dangers of injuries and assaults that may occur when a person is intoxicated, so the non-compliance

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<sup>119</sup> *Id.* at 655–666.

<sup>120</sup> *Freeman*, 150 F. Supp. 2d at 999.

<sup>121</sup> *Id.* at 998.

<sup>122</sup> *Id.* at 999.

<sup>123</sup> *Id.* at 101.

<sup>124</sup> Lake, *supra* n. 7, at 92.

<sup>125</sup> See Alexa Lardieri, *First Time My Friend Gets Too Drunk*, <http://www.collegemagazine.com/editorial/2910/First-Time-my-Friend-Gets-Too-Drunk> (accessed Aug. 16, 2013) (providing the statistic that 1,700 students die annually of alcohol-related incidents and seeing the need to inform individuals on the signs of alcohol poisoning so they will get medical assistance because, as one campus police officer notes, “[m]ost kids are scared to report it because they are usually underage”) (internal quotations omitted).

<sup>126</sup> *Supra* Part III and accompanying text.

<sup>127</sup> *Supra* Part IV(B)(2) and accompanying text.

of policy enforcement is a major issue when it occurs.<sup>128</sup> As noted before, an institution may be liable for the actions of an RA if “harm [is] caused by the [institution’s] negligence in selecting, training, retaining, supervising, or otherwise controlling the [RA].”<sup>129</sup> The potential for liability loops back to the discussion of liability via agency law, and again provides an emphasis of the important roles RAs play on college campuses because of their response as the first line of contact in residential emergencies. It also emphasizes the incredible importance of proper (and continual) training, and making sure that employees are following and enforcing policies, as it may be a matter of life or death for some individuals.

### ***Safety Issues Related to Residential Housing***

Illegal, underage drinking is the most common issue RAs have to deal with and it is often associated with other serious situations requiring RA attention and emergency responses.<sup>130</sup> RAs not only have the challenging job of enforcing institutional rules among their peers, but of recognizing when their peers are not well (physically or emotionally) and contacting the proper emergency personnel or student affairs employees.<sup>131</sup> RAs are trained to get to know their residents well so they may notice when a student is potentially struggling with a mental illness.<sup>132</sup> The number of students on campuses with identified mental health concerns is growing.<sup>133</sup> Unfortunately, as a result of the issues some students

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<sup>128</sup> Restatement (Third) of Agency § 7.05(1) (2006) (noting that negligence on behalf of the principal in training an agent may result in liability).

<sup>129</sup> Restatement (Third) of Agency § 7.05(1) (2006).

<sup>130</sup> Lake, *supra* n. 7, at 92 (stating that “[f]or the modern institution of higher education, all risk roads lead to alcohol” or (alternatively stated) — that alcohol leads to most risk associated with institutions); Lake, *supra* n. 9, at 651 (stating that “[i]f the alcohol crisis on campus is the Vietnam of this generation, its first lieutenants are the overworked and often under-trained and under-equipped resident assistants”); David Bellis, USA TODAY, *Resident Assistants Morph into Crisis Mangers*, <http://www.residentassistant.com/press/USATODAY.htm> (accessed Aug. 16, 2013) (summarizing a number of stories from RAs where students attempted suicide, or were found vomiting or passed out due to alcohol, and “training kick[ed] in” resulting in a call for medical assistance).

<sup>131</sup> Blimling, *supra* n. 6, at 175–182 (identifying the signs and symptoms that an RA is to look for in students in order to refer potentially depressed or suicidal residents to professional staff members as RAs are not equipped to work with a suicidal student).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 175 (Kendall-Hunt 2003) (reporting that in the past 60 years, the suicide rate of individuals aged 15–24 has tripled); see *Promoting Mental Health and Preventing Suicide in College and University Settings*, Suicide Prevention Resource Center, 8 (Oct. 21, 2004), [http://www.sprc.org/library/college\\_sp\\_whitepaper.pdf](http://www.sprc.org/library/college_sp_whitepaper.pdf) (providing results from a study performed by the Center for Disease Control (CDC) from 1995 in which 6.7 percent of college students had

battle, student suicide is a reality<sup>134</sup> and institutions are struggling to determine their role in recognizing students of concern and providing assistance while also trying to limit the potential liability of the institution.<sup>135</sup>

### *A Lack of Judicial Guidance*

Caselaw has made it clear that institutions of higher education may not dismiss a student on the basis of the individual being suicidal as this is, minimally, a violation of the Americans with Disabilities Act.<sup>136</sup> Despite this concrete message, there is a general lack of judicial guidance regarding how institutions are to respond and what kind of responsibility an institution has with regard to a suicidal student.<sup>137</sup> All of this uncertainty becomes important to the role of RAs because if institutions do not know what is required or exactly how to handle a situation, how are they to instruct employees? How are they to guide RAs who are often relied upon to notice when a residential student seems to be acting in a concerning manner?

These questions are of great concern for the role of RAs as “crisis managers.”<sup>138</sup> The student role is multi-faceted with RAs being a “police officer and caregiver . . . medic, counselor and tutor—all wrapped up into one young

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created a suicide plan, 1.5 percent had attempted suicide, and 0.4 percent of students who attempted suicide required medical assistance).

<sup>134</sup> Mary Fletcher Peña, *Reevaluating Privacy and Disability Laws in the Wake of The Virginia Tech Tragedy: Considerations for Administrators and Lawmakers*, 87 N.C. L. Rev. 305, 309 (2008) (noting that suicide is one result, among many, of mental illness that institutions have to handle); Paul S. Applebaum, M.D., *Depressed? Get out!: Dealing with Suicidal Students on College Campuses*, 57(7) Law & Psychiatry 914 (July 2006) (reporting that 1,100 college student commit suicide each year).

<sup>135</sup> See Peña, *supra* n. 134, at 309 (identifying the goal of institutions as providing a balance between assisting students and keeping the community safe).

<sup>136</sup> *Nott v. G.W. Univ.* (providing that Nott’s dismissal because of his suicidal ideation was a violation of the Americans with Disabilities Act and Section 504).

<sup>137</sup> *Mahoney v. Allegheny College* (No. AD. 892-2003 (Pa. Ct. Com. Pl. Dec. 22, 2005) (noting a “reluctan[ce] to find civil liability out of a failure to prevent suicide” and that courts are looking at the “special relationship” doctrine to analyze student suicide cases); *Bash v. Clark U.* (No. 06745A, 2006 WL 4114297 (Mass. Super. 2006) (deciding that foreseeability is the main concern when analyzing cases of student suicide and that the institution did not owe Bash a duty to protect her from her self-injury of a drug-overdose despite university awareness that she may have an issue with drugs); see *Jain v. Iowa*, 617 N.W.2d 293 (Iowa 2000) (determining that suicide prevention is not the duty of the college or its employees); but see *Shin v. MIT*, 19 Mass. L. Reprtr. 570 (Mass. Super. 2005) (denying the institution’s motion for summary judgment based upon an administrator’s alleged lack of follow-up with a suicidal student who then, allegedly, burned herself to death, the school later settled with the family).

<sup>138</sup> Bellis, *supra* n. 130.

student as inexperienced in life as the residents who need assistance.”<sup>139</sup> The role of RAs is heavily laden with responsibility and their actions on behalf of, and as employees of, the institution are important with regard to institutional liability. With an increase in RAs named as defendants in litigation or being part of a key set of facts in a legal dispute,<sup>140</sup> institutions have an incentive to limit potential liability created through the actions of RAs.

### POTENTIAL SOLUTIONS

While many other areas of higher education are federally regulated, it is rather surprising that RAs, who basically function as first-responders to emergencies in the late hours of the night and early hours of the morning, are not regulated at all. In response to the need for greater structure and support regarding the RA role, an amendment to the Clery Act may alleviate the need for knowledge about the types and frequency of emergency situations to which RAs are responding. Such an addition may implement: 1) standards for resident assistants and ongoing training; and 2) require statistics regarding RA responses to emergencies and safety concerns that occur on campus. Regulation in these areas could not only provide a better picture for administrators as to what is happening in residence halls, but also draws necessary attention to seriousness of the work of RAs in their capacity as, essentially, emergency responders. Lastly, the awareness that regulations may bring will hopefully increase bystander awareness and intervention on behalf of students in general; and highlight the need for research that will provide a better idea of the need for change.

In the alternative, given that regulation takes time and does not provide an immediate answer, institutions may opt to conduct in-house research regarding: the preparedness of RAs, proper responses to policy violations and emergencies, whether there are gaps in training, how students react to intoxicated individuals, and if they are calling for residential staff assistance when they should. While mandated regulations and reporting of statistics would provide a greater view of issues across campuses, these alternative suggestions allow institutions to get very specific information about the behaviors of their RAs and student body in a more immediate fashion. Either way, more attention should be given to residence halls, particularly in the evening hours when school-sponsored activities and offices shut down and students are in an unstructured environment with fellow students upholding institutional policies and responding to emergencies.

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<sup>139</sup> *Id.*

<sup>140</sup> Kaplin & Lee, *supra* n. 2, at 150 (noting that faculty and staff are usually the parties to negligence claims without mention of student-employees); Helms, Pierson, & Streeter, *supra* n. 5, at 26.

### ***Federally Mandated Standards for RAs***

RAs play an integral role in the safety of students on college campuses, but are not guaranteed the support required for their jobs through regulated training regarding emergency responses, nor do they enjoy the immunity of professional first-responders. Regulation of training, position expectations, and providing proper supervision and support may not only limit the chance of mistakes on behalf of RAs, thereby limiting potential university liability but, more importantly, would provide safer residential environments for students. Additionally, RAs and residential life staff, when responding to emergency situations, should be afforded immunities in a similar manner to the immunities of professional first-responders; which would eliminate individual liability when an RA, or residential life member, is attempting to assist in a crisis situation.

### ***Federally Mandated Reporting of Statistics Involving Emergency and Safety Situations That are Currently Unreported***

There is great awareness around campus safety in general, much of which seems to focus on intruders, disasters, and other large scale crises while the nightly danger of illness, injuries, and sexual assaults related to alcohol consumption of students in, and returning to, residence halls has gone somewhat unnoticed and unregulated with regard to safety standards. Given the aforementioned regulation of the RA role occurs and immunity is given to staff in first-responder scenarios, then mandatory reporting of emergencies and incidents requiring staff response may be the next step. The purpose of such reporting would be to provide institution community members, including students and parents, with a better idea of what is happening in the residential environment so that all parties may take an active role in promoting student safety. Many situations regarding medical or emergency responses by staff are not reported to the community through any other mandate because they are not crimes and, therefore, are not required to be reported.

### ***Additional Research and Increased Bystander Awareness and Intervention***

Additional research and information regarding RA responses to incidents is needed to determine the most effective means of preventing unnecessary injury to individuals. Although alcohol is often consumed on college campuses, and frequently a part of injurious incidents,<sup>141</sup> it is dangerous for RAs (and students in

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<sup>141</sup> Lake, *supra* n. 7, at 92 (reporting that “[a]lcohol risk connects to most of the other risks students face—it is associated strongly with every major negative outcome on campus. For the modern institution of higher education, all risk roads lead to alcohol . . . [a] campus that

general) to accept binge drinking, illness, and passing out as behavioral norms. Once an individual shows signs of alcohol poisoning, or is otherwise in need of assistance, an RA is not medically trained and cannot make the decision as to whether someone is capable of recovering on his or her own. The RA needs to follow campus policies and have the person evaluated by medical personnel. However, what happened in *Freeman*, with RA Huggins being notified about an individual who was ill and passed out due to alcohol, and not calling for medical assistance,<sup>142</sup> or in *Garofalo* where the brother thought Garofalo could just “sleep it off,”<sup>143</sup> are unlikely to be isolated thoughts on college campuses. Are RAs truly aware of the gravity and other dangers associated with these incidents?<sup>144</sup> Is the pressure of documenting incidents or enforcing policies among peers too much and too dangerous to put in the hands of students? Through regulation of the RA role and increased intervention of non-RA students taking pro-active measures, the environment of residential facilities can be safer.

RAs will continue to be involved in emergency and high-stakes situations, and missteps or a lack of action may occur when making decisions in the middle of the night that concern one’s peers. Placing the responsibility of responding to emergency situations and delivering the level of safety that students and parents expect in a residential facility on RAs—student employees—is risky.<sup>145</sup> Maintenance issues, harmful student behaviors, alcohol, drugs, suicide, and sexual assault are among the myriad of issues an RA may likely encounter.<sup>146</sup> Therefore, careful selection and thorough training of RAs is imperative to prevent institutional liability through agency law.<sup>147</sup> The one or two-week crash course of training before the fall semester that is so common<sup>148</sup> may be inefficient for the depth of responsibility that RAs—students—take on in their roles. Therefore, training and educating staff should be a continuous process throughout the year with emphasis on the fact that professionals need to be called whenever a situation possibly involves a danger to someone’s health or safety. Institutions

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successfully combats high-risk alcohol use will likely be safer, more academically sounds, and less litigious”).

<sup>142</sup> 150 F. Supp. 2d at 998–999.

<sup>143</sup> 616 N.W.2d at 655.

<sup>144</sup> See Jeanette Norris, *The Relationship between Alcohol Consumption and Sexual Victimization*, VAWnet Applied Research Forum, 1 (December 2008) (available at [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/AR\\_AlcVictimization.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/AR_AlcVictimization.pdf)) (finding that “at least half of all acquaintance sexual assaults involve alcohol consumption by the perpetrator, the victim, or most commonly, both”).

<sup>145</sup> See Helms, Pierson, & Streeter, *supra* n. 5, at 25 (citing the use of young students as residence hall staff institutional and personal risks of liability).

<sup>146</sup> *Id.* at 28–30.

<sup>147</sup> Restatement (Third) of Agency § 7.05(1) (2006)(listing improper selection, training, and supervising of employees as means by which a principal may incur liability).

<sup>148</sup> DeWitt, *supra* n. 48.

may also want to provide more information to its student staff about *why* certain policies exist and the safety and legal importance of following protocol. Without grounding the list of responsibilities meaningfully to their roots, an employee may be more likely to choose the route of “friend” and not call an authority figure in an emergency.

The lack of judicial guidance with regard to the responses institutions and their employees should take in some situations, especially with regard to suicidal students, has created a problem. Rather than waiting for another student to be injured and a legal battle to go to court for guidance, it would be helpful for authorities, such as the Department of Education, to highlight situations in which an institution has responded properly. Institutions are seeking proper responses and waiting for caselaw is a long and tough way to find out when someone has acted improperly and hypothesize as to what would have been more reasonable. Providing examples of successful interventions or proper responses regarding students of concern is a positive and proactive way to inform institutions about increasing the safety of students while protecting the school from liability.

### CONCLUSION

Where the goal of the Clery Act has increasingly broadened with regard to campus safety, providing an amendment regarding training of RAs and reporting of statistics associated with alcohol-related incidents, injuries, transports, and assaults would further the Act’s goal of creating safer college campuses. The increasingly serious situations RAs handle on a regular basis due to rising numbers in mental health concerns, and the frequent alcohol related issues on college campuses, make the RA role seem more akin to that of a professional’s or first responder’s. RAs truly are the eyes and ears of the university and the amount of responsibility they have with regard to the health and safety of others is shocking in some ways when one realizes that RAs are still students, too. Ideally, the role of RAs would be regulated with regard to training, position expectations, and proper supervision. Additionally, reporting statistics and the need to respond to emergency situations within residence halls will provide a statistical picture of the goings-on in residence halls. Having the knowledge of statistics will allow for more informed responses and actions on behalf of staff, students, and parents. Each of these parties has an interest in increasing the safety of campus communities, which certainly includes residence halls—where students spend a great deal of their time outside of classes.