

# ONE STRIKE AND YOU ARE OUT: WHY INDIANA SHOULD ENACT LEGISLATION TO PREVENT THE REHIRING OF SEXUAL ABUSERS IN GOVERNMENT POSITIONS

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## INTRODUCTION

A police officer responds to a call about an intoxicated woman walking along the side of a road a few blocks away from the local bars. He pulls up beside her and steps out of his car. He is in uniform, armed, and displaying a badge. Although he does not arrest her, the officer tells the woman that she is visibly intoxicated and that he must take her to the police station to sober up in the drunk tank. Instead of taking her to the police station, he drives to a dark country road where he rapes her. In choosing to press charges, the woman learns that she is not the first person this officer has preyed on. All she can think is *how did this happen, why wasn't he stopped?*

According to research conducted by Bowling Green State University, U.S. police officers were charged with rape over four hundred times between 2005 and 2013 and charged with fondling over six hundred times.<sup>1</sup> This data is not comprehensive, as sexual assault is one of the most underreported crimes, especially when the offender is a police officer.<sup>2</sup> Additionally, even when the crime is reported, “a striking number of police accused of sex crimes manage to escape appropriate penalties and maintain police certification by moving from one jurisdiction to another.”<sup>3</sup>

In Indiana, two women sued the City of Fort Wayne and the City of Evansville in 2018 after experiencing their own traumatizing sexual assaults at the hands of on-duty officers.<sup>4</sup> The women alleged that the respective cities were liable for the sexual assaults committed by their on-duty officers because the assaults occurred while the officers were on the job, acting as police officers.<sup>5</sup> Ruling on an issue of first impression, the Supreme Court of Indiana held that cities can be held vicariously liable for an on-duty police officer’s sexual assault under the doctrine of respondeat superior.<sup>6</sup> This development in Indiana common law has opened the door for potential statutory reform.

Police officers are not the only government authorities who abuse their power

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1. Philip M. Stinson et al., *Police Sexual Misconduct: A National Scale Study of Arrested Officers*, 26 CRIM. JUST. POL’Y REV. 665, 668-69 (2015); Elliott C. McLaughlin, *Police Officers in the US Were Charged with More than 400 Rapes over a 9-Year Period*, CNN (Oct. 19, 2018, 10:46 AM), <https://www.cnn.com/2018/10/19/us/police-sexual-assaults-maryland-scope/index.html> [https://perma.cc/82ES-CS7G].

2. McLaughlin, *supra* note 1.

3. Stinson, *supra* note 1, at 669.

4. *Cox v. Evansville Police Dep’t*, 107 N.E.3d 453, 456 (Ind. 2018).

5. *Id.* at 458.

6. *Id.* at 467.

and authority to commit sexual misconduct. In 2018, four Indiana State employees accused then-Indiana Attorney General Curtis Hill of sexual assault by four Indiana State employees.<sup>7</sup> The criminal probe did not move forward, and the professional misconduct action ended with a thirty-day suspension of Attorney General Hill's license to practice law.<sup>8</sup> A civil tort suit is pending in Marion County,<sup>9</sup> and Curtis Hill remained Attorney General of Indiana for the remainder of his elected term.<sup>10</sup> Taken together, these situations demonstrate that the time is right for Indiana to pass a law designed to prevent these exploitations of government power.<sup>11</sup>

This Note advocates for a statutory solution to the persistent problem of aggressors using government conferred power and authority to commit sexual assault and rape on the taxpayers' dime. This Note further argues for a slight change in evidentiary rules to allow database information to be discoverable. Part I begins by discussing the persistent problem of government employees in positions of power abusing their authority to engage in sexual misconduct, assault, and even rape. Part II describes the recent shift in sexual assault civil cases from victims suing their assailants to victims suing the employers or institutions allegedly responsible for the employee at the time of the sexual assault. Part III examines how Indiana case law treats situations in which a government employer or institution is sued for damages due to the sexual misconduct of its employee or representative. Part IV proposes, and analyzes, the constitutionality of a statutory solution to the persistent problem identified in Part I. This Note concludes by proposing and analyzing a short-term, evidentiary solution targeted at deterring the practice of hiring employees who have demonstrated a willingness to abuse their authority by committing sexual misconduct.

#### I. OVERVIEW OF PERSISTENT GOVERNMENT EMPLOYEE MISCONDUCT

This section provides a brief overview of identifiable persistent government employee misconduct. It starts with police officer misconduct generally, then looks briefly at officer misconduct specific to Indiana, and concludes with other government agent misconduct in Indiana.

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7. *In re Hill*, 144 N.E.3d 184, 186-87 (Ind. 2020).

8. *Id.* at 186.

9. *DaSilva v. Hill*, No. 49D12-2007-CT-022288 (Marion Cnty. Super. Ct., filed July 7, 2020).

10. Bill Hutchinson, *Court Finds Indiana Attorney General Curtis Hill Groped Women, Strips Him of Law License for 30 Days*, ABC NEWS (May 12, 2020, 4:39 PM), <https://abcnews.go.com/US/court-finds-indiana-attorney-general-curtis-hill-groped/story?id=70634926> [<https://perma.cc/K4M5-K97J>].

11. Indiana passed HEA 1002, which Governor Holcomb signed into law as Public Law 12 (2021), addressing police use of force and the wandering officer phenomenon. However, as the law is focused on use of force misconduct and training, it does not go far enough to fix the issues outlined in this Article.

### A. Police Officers

Sexual assault is the second most reported form of police misconduct in the United States.<sup>12</sup> However, police departments typically do not collect data regarding sex-related misconduct, and they distribute any data they do collect even less often.<sup>13</sup> Researchers are also unable to study cases that are submitted as an official report because of “the reluctance of officers and organizations to expose cases of sex-related police misconduct to outside scrutiny.”<sup>14</sup> In sum, “[c]ertain forms of police violence, like sexual violence, remain marginalized in police training and overall law enforcement conscientiousness.”<sup>15</sup>

The International Association of Chiefs of Police (“IACP”) acknowledged in 2011 that agency leaders resist sexual misconduct policies because they are often in denial regarding the existence of the problem in their agency or because they do not feel it is necessary to take action until an incident occurs within their agency.<sup>16</sup> Despite encouragement from the IACP in 2011 to implement sexual misconduct training and policies, much of police sexual assault training centers around investigating and responding to sexual assaults committed by others, not sexual assaults committed by the officers themselves.<sup>17</sup> The continued existence of news headlines denoting officer sexual misconduct tends to show that little progress has been made in the past ten years.<sup>18</sup>

Furthermore, police work has been identified as an occupation that encourages or allows occupational deviance.<sup>19</sup> Occupation deviance is defined as rule or norm-violating behavior that occurs due to the nature of the worker’s occupation.<sup>20</sup> Tom Barker, an ex-police officer with over forty years of research experience, uses an occupational deviance framework to explain his findings regarding police deviance and sexual abuse.<sup>21</sup> As he explained in his 2020 book: “When the intersection of inclination and opportunity occurs under a perceived low-risk environment, the likelihood of occupational deviance is increased. This nexus—*inclination, opportunity, and low risk*—is impacted in police work

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12. Devon W. Carbado, *Blue-On-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1498 (2016), *citing* NAT’L POLICE MISCONDUCT REPORTING PROJECT, 2010 *Annual Report*, CATO INST., <http://www.policemisconduct.net/statistics/2010-annual-report/> [<https://perma.cc/C84F-3KJN>].

13. Stinson, *supra* note 1, at 666.

14. *Id.*

15. Carbado, *supra* note 11, at 1516 (*citing* Human Rights Watch, *Improving Police Response to Sexual Assault* 19 (2013)), [https://www.hrw.org/sites/default/files/reports/improvingSAInvest\\_0.pdf](https://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf) [<https://perma.cc/7JEP-6JCL>].

16. *Addressing Sexual Offenses and Misconduct by Law Enforcement: Executive Guide 6* (2011) *available at* <https://www.theiacp.org/sites/default/files/all/a/AddressingSexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf> [<https://perma.cc/3KYF-MYJS>].

17. Carbado, *supra* note 11, at 1516.

18. McLaughlin, *supra* note 1.

19. TOM BARKER, *AGGRESSORS IN BLUE: EXPOSING POLICE SEXUAL MISCONDUCT* 4 (2020).

20. *Id.*

21. *Id.*

settings by the unequal power relationship between the worker and his or her ‘client.’”<sup>22</sup> Law enforcement officers have an unusual amount of discretion and little oversight compared to other occupations.<sup>23</sup> They also have an unusual amount of power: the ability to stop, search, arrest, use force, etc., all as representatives of, and with the authority of, the government.<sup>24</sup> It follows that police work is a “sexual abuse-prone occupation,” an occupation that has workers and clients that “do not meet on equal terms of power and authority.”<sup>25</sup>

Studies show that these occupationally deviant officers target the most vulnerable and the least credible of the people who they interact with: crime victims, prisoners, informants, students, and minors.<sup>26</sup> The same studies also showed that these officers pulled over drivers to extort sex through threats of arrest and often flat-out raped victims who were reluctant.<sup>27</sup> Additionally, and perhaps even worse, research demonstrates that police officers often engage in *quid pro quo* sexual favors with citizens in exchange for not giving the citizen a citation or arresting them.<sup>28</sup> Per this research, officers and agency managers believe that less serious, consensual, and non-violent sexual misconduct happens regularly.<sup>29</sup>

Furthermore, police sexual violence is a “pattern prone” offense that often involves recidivist officers.<sup>30</sup> A 2013 study demonstrates how police organizations fail to document, report, and adequately punish police officers who are recidivist sex offenders, allowing the continuation of sexual assaults and further victimization.<sup>31</sup>

Many officers accused of sexual misconduct escape appropriate punishment and maintain police certification by “moving from one jurisdiction to another.”<sup>32</sup> A recent study, conducted by professors Ben Grunwald and John Rappaport and published in the 2020 Yale Law Journal, systematically investigated “wandering officers” and police misconduct in Florida.<sup>33</sup> Grunwald and Rappaport define “wandering officers” as “law-enforcement officers fired by one department, sometimes for serious misconduct, who then find work at another agency.”<sup>34</sup> The study analyzed data pulled from the employment records of 98,000 full-time law-

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22. *Id.*

23. *Id.* at 5-6.

24. *Id.* at 6.

25. *Id.* at 5.

26. *Id.* at 20.

27. *Id.*

28. Stinson, *supra* note 1, at 667.

29. *Id.*

30. *Id.* at 669.

31. *Id.* at 668-69.

32. *Id.* at 669.

33. Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 YALE L.J. 1676, 1676 (2020).

34. *Id.*

enforcement officers in Florida over a thirty-year period.<sup>35</sup> In an interview with *The Washington Post*, Grunwald and Rappaport highlighted some of their findings: “[P]olice officers who are fired tend to get rehired by another agency within three years;” and “when a wandering officer gets hired by a new agency, they tend to get fired about twice as often as other officers and are more likely to receive ‘moral character violations,’ both in general and for physical and sexual misconduct.”<sup>36</sup>

Generally, the study indicated that wandering officers pose a heightened risk to the communities they serve, even more so than rookie police officers.<sup>37</sup> One conclusion from the study is that wandering officers are “significantly” more likely than officers who have never been fired to receive complaints and over fifty percent more likely to be fired again.<sup>38</sup> This held true across all races, ages, and education levels, indicating that demographics do not play a significant role in either officer misconduct or in the wandering officer phenomenon.<sup>39</sup> Additionally, agency variables such as funding, culture, leadership, and beat assignment had statistically insignificant effects.<sup>40</sup> The study led Grunwald and Rappaport to conclude that “the most straightforward explanation is also the most plausible one: wandering officers simply behave worse than officers who have never been fired.”<sup>41</sup>

So why do agencies keep hiring high-risk officers with patterns of misconduct? One reason is lack of information, either due to inadequate background checks, inadequate resources to conduct the proper checks, or the ease of deliberately concealing professional history.<sup>42</sup> This Article is not the first to identify this problem, and some steps have been taken towards rectifying it. For example, the National Decertification Index (“NDI”) was implemented to combat this problem.<sup>43</sup> However, reporting officers’ decertification to the NDI is not mandatory in many states, so the database is incomplete.<sup>44</sup> Additionally, the NDI only tracks the decertification of officers, not all misconduct, so even the reports it does compile are severely limited.<sup>45</sup> This is because many states require either criminal convictions or utterly egregious conduct before an officer will be decertified, and five states plus the District of Colombia have no decertification

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35. *Id.*

36. Nikita Lalwani & Mitchell Johnston, *What Happens When a Police Officer Gets Fired? Very Often Another Police Agency Hires Them*, WASH. POST (June 16, 2020, 6:00 AM), <https://www.washingtonpost.com/politics/2020/06/16/what-happens-when-police-officer-gets-fired-very-often-another-police-agency-hires-them/> [https://perma.cc/N6QZ-QSX9].

37. Grunwald & Rappaport, *supra* note 32, at 1736.

38. *Id.* at 1734.

39. *Id.* at 1740.

40. *Id.* at 1751-52.

41. *Id.* at 1758.

42. *Id.* at 1758-59.

43. *Id.* at 1696.

44. *Id.* at 1759.

45. *Id.*

at all.<sup>46</sup> Many states also have databases meant for tracking officer misconduct, but reporting to the certification boards or the database is often voluntary and viewed as an invitation for a defamation suit.<sup>47</sup>

Another possible reason for hiring wandering officers is that the agencies externalize the cost of hiring a risky officer; therefore, they are not financially incentivized to care.<sup>48</sup> Even if a plaintiff is able to successfully hold an agency liable in a lawsuit, many agencies either use central government funds or pre-budgeted litigation funds to pay the judgement and experience little to no financial pressure.<sup>49</sup>

The wandering officer study excluded officers who resigned, but anecdotal evidence suggests that officers are often able to resign with a positive reference in exchange for not pursuing legal action.<sup>50</sup> This means that there is an unknown quantity of officers in the “resigned” category who might have committed misconduct and moved on to another position with no record of it at all.<sup>51</sup>

Additionally, the study intentionally excluded any officers who were rehired to the same agency as a result of labor arbitration after being fired because they aren’t *technically* wandering officers.<sup>52</sup> Many officers are rehired over police chief objections due to technicalities, such as a missed deadline or failure to interview witnesses, that lead an arbitrator to conclude the firing was unjustified even in spite of the fact that the underlying misconduct was undisputed.<sup>53</sup> For example, in the District of Columbia, an officer convicted of sexually assaulting a young woman in his patrol car was forcibly rehired nearly eight years after his conviction when an arbitrator found that firing the officer was too harsh a punishment.<sup>54</sup>

The reality of the situation is that many firings go unreported. Even worse, “[s]ome states shield police personnel records—including firings—from public disclosure.”<sup>55</sup> The biggest issue seems to be police unions’ bargaining power and

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46. *Id.* at 1760 (“[I]n 2015, over half of all police decertifications reported to the NDI came from Florida and Georgia, while Louisiana, Mississippi, and Wyoming did not decertify a single officer.”).

47. *Id.* at 1695. *See also* J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115, 135 (1998) (“Providing such negative information creates a risk of defamation liability while offering few clear benefits to the referring employer. Indeed, the available empirical evidence suggests that former employers are less likely to reveal employee misconduct than any other information about the employee.”).

48. *Id.* at 1767-68.

49. *Id.* at 1768.

50. *Id.* at 1695.

51. *Id.*

52. *Id.* at 1734.

53. Kimbriell Kelly et al., *Fired/Rehired: Police Chiefs Are Often Forced to Put Officers Fired for Misconduct Back on the Streets*, WASH. POST (Aug. 3, 2017), <https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/> [<https://perma.cc/R2PW-8K68>].

54. *Id.*

55. *Id.*

forced arbitration.<sup>56</sup> In Indiana specifically, a police chief is unable to even recommend the firing of an officer until such time as the criminal proceedings are fully resolved.<sup>57</sup> Additionally, the police chief does not have the power to fire an officer; upon the chief's recommendation, the Civilian Police Merit Board hears the case and makes final decisions about whether to fire the officer.<sup>58</sup> According to the Indiana Law Enforcement Training Board, only thirty-eight Indiana police officers have *ever* been decertified as of 2017, and the reasons for decertification were not disclosed in the public records request.<sup>59</sup>

### B. Other Government Agents

Police work is not the only occupation that has inclination, opportunity, and a perceived low risk of consequences, the factors that increase occupational deviance.<sup>60</sup> Sexual abuse-prone relationships occur most often “in work-related settings where there is an unequal power differential between the victim and the perpetrator” and where “the victim is perceived to have less authority or status than the perpetrator.”<sup>61</sup> Examples of sexual abuse-prone occupations include clergy, coaches, professors, caregivers, and most notably, “elected government officials—possibly the occupation with the most numerous examples of sexual abuse and cover-up[s].”<sup>62</sup>

Even on the occasions when sexual misconduct is not able to be covered up, the perpetrators often face little to no repercussions: Indiana's Attorney General was merely suspended for thirty days after the Indiana Supreme Court found he had committed “acts of battery,” along the lines of sexual touching and groping, against several women.<sup>63</sup> In response to the allegations made against Attorney General Hill, Indiana lawmakers voted to enroll House Bill 1309 in 2018—later enacted by Governor Holcomb—which established mandatory self-determined sexual harassment policies for all three branches of government.<sup>64</sup> While the

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56. *Id.*

57. Jill Disis, *How Long Should It Take to Fire a Police Officer?*, INDYSTAR (Sep. 22, 2014, 7:21 AM ET), <https://www.indystar.com/story/news/crime/2014/09/22/long-take-fire-police-officer/15915683/> [<https://perma.cc/4H99-83L8>].

58. *Id.*

59. Letter from Tim J. Cain, Staff Att’y, Ind. L. Enforcement Training Board, to Sam Stecklow, Rep., Invisible Inst. (Apr. 28, 2017), *available at* <https://www.prisonlegalnews.org/media/publications/Indiana-Decertifications.pdf> [<https://perma.cc/46HW-7BJF>]. The reasons for decertification were not provided due to a deficiency in the records request, although Mr. Cain admitted that the primary reporting system does not track that information. *Id.*

60. BARKER, *supra* note 18, at 4.

61. *Id.* at 5.

62. *Id.*

63. *In re Hill*, 144 N.E.3d 184, 186 (Ind. 2020).

64. Tony Cook, *Sexual Harassment Policy Overhaul Coming for All 3 Branches of Indiana Government*, INDYSTAR, (Mar. 7, 2018, 4:23 PM ET), <https://www.indystar.com/story/news/politics/2018/03/07/sexual-harassment-overhaul-coming-all-three-branches-indiana-governmentawmakers-governor-supreme-cou/399097002/> [<https://perma.cc/4DFG-GPRY>].

Indiana Legislature deserves a nod for taking a step in the right direction, it is somewhat shocking that there was no sexual harassment policy required prior to 2018.

The only other official action Indiana has taken is the Indiana State Sexual Violence Primary Prevention Plan 2016-2021, published by the Indiana State Department of Health.<sup>65</sup> This plan approaches sexual violence from a public health perspective, meaning it focuses on educating the community and implementing programs that try to shift community values.<sup>66</sup> While commendable in theory, there is no way to know whether the plan has been effective since its implementation in 2016, as there are no recent statistics available regarding the prevalence of sexual violence in Indiana.

Indiana is also not required to report sexually violent crimes to the FBI at the present time, so the availability of Indiana rape statistics is severely lacking compared to other states that are required to report to the Uniform Crime Report (“UCR”).<sup>67</sup> The U.S. Equal Employment Opportunity Commission (“EEOC”) compiles statistics on sexual harassment charges, and the amount of EEOC charges filed in Indiana has decreased from 3.5% in 1997 to 1.5% in 2021.<sup>68</sup> However, it is impossible to determine whether this is due to a decrease in sexual harassment occurring in Indiana workplaces, or just a decrease in charges being filed.<sup>69</sup> The University of Massachusetts Amherst’s Center for Employment Equity found that approximately five million employees are sexually harassed at work every year, but 99.8 percent of those people never file formal charges,<sup>70</sup> so it is unlikely that the EEOC data accurately reflects the amount of sexual assault occurring in Indiana workplaces.

The lack of statistics regarding sexual misconduct in Indiana workplaces makes it impossible to estimate how often sexual misconduct occurs in Indiana government. However, the fact that sexual misconduct is extremely underreported combined with the fact that government employers have innumerable opportunities for sexual abuse-prone relationships in the workplace indicates that sexual misconduct in Indiana government is a problem.

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65. IND. STATE DEP’T OF HEALTH, IND. STATE SEXUAL VIOLENCE PRIMARY PREVENTION PLAN 2016-2021 (2015), [https://www.in.gov/health/owh/files/Indiana\\_Sexual\\_Violence\\_Primary\\_Prevention\\_Plan\\_2016-2021.pdf](https://www.in.gov/health/owh/files/Indiana_Sexual_Violence_Primary_Prevention_Plan_2016-2021.pdf) [https://perma.cc/8B7Z-MBF6].

66. *Id.* at 5-6.

67. Katie Cierniak et al., *Sexual Violence Prevention in Indiana: Toward Safer, Healthier Communities*, CTR. EVALUATION & EDUC. POL’Y 4 (Jan. 2012), available at [https://www.in.gov/icw/files/Brief\\_Sexual\\_Violence\\_Prevention\\_021412.pdf](https://www.in.gov/icw/files/Brief_Sexual_Violence_Prevention_021412.pdf) [https://perma.cc/2GDR-GJH4].

68. *EEOC & FEPA Charges Filed Alleging Sexual Harassment, by State & Gender FY 1997 – FY 2019*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/statistics/eeoc-fepa-charges-filed-alleging-sexual-harassment-state-gender-fy-1997-fy-2019> [https://perma.cc/P83X-DBSP].

69. *Id.*

70. Carly McCann et. al., *Employer’s Responses to Sexual Harassment*, UNIV. MASS. AMHERST CTR. EMP. EQUITY, <https://www.umass.edu/employmentequity/employers-responses-sexual-harassment> [https://perma.cc/Z9ZU-TMWT].



## II. THE SHIFT FROM PRIVATE LIABILITY TO INSTITUTIONAL LIABILITY

Vicarious liability is a common law doctrine that holds a third party responsible for a defendant's conduct because of the relationship between the parties.<sup>71</sup> Respondeat superior, defined as "let the superior make answer," is a form of vicarious liability that holds employers liable for the torts of employees that occur within the employee's "scope of employment."<sup>72</sup> Scope of employment is "[t]he range of reasonable and foreseeable activities that an employee engages in while carrying out the employer's business."<sup>73</sup> "Courts differ, though, in their interpretation of what 'scope of employment' encompasses."<sup>74</sup> This Part will first discuss the recent trend in sexual assault liability suits of shifting the liability from the assailant to the assailant's employer. This Part will then look specifically at the approach some other jurisdictions have taken regarding employer liability sexual assault cases.

### *A. Indiana is Not Alone in Shifting Liability to the Employer*

Indiana is not the only state that has seen a shift in the law that favors allowing vicarious liability suits for sexual misconduct under the doctrines of respondeat superior and non-delegable duty.<sup>75</sup> Traditionally, sexual assault is considered outside the scope of employment, meaning the employer could not be found liable, because sexual assault was seen as either personally motivated or extremely unusual.<sup>76</sup> While courts vary in how they interpret "scope of employment," they usually find employee acts to be within the scope of employment if the employer could foresee the employee's action or if the employee's action was motivated by serving the employer's interest, both of which do not typically apply in a sexual assault.<sup>77</sup>

Recently, however, some courts have been willing to consider sexual assault as within the scope of employment if "the assault occurred as a result of job-created power or authority."<sup>78</sup> Why? It accomplishes victim compensation, usually even more often than individual liability.<sup>79</sup> It spreads the loss over a wider section of the community.<sup>80</sup> It is a more economically efficient way to deter the proscribed behavior since it encourages employers to search for new and

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71. Vicarious Liability, BLACK'S LAW DICTIONARY (11th ed. 2019).

72. Respondeat Superior, BLACK'S LAW DICTIONARY (11th ed. 2019).

73. Scope of Employment, BLACK'S LAW DICTIONARY (11th ed. 2019).

74. Rochelle Rubin Weber, "Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees, 76 MINN. L. REV. 1513, 1514 (1992).

75. See *infra* Part III.

76. Weber, *supra* note 73.

77. *Id.* at 1517.

78. *Id.* at 1522-23.

79. *Id.* at 1536.

80. *Id.* at 1537.

innovative ways to prevent the economic loss caused by paying out settlements and damage awards.<sup>81</sup> Employers make profits while exposing others to the risk-creating activities of their employees.<sup>82</sup> These profits put employers “in a better position to absorb and distribute costs and shift them to society; and holding employers liable provides an incentive for exercising care in choosing, training, and supervising employees.”<sup>83</sup>

*B. Which Jurisdictions Are Willing to Hold Employers Liable for Sexual Assaults Committed by Their Employees?*

California looked at the policy justifications for respondeat superior when deciding whether a government employer is able to be held vicariously liable for a sexual assault committed by an employee and found that public policy compelled the application of respondeat superior.<sup>84</sup> The Supreme Court of California reasoned that deterrence would be served due to the fact that imposing liability creates a strong incentive for agency leaders to prevent sexual assault from happening again.<sup>85</sup> Additionally, the *Mary M.* court reasoned that the imposition of liability would be “an appropriate method to ensure that victims . . . are compensated.”<sup>86</sup> As to the legal analysis, the *Mary M.* court found that misuse of job-related power could fall within the scope of employment.<sup>87</sup>

Louisiana has also adopted the job-created power or authority standard. In *Applewhite v. City of Baton Rouge*, the Louisiana Court of Appeals imposed liability on the City of Baton Rouge after an on-duty police officer raped a woman.<sup>88</sup> The court reasoned that since the officer was only able to separate Applewhite from her companions because of his authority as a police officer, the employer should be responsible for the actions the officer committed while in his position of authority conferred by the employer.<sup>89</sup>

The Ninth Circuit Court of Appeals, applying Washington law, used the standard of whether the sexual misconduct occurred at the same time the employee was engaged in furthering the employer’s interests.<sup>90</sup> In *Simmons v. United States*, the Ninth Circuit held that an inappropriate sexual relationship with a client during a mental health counseling session was within the scope of employment because the unauthorized acts were committed in conjunction with acts that were in the furtherance of the employer’s interests.<sup>91</sup>

Following the Ninth Circuit’s lead, the Supreme Court of Alaska in *Doe v.*

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81. *Id.* at 1519-20.

82. *Id.*

83. *Id.* at 1520.

84. *Mary M. v. City of L.A.*, 814 P.2d 1341, 1343-46 (Cal. 1991).

85. *Id.* at 1347.

86. *Id.* at 1348.

87. *Id.* at 1349-52.

88. 380 So. 2d 119, 123 (La. Ct. App. 1979).

89. *Id.* at 121-22.

90. *Simmons v. United States*, 805 F.2d 1363, 1369 (9th Cir. 1986).

91. *Id.* at 1369-70.

*Samaritan Counseling Center* expanded its interpretation of “scope of employment” in 1990 to whether the “tortious conduct arises out of and is reasonably incidental to the employee’s legitimate work activities.”<sup>92</sup> In *Doe*, there was a consensual sexual relationship between a doctor employed by Samaritan Counseling Center and a patient of Samaritan Counseling Center.<sup>93</sup> The *Doe* court rejected the traditional reasoning that conduct motivated solely by personal interest falls outside the scope of employment when it arose out of the employee’s legitimate work activities.<sup>94</sup>

Similarly, Minnesota has also held that an employee’s personal motivation is not dispositive of whether an employer should be held liable for the employee’s misconduct.<sup>95</sup> Instead, the court in *Marston v. Minneapolis Clinic of Psychiatry & Neurology* emphasized that the key factor in determining scope of employment for the purposes of vicarious liability is whether the assault is related to the employee’s duties and “occurs within work related limits of time and place.”<sup>96</sup>

Lastly, Arizona’s standard is somewhat stricter than the previously mentioned jurisdictions’ standards in that it is highly factually specific. In *St. Paul Fire & Marine Ins. Co. v. Ashbury*, the Court of Appeals of Arizona held that tortious sexual abuse must be “intertwined with and inseparable from the services provided” by the employer.<sup>97</sup> Therefore, claims by a gynecologist’s patients that he fondled them in an inappropriate way while performing routine gynecological examinations was “intertwined with and inseparable from the services provided,” justifying imposition of vicarious liability.<sup>98</sup> However, a physician’s sexual molestation of a patient who was being treated for hand injuries was *not* “intertwined with and inseparable from the services provided,” barring an extension of vicarious liability.<sup>99</sup>

### III. EMPLOYMENT LIABILITY IN INDIANA

This section will provide an overview of vicarious liability and Indiana’s former standard before diving into Indiana’s three seminal cases that represent the doctrinal shift to allow sexual assault victims to sue employers under a theory of vicarious liability. The three cases will be discussed as follows: *Stropes v. Heritage House Childrens Center, Inc.*;<sup>100</sup> *Barnett v. Clark*;<sup>101</sup> and *Cox v.*

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92. 791 P.2d 344, 348 (Ala. 1990) (clarified by *Veco, Inc. v. Rosebrock*, 970 P.2d 906 (Ala. 1999)).

93. *Id.* at 345

94. *Id.* at 348-49.

95. *Marston v. Minneapolis Clinic of Psychiatry & Neurology*, 329 N.W.2d 306, 309-10 (Minn. 1982).

96. *Id.* at 310.

97. 149 Ariz. 565, 567 (Ariz. Ct. App. 1986).

98. *Id.*

99. *Id.*

100. 547 N.E.2d 244 (Ind. 1989).

101. 889 N.E.2d 281 (Ind. 2008).

*Evansville Police Department*.<sup>102</sup>

As extensively discussed in Part II, courts differ in their interpretation of what “scope of employment” encompasses, especially when it comes to sexual assaults.<sup>103</sup> Indiana used to follow a traditional approach to interpreting “scope of employment.”<sup>104</sup> The standard, as of 1972, was as follows:

[T]he conduct of a servant [has been held] to be within the scope of his employment where the conduct was actuated to an appreciable extent by the purpose to serve the master, . . . where the conduct was performed substantially within the authorized time, . . . or where the work is the kind the servant is employed to perform.<sup>105</sup>

Sexual assault in the past was seen as either personally motivated or extremely unusual.<sup>106</sup> Therefore, sexual assault was outside the scope of employment as a matter of law.<sup>107</sup> While not many cases of sexual assault arose prior to 1989, the Indiana Court of Appeals in *Fields v. Cummins Employees Federal Credit Union* applied the traditional employer’s benefit interpretation to sexual assault and concluded, “We find it inconceivable that acts of sexual harassment or assault could be for the benefit of the employer. Therefore, [the defendant’s] acts did not arise out of his employment . . . .”<sup>108</sup>

The first major shift in Indiana’s doctrine of respondeat superior came in *Stropes v. Heritage House Childrens Center, Inc.* in 1989. A fourteen-year-old male with cerebral palsy and severe mental incapacitation was placed at the Heritage House Childrens [sic] Center of Shelbyville, Inc. (“Heritage”) as a ward of Marion County for his care, security, and well-being.<sup>109</sup> A male nurse’s aide employed by Heritage had the responsibility of feeding, bathing, and otherwise caring for the fourteen-year-old.<sup>110</sup> One night, in the middle of changing the child’s clothes, the employee was witnessed performing oral and anal sex on the child.<sup>111</sup> The employee pled guilty to criminally deviate conduct after criminal charges were filed.<sup>112</sup> The child, through a representative, filed a complaint against Heritage asking for compensatory and punitive damages.<sup>113</sup> The child

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102. 107 N.E.3d 453 (Ind. 2018).

103. Weber, *supra* note 73, at 1514.

104. Neal F. Eggeson, Jr., *Searching for Road Signs on Indiana’s Scope of Employment Highway*, 9 IND. CIV. LITIG. REV. 59, 61 (2012), available at <https://static1.squarespace.com/static/51488a73e4b0405c4e242a9e/t/520aa3f5e4b0f3bf53bbabb0/1376429045830/Respondeat+Superior+part+1.pdf> [<https://perma.cc/UWM2-J63G>].

105. *Id.* (internal citations omitted).

106. Weber, *supra* note 73, at 1514.

107. *Fields v. Cummins Emps. Fed. Credit Union*, 540 N.E.2d 631 (Ind. Ct. App. 1989).

108. *Id.* at 638.

109. *Stropes v. Heritage House Childrens Center, Inc.*, 547 N.E.2d 244, 245 (Ind. 1989).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

alleged Heritage was responsible for the actions of its employee while on duty under the doctrine of respondeat superior.<sup>114</sup>

The substantive question for review in *Stropes* was whether, as a matter of law, Heritage may be subject to liability for its employee's sexual misconduct under either the doctrine of respondeat superior or the "common carrier" (non-delegable duty) exception.<sup>115</sup> The court in *Stropes* held that the question of employer liability under respondeat superior should have gone to trial, as the sexual assault is not per se determinative of the scope of employment question.<sup>116</sup>

The court further held that the focus of the question is not the employee's motivation or permission to act, but rather whether the sexual misconduct fell within or arose out of the authorized employment duties.<sup>117</sup> As to the question of whether Heritage may be found liable under the common carrier doctrine for the acts of the employee regardless of whether the acts fell within the scope of employment, the court held that Heritage clearly assumed a non-delegable duty to be responsible for the care and safety of the child.<sup>118</sup>

In *Stropes*, Indiana's Supreme Court resolutely held that sexual assault does not fall outside of the scope of employment under the doctrine of respondeat superior as a matter of law.<sup>119</sup> This was an important step in Indiana's common law towards a victim's ability to hold an employer or institution responsible for the harms the victim suffered as a direct result of putting their trust in the employer.<sup>120</sup> Additionally, the Court in *Stropes* clarified the treatment of the common carrier exception in Indiana common law and made a wide-sweeping

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114. *Id.*

115. *Id.* at 247. The common carrier (non-delegable duty) exception mentioned in this case is a doctrine that holds entities such as railroads or airlines liable for anything that happens to the individuals they carry due to the control and autonomy that is surrendered by the passengers while aboard the transportation vehicle. *See Cox v. Evansville Police Dep't*, 107 N.E.3d 453, 465-66 (Ind. 2018).

116. *Stropes*, 547 N.E.2d at 248-49.

117. *Id.* at 249 ("Heritage's employee committed some acts unquestionably within the scope of employment. . . . [h]e was also authorized to undress [the child] and to touch his genitals and other parts of his body when bathing him and changing his clothes." *Id.* "A jury presented with the facts . . . might find . . . that [the employee's] actions were, 'at least for a time, authorized by his employer, related to the service for which he was employed, and motivated to an extent by [his employer's] interests.'" *Id.* at 250 (quoting *Gomez v. Adams*, 462 N.E.2d 212, 224-25 (Ind. Ct. App. 1984)).

118. *Id.* at 253-54 (discussing the child's lack of autonomy and dependence on Heritage, as well as Heritage's degree of control over the child, the primary factor relevant in asserting the common carrier doctrine).

119. *Id.* at 249.

120. Up until the *Stropes* decision in Indiana, sexual assault had been held outside the scope of employment as a matter of law, and negligence claims asserting liability on the part of the employer for breaching a duty to protect patrons by carefully screening and hiring its employees had also failed as a general matter. *Id.* at 246.

extension of the doctrine to custodial institutions.<sup>121</sup>

Another seminal case in the development of Indiana's vicarious liability doctrines was *Barnett v. Clark* in 2008. In *Barnett*, the plaintiff sought public assistance from her local trustee's office where she was interviewed by a deputy trustee.<sup>122</sup> The deputy trustee told the plaintiff that in order to receive benefits, she'd have to do some bookwork for him.<sup>123</sup> The plaintiff returned a few days later to do the bookwork.<sup>124</sup> As the deputy was reviewing the completed work with the plaintiff in the back office, he "closed the door, blocked it with a chair, turned off the lights, and sexually assaulted the plaintiff."<sup>125</sup> The plaintiff sought damages from the Trustee of Pleasant Township in Steuben County, Indiana for the sexual misconduct of one of the Trustee's employees.<sup>126</sup> The trial court granted summary judgement in favor of the Trustee, holding that the sexual assault occurred outside the deputy trustee's scope of employment as a matter of law.<sup>127</sup> The Court of Appeals reversed, but the Indiana Supreme Court affirmed the trial court.<sup>128</sup>

Since the plaintiff sought damages under the doctrine of respondeat superior and cited *Stropes*, arguing that some of the employee's acts were authorized, the question of whether the sexual assault occurred within the scope of employment should go to the jury.<sup>129</sup> The court in *Barnett* distinguished the authorized employment duties in *Stropes*—undressing, bathing, and feeding the child—from the authorized duties of the deputy trustee—a handshake as the extent of physical conduct.<sup>130</sup> The court ultimately affirmed the trial court and held that summary judgement was proper due to the fact that the authorized duties of the deputy trustee did not include an express or implied authorization to touch her, so the sexual assault was outside the scope of his employment as a matter of law.<sup>131</sup>

*Barnett* added clarification to vicarious liability in a sexual assault setting by placing an outer limit on *Stropes*. However, there was some confusion in Indiana post-*Stropes*. Some plaintiffs and courts thought *Stropes* implied that the question of whether a sexual assault falls within the scope of employment should more often than not be a question of fact for the jury instead of a question of law the court could decide in summary judgement.<sup>132</sup> Additionally, *Barnett* sets a

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121. *Id.* at 253-55.

122. *Barnett v. Clark*, 889 N.E.2d 281, 283-84 (Ind. 2008).

123. *Id.* at 283.

124. *Id.*

125. *Id.*

126. *Id.* at 282.

127. *Id.*

128. *Id.*

129. *Id.* at 282-83.

130. *Id.* at 286.

131. *Id.*

132. *See, e.g., Stropes v. Heritage House Childrens Center of Shelbyville, Inc.*, 547 N.E.2d 244, 250 (Ind. 1989) (employee assault upon incapacitated patient); *Southport Little League v. Vaughan*, 734 N.E.2d 261, 268 (Ind. Ct. App. 2000) (equipment manager's molestation of participating youths);

potential limit on the proposed statute discussed in Part IV of this Note.

The most recent development of vicarious liability law in Indiana came from the Supreme Court in *Cox v. Evansville Police Department*, a 2018 case that involved two women who sued the City of Fort Wayne and the City of Evansville respectively for sexual assaults committed by on-duty police officers employed by the cities.<sup>133</sup> In both scenarios, on-duty officers were called to assist the plaintiff-victims and instead took advantage of their power and authority over the women to sexually assault them.<sup>134</sup>

Cox and Beyer, the victims, sued their assailants' respective city-employers in civil court.<sup>135</sup> Cox sued the City of Evansville under the doctrines of respondeat superior, the common carrier exception, and negligent hiring, retention, and supervision.<sup>136</sup> Evansville moved for summary judgement and the trial court granted it on the common carrier theory.<sup>137</sup> Cox then appealed the trial court's decision.<sup>138</sup> Beyer sued the City of Fort Wayne claiming the same three theories, and the trial court granted Fort Wayne's motion for summary judgement on the common carrier theory and negligence theory, but not on the respondeat superior theory.<sup>139</sup> Both Fort Wayne and Beyer appealed, and the Indiana Court of Appeals accepted and consolidated both cases.<sup>140</sup> The Indiana Court of Appeals reversed the trial courts' grant of summary judgement to the cities on the common carrier issue and affirmed the denial of summary judgement to Fort Wayne on the respondeat superior theory.<sup>141</sup>

The Indiana Supreme Court affirmed the trial courts' grants of summary judgement to the cities, holding that the relationships between the women and cities do not fall within the common carrier exception because the women did not enter a "contract of passage" with the cities.<sup>142</sup> On the issue of respondeat superior liability, the court held that a city may be held liable under the scope-of-employment respondeat superior rule.<sup>143</sup> The court articulates its reasoning best:

Resounding in our decision today is the maxim that great power comes with great responsibility. Cities are endowed with the coercive power of the state, and they confer that power on their police officers. Those officers, in turn, wield it to carry out employment duties—duties that may include physically controlling and forcibly touching others without

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Konkle v. Henson, 672 N.E.2d 450, 450 (Ind. Ct. App. 1996) (acts of molestation perpetrated by a minister).

133. *Cox v. Evansville Police Dep't*, 107 N.E.3d 453, 456 (2018).

134. *Id.*

135. *Id.* at 458.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 457, 465-67.

143. *Id.* at 456.

consent. For this reason, when an officer carrying out employment duties physically controls someone and then abuses employer-conferred power to sexually assault that person, the city does not, under *respondeat superior*, escape liability as a matter of law for the sexual assault.<sup>144</sup>

In *Cox*, the court adopts the “job-created authority or power” standard<sup>145</sup> in determining whether a city escapes, under respondeat superior, liability for sexual assaults committed by its employees as a matter of law.<sup>146</sup> *Cox* specifically discussed the job-created authority or power standard in the context of police officers, but an argument could be made that the *Cox* reasoning applies to any employee with a high degree of job-created authority or power. This case and the actual and potential expansion of vicarious liability in Indiana serves as the base of the underlying legal reasoning supporting the proposed statute discussed in Part IV of this Note.

#### IV. PROPOSAL AND ANALYSIS OF SINGLE STRIKE LAW

##### *A. Proposal*

The preceding sections illuminated the need for a uniform system which addresses sexual misconduct by state-sponsored actors. In recognition of this need, this section proposes a state-wide database for sexual misconduct records. But record keeping is only a part of the equation. Thus, this section also discusses the need for an appropriate education program and a hardline misconduct prevention rule.

*1. One Strike: Keep Score.*—A primary reason for wandering officers’ ability to keep getting hired at new precincts or departments is the lack of a nationwide database documenting officer misconduct.<sup>147</sup> However, the first step would be to establish databases in each state with mandatory and consistent reporting. To that end, the Indiana legislature should enact an Indiana state law to establish and fund a statewide database, similar to the National Association of State Directors of Teacher Education and Certification (“NASDTEC”) Clearinghouse database that collects and tracks sexual misconduct actions taken against Indiana state and local government employees.<sup>148</sup> More specifically, the database, hereinafter referred to as “One Strike: Keep Score,” would collect sexual misconduct-related criminal convictions, findings of civil liability, civil settlements, disciplinary actions, disciplinary warnings, and complaints. In order to avoid the negative impact of false or unsubstantiated allegations, the data regarding civil settlements,

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144. *Id.*

145. *See Weber, supra* note 73, at 1522-23 (Some “courts have found that sexual assaults may be within the “scope of employment” . . . is the sexual assaults were committed by employees through the use of job-created power.”).

146. *Cox*, 107 N.E.3d at 456.

147. *See supra* Part I.

148. NASDTEC CLEARINGHOUSE, NASDTEC, [https://www.nasdtdec.net/page/Clearinghouse\\_FAQ](https://www.nasdtdec.net/page/Clearinghouse_FAQ) (last visited Mar. 13, 2021) [<https://perma.cc/TE7H-HYT6>].



disciplinary warnings, and complaints will only be accessible for discovery in a subsequent civil or criminal proceeding.<sup>149</sup>

One Strike: Keep Score would serve several functions. One goal would be to remedy the lack of sexual misconduct statistics and data in Indiana by providing both a mandatory data collection mechanism and a statewide repository for the data. In addition to acting as a mechanism for collecting sexual misconduct data, One Strike: Keep Score would be available for taxpayer-funded government employers to search as part of their employee background checks. Government employers presumably want to minimize their exposure to potential litigation or liability, including vicarious liability suits stemming from a bad actor's future sexual misconduct, by consciously choosing not to hire bad actors with a history of sexual misconduct. Access to One Strike: Keep Score would assist government employers in making informed hiring decisions, whether that means not hiring an individual or only hiring an individual for employment positions that involve less risk and less opportunity for committing sexual assault.

2. *One Strike: Do It Right.*—Another issue identified in Part I of this Note is the forced rehiring of justifiably fired government employees, especially police officers. The second prong of the proposed statute, hereinafter called the “One Strike: Do It Right” program, would address this problem by implementing statewide policies, procedures, and yearly education and training programs to facilitate the proper firing of employees who commit sexual misconduct. The One Strike: Do It Right program would also include mandatory policies and procedures to help government employers efficiently implement and participate in the collection and use of the One Strike database. Lastly, the One Strike: Do It Right program would focus and enhance certain existing education and training programs that are being implemented at the present time as part of Indiana's State Sexual Violence Primary Prevention Plan 2016-2021 by specifically targeting employers with high-risk positions in addition to general community education.<sup>150</sup>

3. *One Strike: You Are Out.*—The last prong of the proposed statute, hereinafter the One Strike: You Are Out rule, prohibits any individual who has been criminally convicted or held civilly liable for sexual misconduct—whether individually or through their employer—from ever being employed by a taxpayer-funded employer in Indiana. There are several necessary limits to the One Strike: You Are Out rule to ensure this legal net only catches the intended fish and not any innocent or falsely accused individuals.

First, only criminally convicted or civilly liable individuals will fall within the One Strike: You Are Out rule to ensure that there are no procedural due process issues. Proof beyond a reasonable doubt is the due process standard when the defendant's freedom is on the line, but this heightened standard is not necessary to justify limiting employment opportunities.<sup>151</sup> The individuals falling

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149. *See infra* Part V.

150. IND. STATE DEP'T OF HEALTH, *supra* note 60.

151. Limiting employment opportunities does not require much due process, as Indiana is an at-will employment state, and employers are permitted to discriminate in making employment decisions based on prior misconduct. *See, e.g., Can My Employer Terminate Me for No Reason?*,

within this rule are not being imprisoned, so a civil trial with a preponderance of the evidence standard should be enough procedural due process to justify banning liable individuals from being employed by taxpayer funded employers. The liable individual still gets their day in court before being denied the opportunity to work in Indiana government. Naturally, a criminal trial has a higher standard for conviction, so criminal convictions would not face due process issues either.

At first glance, it would be tempting to limit the One Strike: You Are Out rule to employment positions that confer certain duties or power and authority to the employee, since those are the situations that Indiana's doctrine of respondeat superior covers at this point in time. However, the One Strike: You Are Out rule does not need to be further limited to only preventing individuals falling under this rule from employment in governmental positions of power and/or authority due to the fact that the substantive due process argument holds up even if the doctrine of respondeat superior would not apply to the situation in court under Indiana common law.

As Indiana common law stands today with regards to the doctrine of respondeat superior, an employer is not able to be held liable as a matter of law for an employee's sexual misconduct unless their employer conferred duties (*Stropes*) or power and authority (*Cox*) lead naturally to the sexual assault. However, taxpayer dollars still go towards defending sexual misconduct litigation, even if the plaintiff ultimately loses the suit like in the *Barnett* case discussed in Part III of this Note. Therefore, the One Strike: You Are Out rule should apply to any government employment position that could invite litigation if the employee commits sexual assault during their shift.

### *B. Due Process*

As discussed above, there should be no procedural due process argument against this proposed statute because the only individuals subject to the One Strike: You Are Out rule will have had a full civil or criminal trial and been found liable or convicted respectively. They will have had their day in court with a full trial, and the preponderance of evidence standard is sufficient due process protection when the individual's freedom is not on the line.

Additionally, there should be no substantive due process argument against this proposed statute either. Strict scrutiny is not justified here because the class of individuals (sexually deviant bad actors) is not historically discriminated against,<sup>152</sup> and there is no fundamental right to be hired by the government.<sup>153</sup>

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IN.gov, <https://faqs.in.gov/hc/en-us/articles/115005043967-Can-my-employer-terminate-me-for-no-reason-> [<https://perma.cc/63X4-CDDM>].

152. Suspect classifications for strict scrutiny are race, national origin, religion, and alienage. See generally *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

153. *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951). The appeals court majority, upholding the dismissal of a government employee against due process and First Amendment claims, asserted that "The First Amendment guarantees free speech and assembly, but it does not guarantee Government employ." *Id.*

There is also no fundamental right to not be discriminated against in the hiring process for prior misconduct. Therefore, Indiana only needs a rational basis for enacting this statute, and the rational basis is to redirect the flow of taxpayer dollars to a more effective (and hopefully cheaper) deterrence model. This law is aimed at reducing the amount of taxpayer dollars spent on sexual misconduct litigation, money judgements, and legal fees and redirecting some of those taxpayer dollars towards costs associated with deterrence: funding the database and the One Strike: Do It Right program. It is a reasonable inference that taxpayers would rather their dollars go towards preventing the sexual assaults from ever happening instead of towards compensating the victims after the fact.

### *C. Dispensing of Opposition*

A major concern with this proposed statute is whether details about individuals in the database and on the One Strike: You Are Out list are publicly accessible, and if so, how accessible. At this point in time, criminal sex offenders often request a trial, increasing the cost of litigation for the state, or plead guilty on a lower charge to avoid having to register as a sex offender.<sup>154</sup> Making the registry searchable online had little to no effect on recidivism.<sup>155</sup>

A similar concern exists with the One Strike: You Are Out list. An individual facing the possibility of being put on a sexual misconduct registry might be tempted to push for a full trial rather than plead guilty in a criminal case in order to avoid ending up on the no-hire list. A civil defendant might be tempted to settle a civil case rather than let it go to completion and be held liable.

In order to allay these concerns, the statistics and other general, non-identifying data in the database will be public, but more intimate data regarding specific individuals listed within the database will not be searchable or available to the public at large. Instead, the details (except for complaints) will only be accessible by Indiana human resource departments, background check companies, professional licensing organizations, and litigants with court-issued discovery orders.

Due to their unsubstantiated nature, complaints will only be accessible by litigants with court-issued discovery orders for the limited purpose of proving a pattern. This limited access allows the database and registry to function the way they are meant to while protecting individual bad actors just enough to lessen the temptation to fight or settle in an attempt to stay out of the database. In this way, the database and registry are to function similarly to the NASDTEC database or a Child Protection Services family flagging database.

Another important consideration is how this law is funded and implemented.

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154. See Elizabeth J. Letourneau et al., *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women*, MED. UNIV. S.C. 4 (Sept. 2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf> [<https://perma.cc/9CUZ-ADGZ>]; Eli Lehrer, *Rethinking Sex-Offender Registries*, NAT'L AFFAIRS (Winter 2016), <https://www.nationalaffairs.com/publications/detail/rethinking-sex-offender-registries> [<https://perma.cc/3FY3-YR88>].

155. *Id.*

Funding, as somewhat already discussed, would come from the money no longer spent on misconduct litigation. The idea is that after a time, the law would pay for itself in money saved by preventing future litigation. A committee would likely need to be set up to study and evaluate how long it would take for the law to pay for itself.

As for implementation, the Indiana State Department of Health would be the best state agency to implement and manage the various programs created by this law. The Indiana State Department of Health already manages Indiana's Rape Prevention and Education Program, so they would be the best equipped to take on these additional, but related, duties.<sup>156</sup>

Another concern with this law is how to ensure the information gets into the database and registry in a timely manner, as well as how the registry actually prevents the rehiring of bad actors. Regarding complaints and employer disciplinary actions, there will be a mandatory reporting clause requiring all government employers to report sexual misconduct complaints or employer-conducted disciplinary action to the Indiana State Department of Health within thirty days of receiving the complaint or concluding the disciplinary action. An objection form submitted within the thirty days in place of the report will serve as a mechanism for objecting to reporting certain instances, such as when a complaint comes in that is completely unsubstantiated (for example, the employee has an alibi that proves the complaint is false).

As to settlements, the statute will require the settling party to submit the settlement agreement to the Indiana State Department of Health within ten days of the judge accepting the settlement agreement and closing the matter. Lastly, the statute will require judges in civil and criminal cases to issue a court order requiring the liable or convicted party to register on the One Strike: You Are Out list, with a fine or potential contempt proceeding if they do not, like in child support cases. Additionally, the Indiana State Department of Health will survey Indiana public records on a regular basis to ensure all relevant convictions and civil judgements are added to the database.

A more long-term concern with the proposed statute is whether other states and employers outside of Indiana will have access to the database. The answer is yes, but in a more limited way. Other states and companies outside Indiana will be able to see general statistics and will be able to request whether an individual is on the One Strike: You Are Out list. Additionally, they will be able to see that the individual faced disciplinary action at a previous employer but not the nature of the misconduct—they would have to go straight to the employer for that information. However, the settlements and complaints will not be accessible to anyone outside of Indiana due to their unsubstantiated nature.

#### V. A CASE-BY-CASE FIX: EVIDENTIARY EXPANSION TO PROVE NEGLIGENCE IN SCREENING AND HIRING?

In *Tindall v. Enderle*, the Indiana Court of Appeals stated that the negligent

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156. SEXUAL VIOLENCE PRIMARY PREVENTION PROGRAM, IND. DEP'T OF HEALTH: OFFICE OF WOMEN'S HEALTH, <https://www.in.gov/isdh/23820.htm> [<https://perma.cc/82ZC-9WSS>].

hiring cause of action “generally arises only when an agent, servant or employee steps beyond the recognized scope of his employment to commit a tortious injury upon a third party.”<sup>157</sup> Therefore, negligent hiring claims are meant to be the vehicle for redress for plaintiffs who are injured by an employee acting outside the scope of his or her employment. However, negligent hiring claims are notoriously difficult to win, primarily due to lack of evidence: a plaintiff must prove that the employer knew or had reason to know of the risk of harm.

This is especially problematic in negligent hiring claims against agencies for sexual assault because record-keeping is so limited. The One Strike: Keep Score database is one avenue to provide plaintiffs with evidence of a history of misconduct as well as a way for employers to better screen new hires. However, Indiana courts should also recognize the difficulties plaintiffs face when seeking justice by shifting the burden of persuasion to the employer to prove that they did not have reason to know of prior misconduct. This would incentivize employers to do better due diligence when hiring new employees as well as increase the potential costs and risks with hiring a questionable applicant.

#### CONCLUSION

Unfortunately, sexual assault is still an extremely prevalent and underreported problem. The Supreme Court of Indiana has widened the doctrine of respondeat superior to allow employers to be held liable for the sexual misconduct of their employees if the assault flowed naturally from the employee’s authorized duties or conferred power. This change in common law has provided Indiana’s legislature with a unique opportunity to use the common law to their advantage. Enacting the proposed statutory scheme, the Single Strike Law, would utilize economics and self-interest to deter sexual assault before it ever happens. Additionally, it would give government employers the knowledge and tools they need to address long-standing problems with employee sexual (and perhaps other types of) misconduct. It would encourage bad actors and sexually deviant individuals to leave Indiana entirely. Lastly, it would show the rest of the United States that Indiana takes a hardline stance on sexual assault. This, in turn, would attract trustworthy and decent potential government employees to Indiana and would invite the rest of the country to follow its lead. For the foregoing reasons, the three-prong scheme of the proposed Single Strike Law should be introduced as a bill during the 2022 Indiana General Assembly.

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157. 320 N.E.2d 764, 767-68 (Ind. Ct. App. 1974).