LICENSED TO KILL: A DEFENSE OF VICARIOUS LIABILITY UNDER THE ENDANGERED SPECIES ACT

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ABSTRACT

The Endangered Species Act (ESA) makes it illegal to "take" an endangered and threatened species by killing, harming, or harassing the animal. Although the classic example of a take is an individual poacher shooting an endangered species, these protected species are also harmed by larger-scale policies and programs. In several court cases, local and state governments have been held vicariously liable for the take of endangered species when their policies or actions caused third parties to commit a take.

The vicarious liability theory, as applied to the ESA, is controversial and has been criticized by numerous scholars. This Note argues that a limited version of the vicarious liability theory is consistent with the text of the ESA and plays an essential role in fulfilling the promise of the ESA's take prohibition. As a case study, this Note examines how the vicarious liability theory could be used to hold the state of Louisiana liable for licensing shrimping gear that causes the take of endangered and threatened sea turtles. As illustrated by the Louisiana example, the acceptance of a narrowly construed vicarious liability theory would protect endangered species without placing an unreasonable or unconstitutional burden on state and local governments.

INTRODUCTION

In 1987, the Louisiana legislature passed a law forbidding state officials from enforcing federal regulations to protect sea turtles.[1] The

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1. Act of July 28, 1987, 1987 La. Acts 713 (codified at LA. REV. STAT. ANN. § 56:57.2 (2004)); *see infra* Part I.B.

federal regulations required shrimping vessels to install Turtle Excluder Devices (TEDs) in their nets, providing an escape hatch for captured sea turtles.[2] TEDs save thousands of threatened and endangered sea turtles each year from being drowned in shrimp trawls in the Gulf of Mexico and along the Atlantic Coast of the southeastern United States.[3] Louisiana, home to America's largest shrimp fishery,[4] is the one state that ignores federal TED requirements.[5] As of this writing, the federal government has not brought enforcement actions against Louisiana, and there is no sign that the Louisiana shrimp fishery will end the damage being done to the five species of threatened and endangered sea turtles that swim in the Gulf waters.[6]

This Note argues that Louisiana and other states could be held vicariously liable under section 9 of the Endangered Species Act[7] (ESA) when they cause their citizens to take endangered species.[8] The most clear-cut example of a take is when a hunter illegally poaches an endangered species. The vicarious liability doctrine, in the context of the ESA, allows for the imposition of liability on a state or local government for a less direct form of take: when its policies authorize others to harm endangered species. Although the vicarious

2. Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. 24,244, 24,244 (June 29, 1987) (codified at 50 C.F.R. pts. 217, 222, 227 (2013)). For an overview of how TEDs operate to protect sea turtles, see ScubazooVideo, *Turtle Excluder Device (TED) Fitted to a Trawl Net To Stop Turtles Drowning*, YOUTUBE (June 9, 2010), http://www.youtube.com/watch?v=y71cgxmyMO4; *infra* Part I.A.

3. NAT'L MARINE FISHERIES SERV., NAT'L OCEANIC & ATMOSPHERIC ADMIN., ENDANGERED SPECIES ACT – SECTION 7 CONSULTATION BIOLOGICAL OPINION 153 (2012), *available at* http://sero.nmfs.noaa.gov/pr/esa/Fishery%20Biops/SoutheastShrimpBiop_Final.pdf.

4. *See* OFFICE OF SCI. & TECH., NAT'L OCEANIC & ATMOSPHERIC ADMIN., SHRIMP STATISTICS (2013), *available at* http://www.st.nmfs.noaa.gov/Assets/commercial/market-news/archives/New-Orleans/2012doc45.zip (collecting statistics, reported monthly, that show that Louisiana harvested more pounds of shrimp than any other gulf state in 2009, 2011, and 2012).

5. NAT'L MARINE FISHERIES SERV., *supra* note 3, at 11; Benjamin Alexander-Bloch, *18 Shrimp Trawlers Fined over Turtle Excluder Devices*, TIMES-PICAYUNE (New Orleans), Nov. 4, 2011, at B-4.

6. *See* Endangered and Threatened Wildlife, 50 C.F.R. § 17.11(h) (2013) (listing endangered and threatened wildlife).

7. Endangered Species Act of 1973 § 9, 16 U.S.C. § 1538 (2012).

8. The harming or harassing of an endangered species can be referred to as a "take" or a "taking." *See, e.g.*, Paul Boudreaux, *Understanding "Take" in the Endangered Species Act*, 34 ARIZ. ST. L.J. 733 *passim* (2002) (discussing the "lack of clarity of the word 'take'"); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 *passim* (1995) (using "taking"). This Note typically uses the noun "take," but both are correct. Part II.A defines "take" in the context of the ESA.

liability doctrine has faced a skeptical reception in academia, a limited vicarious liability doctrine fits with the structure and purpose of the ESA. It would also allow for effective enforcement of the take prohibition without infringing impermissibly on states' rights. A large number of species could benefit from the application of the ESA's take prohibition to state policies: with vicarious liability as a tool, states could be liable for allowing hunters to use lead ammunition, which has devastated the endangered California condor population,[9] or licensing fishing gear that harms one of the few remaining northern right whales.[10] The possible applications of the vicarious liability doctrine are vast and could evolve to address threats to species as they emerge.

This Note is the first piece of legal scholarship to present a thorough defense of vicarious liability under the ESA. Several environmental law scholars have criticized the doctrine, but their arguments so far have gone unanswered.[11] The vicarious liability doctrine could be a valuable tool for the protection of endangered species, particularly if applied consistently with the applicable legal limitations. In addition, if more courts were to endorse the theory, state and local governments would be likely to reconsider policies and actions that they know will cause their citizens to harm endangered animals. The Louisiana example is a case study of how the vicarious liability doctrine could be used to address seemingly intractable policies that are having a devastating effect on endangered species.

In Part I, this Note provides a case study illustrating how a state can cause others to harm endangered species. It explains the importance of protecting sea turtle populations in the Gulf of Mexico and how Louisiana's refusal to comply with federal TED regulations seriously undermines that goal. Part II outlines the development of the vicarious liability doctrine and its controversial status in the courts and the halls of academia. Part III defines a more limited and persuasive formulation of the vicarious liability theory based on the common-law distinction between misfeasance and nonfeasance. Part III also illustrates how this limited version of the doctrine would

9. Ted Williams, *Will Lead Bullets Finally Kill Off the California Condor?*, YALE ENV'T 360 (May 7, 2013), http://e360.yale.edu/feature/will_lead_in_bullets_finally_kill_off_california_condor/2647.

10. *See* Strahan v. Coxe, 127 F.3d 155, 158–71 (1st Cir. 1997) (upholding a district court's finding that Massachusetts commercial fishing regulations qualified as a taking of the northern right whale under the ESA).

11. *See infra* Part IV.

apply to the Louisiana case. Finally, Part IV explains why the vicarious liability doctrine, as applied to the Louisiana case or other circumstances, adheres to the language and purpose of the ESA and is an important tool for conservation.

I. A CASE STUDY: LOUISIANA AND SEA TURTLE PROTECTION

The ESA, originally passed in 1973, represents a national commitment to conserving biodiversity and preventing the extinction of wildlife.[12] This is a daunting task because animals and plants are currently going extinct at least one hundred times faster than the natural, background rate of extinction due to human actions.[13] Why take on such a discouraging challenge? The ESA recognizes that endangered and threatened species have "esthetic, ecological, educational, historical, recreational, and scientific value."[14] These concerns can be expressed as the four "*e*'s": species have esthetic, ethical, economic, and ecological value.[15]

The esthetic value is the enjoyment people get from observing and interacting with flora and fauna.[16] The ethical value of preserving biodiversity comes in many forms, depending on one's ethics. It could be rooted in an inherent "right to exist,"[17] or a moral obligation to preserve the earth and its natural resources for future generations. Some religions, like Christianity, also encourage people to practice stewardship over the earth.[18] Additionally, biodiversity has an economic value: endangered and threatened species can provide products used by humans, inform scientific or medical research, and contribute to ecosystem services like water filtration, clean air, and

12. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531–1544 (2012)).

13. STUART L. PIMM, THE WORLD ACCORDING TO PIMM: A SCIENTIST AUDITS THE EARTH 10 (2001).

14. Endangered Species Act § 2(a)(3), 16 U.S.C. § 1531(a)(3).

15. PAUL R. EHRLICH & ANNE EHRLICH, EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES 6 (1981).

16. *Id.* at 38–48; *see* William M. Flevares, Note, *Ecosystems, Economics, and Ethics: Protecting Biological Diversity at Home and Abroad*, 65 S. CAL. L. REV. 2039, 2044–46 (1992) (describing the recreational and aesthetic values of biodiversity).

17. EHRLICH & EHRLICH, *supra* note 15, at 48–52.

18. Kyle S. Van Houtan & Stuart L. Pimm, *The Various Christian Ethics of Species Conservation*, *in* RELIGION AND THE NEW ECOLOGY: ENVIRONMENTAL RESPONSIBILITY IN A WORLD IN FLUX 116, 118, 132–33 (David M. Lodge & Christopher Hamlin eds., 2006).

healthy soil.[19] In 1997, ecological economist Robert Costanza estimated that the ecosystem services on the planet could be valued at $33 trillion per year, which was significantly greater than the global gross national product of $18 trillion per year.[20] Finally, each species has ecological value because it is interconnected with its predators, prey, competitors, and other aspects of its environment.[21] Losing one species can create a domino effect in the food chain or alter the ecosystem in ways that people may not be able to predict.[22]

The argument for protecting sea turtles encompasses all four "*e*'s." First, sea turtles are greatly admired for their esthetic value, and they attract ecotourism in the United States and around the world.[23] Second, the ethical and moral reasons to protect biodiversity generally apply equally to sea turtles. Third, sea turtles provide economic benefits in the form of ecotourism, scientific knowledge, and ecosystem services. For instance, scientists have studied sea turtles' ability to hold their breath for extended periods of time and their navigational skills, with the hope of finding applications for human use.[24] Fourth, sea turtles play a key ecological role in both the marine and beach ecosystems: they help maintain the health of seagrass beds, which are essential for other marine species, and bring important nutrients onto beaches and dunes.[25] It is unlikely that people currently understand all of the value that sea turtles may provide as a key part of the ecosystem. The drafters of the ESA recognized that all forms of life are "potential resources" that "may

19. *See* EHRLICH & EHRLICH, *supra* note 15, at 53–76; NAT'L RESEARCH COUNCIL, PERSPECTIVES ON BIODIVERSITY: VALUING ITS ROLE IN AN EVERCHANGING WORLD 43 (1999).

20. Robert Costanza et al., *The Value of the World's Ecosystem Services and Natural Capital*, 387 NATURE, May 15, 1997, at 253, 253.

21. EHRLICH & EHRLICH, *supra* note 15, at 78–80.

22. *Id.*; *see* NAT'L RESEARCH COUNCIL, *supra* note 19, at 48 (explaining how the manipulation of the food chain structure can cause ecosystem-wide effects).

23. *See, e.g.*, Peter C.H. Pritchard, *The Green Turtle: The Most Valuable Reptile in the World*, *in* 6 THE STATE OF THE WORLD'S SEA TURTLES REPORT 25, 28 (2011), *available at* http://seaturtlestatus.org/sites/swot/files/report/033111_SWOT6_FinalA.pdf (calling green sea turtles "'the most valuable reptile in the world,' not in reference to [their] meat, fat, and other consumables, but rather to [their] aesthetic value and value for nonconsumptive uses such as ecotourism and scientific study").

24. Kathleen Doyle Yaninek, *Turtle Excluder Device Regulations: Laws Sea Turtles Can Live With*, 21 N.C. CENT. L.J. 256, 257 (1995).

25. *Information About Sea Turtles: Why Care?*, SEA TURTLE CONSERVANCY, http://www.conserveturtles.org/seaturtleinformation.php?page=whycareaboutseaturtles (last visited Feb. 23, 2014).

provide answers to questions which we have not yet learned to ask."[26] Therefore, "[s]heer self-interest impels us to be cautious."[27]

A. The Shrimping Industry's Impact on Sea Turtles and the Need for TEDs

All five species of sea turtles found in the Gulf of Mexico and U.S. Atlantic Ocean are listed under the ESA as threatened or endangered.[28] The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), hawksbill (*Eretmochelys imbricata*), and the Florida breeding population of green (*Chelonia mydas*) sea turtles are all endangered,[29] whereas the loggerhead (*Caretta caretta*) and the rest of the green sea turtle population are threatened.[30]

Sea turtles face a growing number of anthropogenic threats. Human presence on beaches, artificial lighting, coastal development, beach armoring, and poaching can degrade available nesting sites.[31] In the ocean, sea turtles are threatened by oil and gas exploration,[32] marine transportation, pollution and debris, offshore artificial lighting and development, dredging, military training and detonations, and scientific research.[33] Additionally, climate change will increasingly affect sea turtles by altering their breeding and foraging habitats.[34] Confronting a litany of threats, endangered sea turtles face an uphill battle toward recovery.[35]

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26. H.R. REP. NO. 93-412, at 5 (1973).

27. *Id.*

28. Endangered and Threatened Wildlife, 50 C.F.R. § 17.11(h) (2013).

29. NAT'L MARINE FISHERIES SERV., *supra* note 3, at 29.

30. *Id.*

31. NAT'L MARINE FISHERIES SERV., NAT'L OCEANIC & ATMOSPHERIC ADMIN., DRAFT ENVIRONMENTAL IMPACT STATEMENT TO REDUCE INCIDENTAL BYCATCH AND MORTALITY OF SEA TURTLES IN THE SOUTHEASTERN U.S. SHRIMP FISHERIES 26–27 (2012), *available at* http://sero.nmfs.noaa.gov/pr/endangered%20species/Shrimp%20Fishery/Sea%20Turtle%20DEIS.pdf.

32. *See, e.g.*, NAT'L MARINE FISHERIES SERV., *supra* note 3, at 86–91 (describing the potential damage resulting from the Deepwater Horizon oil spill in April 2010).

33. *See id.* at 41 (discussing threats from military training and scientific research); *see also* NAT'L MARINE FISHERIES SERV., *supra* note 31, at 27 (listing many of the other threats to sea turtles).

34. *See* NAT'L MARINE FISHERIES SERV., *supra* note 31, at 27–30, 33–34 (indicating that climate change could affect sea turtle sex ratios and "decrease available nesting habitat").

35. *See* NAT'L MARINE FISHERIES SERV., *supra* note 3, at 40–43 (laying out in more detail the primary threats to loggerhead sea turtles and other sea turtles in the southeastern United States and noting that "many of the threats affecting loggerheads are either the same or similar in nature to threats affecting other listed sea turtle species").

One of the greatest threats to these species' survival is fishery bycatch.[36] In particular, sea turtles face the risk of being captured in shrimp trawls, which are open-mouth nets that are pulled through the water or dragged along the bottom of the ocean to catch shrimp.[37] In 1990, the National Research Council declared that shrimp trawling was the primary source of anthropogenic mortality for sea turtles in U.S. waters.[38] The National Marine Fisheries Service (NMFS), the lead federal agency "responsible for the management, conservation and protection of living marine resources" in the United States,[39] has stated that "[s]outheast[ern] U.S. shrimp fisheries have historically been the largest fishery threat" to sea turtles, and these fisheries "continue to interact with and kill large numbers of turtles each year."[40] Shrimp trawls indiscriminately sweep up any creature that falls into the net and is too large to escape through the mesh.[41] Sea turtles caught in trawls may be injured or killed by forced submergence. Although a marine species, sea turtles lack gills and must breathe oxygen, so they drown when forced underwater for significant periods of time.[42] During forced submergence, sea turtles' acid-base balance is disturbed and their oxygen stores deplete more rapidly than when they voluntarily submerge; consequently, they cannot survive underwater for as long as normal.[43]

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36. *See* NAT'L MARINE FISHERIES SERV., *supra* note 31, at 54 ("Incidental capture in fishery operations remains one of the primary marine anthropogenic mortality sources to Atlantic sea turtle populations.").

37. LA. DEP'T OF WILDLIFE AND FISHERIES, LOUISIANA TRAWL GEAR CHARACTERIZATION 1-1 to 1-3, *available at* http://www.nmfs.noaa.gov/pr/pdfs/strategy/la_trawl_gear.pdf.

38. NAT'L RESEARCH COUNCIL, DECLINE OF THE SEA TURTLES: CAUSES AND PREVENTION 75–76 (1990). For an overview of the potential threat to sea turtles caused by trawl fisheries, see generally E. GRIFFIN, K.L. MILLER, S. HARRIS & D. ALLISON, OCEANA, TROUBLE FOR TURTLES: TRAWL FISHING IN THE ATLANTIC OCEAN AND GULF OF MEXICO (2008), *available at* http://oceana.org/sites/default/files/reports/Trouble4Turtles_WebFinal1.pdf.

39. *About National Marine Fisheries Service*, NOAA FISHERIES, http://www.nmfs.noaa.gov/aboutus/aboutus.html (last visited Feb. 23, 2014).

40. NAT'L MARINE FISHERIES SERV., *supra* note 3, at 41.

41. *See* GRIFFIN ET AL., *supra* note 38, at 2 ("While the shrimp fishery is one of the most economically significant trawl fisheries, the gear also targets a variety of other species, including flounder, scallop, scup, black sea bass, groundfish, Atlantic croaker, mackerel, weakfish, squid and conch.").

42. Yaninek, *supra* note 24, at 258.

43. NAT'L MARINE FISHERIES SERV., *supra* note 31, at 106.

TEDs can be installed in shrimp trawls to provide a life-saving escape hatch for captured turtles.[44] For many years, sea turtle interactions with shrimp trawls were declining due to TED regulations and a reduction in the amount of shrimp trawling occurring in the Gulf of Mexico,[45] but in 2010 and 2011 there was a large spike in the number of dead or injured sea turtles discovered and reported by government observers and private individuals.[46] Necropsy results suggested that many of the mortalities resulted from drowning, which is characteristic of fishery interactions[47] and led NMFS to conclude that "sea turtles may be affected by shrimp trawling to an extent not previously considered."[48] NMFS estimates that there are 494,272 interactions each year between sea turtles and the most common type of shrimp trawl—the "otter trawl"—used in offshore waters.[49] Of these, roughly 51,605 are fatal.[50] Because nearly half of all shrimp landings are in Louisiana, a large portion of sea turtle mortalities most likely occur in Louisiana waters.[51]

To address the major threat to sea turtle populations posed by shrimp trawling, NMFS began testing TEDs in 1978.[52] In 1987, NMFS enacted regulations requiring TEDs in most types of shrimp trawls twenty-five feet or longer.[53] These regulations apply to all U.S. and state waters in the Gulf of Mexico and the Atlantic Ocean, from

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44. Sean Skaggs, *Sea Turtles and Turtle Excluder Devices: A Review of Recent Events*, 14 WM. & MARY ENVTL. L. & POL'Y REV. 27, 29 (1990).

45. NAT'L MARINE FISHERIES SERV., *supra* note 3, at 77.

46. *Id.* at 126–27. Dead or injured sea turtles are typically spotted on beaches or in the ocean, and are recorded as "strandings" by the Sea Turtle Stranding and Salvage Network (STSSN). *See id.* (documenting the "elevated sea turtle strandings in the Northern Gulf of Mexico" over these two years). STSSN then publicly reports the stranding data. *See Sea Turtle Stranding and Salvage Network (STSSN)*, NOAA, http://www.sefsc.noaa.gov/species/turtles/strandings.htm (last visited Feb. 23, 2014). Strandings are often the only available sea turtle mortality data, but they represent only 5–28 percent of sea turtle deaths, since many turtle carcasses are carried out to sea, sink, or are consumed by predators. *See* NAT'L MARINE FISHERIES SERV., *supra* note 3, at 142–43 ("Because of oceanic conditions (i.e., currents, waves, wind) and the dynamic nature of the marine environment, it is likely that stranding records actually represent only a small number of the total at-sea mortalities.").

47. NAT'L MARINE FISHERIES SERV., *supra* note 3, at 77–78.

48. *Id.* at 88.

49. *Id.* at 13, 153 tbl.33.

50. *Id.* at 153 tbl.33.

51. *See* OFFICE OF SCI. & TECH., *supra* note 4 (showing that in 2013 Louisiana shrimpers caught over fifty percent of the pounds of shrimp caught in the Gulf States).

52. NAT'L MARINE FISHERIES SERV., *supra* note 3, at 253; Skaggs, *supra* note 44, at 28–29.

53. Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. 24,244 (June 29, 1987) (codified at 50 C.F.R. pts. 217, 222, 227 (2013)).

Florida to the northern boundary of North Carolina.[54] Due to legal challenges and political backlash, the full implementation of TED requirements did not begin until sometime between 1992 and 1994.[55] Some specific gear types (most notably skimmer trawls) and smaller shrimp trawls[56] are still exempt from the TED requirements if they follow tow-time restrictions, which are an alternative method of protecting sea turtles by limiting the amount of time that trawls can remain submerged.[57] NMFS recently considered, but ultimately rejected, a new rule that would require TEDs on skimmer trawls as well, noting that compliance with tow-time restrictions was low and much shorter forced submerges were harming sea turtles than previously believed.[58] Studies show that even when shrimpers comply with alternative tow-time restrictions, turtles will still be killed by forced submergence.[59] Additionally, tow-time restrictions are not appropriate for all shrimp trawls: they have only been applied to types of gear that practically require the nets to be raised with some frequency.[60]

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54. 50 C.F.R. § 222.102 (2013).

55. *See* NAT'L MARINE FISHERIES SERV., *supra* note 3, at 254 ("A chaotic array of lawsuits, injunctions, suspensions of law enforcement, legislative actions by several states, legislation by Congress, and temporary rules issued by NMFS and the Department of Commerce follows the initial effective date of the 1987 regulations. The result is a patchwork of times and areas where TEDs are and are not required/enforced."). *See generally* Skaggs, *supra* note 44 (describing the events that transpired in the three years after the enactment of the 1987 regulations to delay implementation of TED requirements).

56. For a list of exempted vessels, see Exceptions to Prohibitions Relating to Sea Turtles, 50 C.F.R. § 223.206(d)(2)(ii) (2013).

57. Tow-time restrictions are put in place with the hope that shrimpers will raise their nets and release any sea turtles before they drown. Shrimping vessels that choose to use TEDs have no time limits on their trawls. For more information on skimmer trawls and alternative tow-time restrictions, see NAT'L MARINE FISHERIES SERV., *supra* note 31, at 3–5.

58. Sea Turtle Conservation; Shrimp Trawling Requirements, 77 Fed. Reg. 27,411, 27,411–12 (proposed May 10, 2012) (to be codified at 50 C.F.R. pt. 233); *see also* NAT'L MARINE FISHERIES SERV., *supra* note 31, at 4, 14, 108 (providing evidence that the current tow-time restrictions still lead to sea turtle mortalities). NMFS withdrew the proposed rule in February 2013, concluding that the benefits to sea turtles did not justify the economic costs to shrimp fishermen. Sea Turtle Conservation; Shrimp Trawling Requirements, 78 Fed. Reg. 9024, 9024–26 (Feb. 7, 2013).

59. *See, e.g.*, Christopher R. Sasso & Sheryan P. Epperly, *Seasonal Sea Turtle Mortality Risk from Forced Submergence in Bottom Trawls*, 81 FISHERIES RES. 86, 86–88 (2006) (reporting sea turtle deaths after only ten minutes of forced submergence, despite tow-time restrictions of fifty-five minutes).

60. *See* NAT'L MARINE FISHERIES SERV., *supra* note 3, at 9 (noting that tow-time restrictions "are for gears or fishing practices that, at least historically, out of physical, practical, or economic necessity, were thought to require fishermen to limit their tow times naturally").

NMFS calculates that approved, properly installed TEDs allow 95–98 percent of sea turtles to escape from the trawls[61] and result in minimal loss of shrimp.[62] Based on this calculation, the consistent use of TEDs in the Louisiana shrimp fishery would save thousands of endangered and threatened sea turtles each year[63] and help species, like the highly endangered Kemp's ridley sea turtle, continue to recover from the brink of extinction.[64]

B. Louisiana's Resistance to TEDs

When the federal government first proposed TED requirements for certain shrimp trawlers in 1987, Louisiana shrimpers reacted with extreme hostility.[65] Shrimpers oppose the requirements based on cost: NMFS estimates that installing and maintaining TEDs in two nets may cost shrimp fishermen over $2,000 in the first year.[66] This cost is significant to fishermen in an industry that is already struggling.[67] With the encouragement of the shrimp industry, the Louisiana state legislature passed a law forbidding the use of state funds to enforce

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61. NAT'L MARINE FISHERIES SERV., *supra* note 31, at 5. *But see* Memorandum from Miyoko Sakashita, Oceans Dir., Ctr. for Biological Diversity, Marydele Donnelly, Dir. of Int'l Policy, Sea Turtle Conservancy, Elizabeth Wilson, Senior Manager for Marine Wildlife, Oceana, Christopher Pincetich, Campaigner and Marine Biologist, Sea Turtle Restoration Project, Sierra B. Weaver, Senior Staff Attorney, Defenders of Wildlife, to Michael Barnette, Nat'l Marine Fisheries Serv., RE: Comments on the Scope of the Fisheries Service's Environmental Impact Statement for Sea Turtle Conservation and Recovery Actions 9–11 (Aug. 8, 2011) (on file with the *Duke Law Journal*) (raising concerns about the effectiveness of TEDs because of unrealistic testing protocols and inadequate compliance).

62. NAT'L MARINE FISHERIES SERV., *supra* note 31, at 167 (estimating that TEDs cause a 5 percent reduction in shrimp harvest).

63. *See supra* notes 29–51 and accompanying text.

64. TEDs come with other benefits as well. TEDs reduce the unwanted bycatch of fish, which protects species such as the endangered Gulf sturgeon and lessens the "serious waste of fishery resources" associated with large bycatch. *See* Yaninek, *supra* note 24, at 270 (explaining that "shrimpers kill and waste 2.5 billion pounds of fish a year" through bycatch, "70 percent of which would have been commercially valuable if allowed to mature"); *see also* NAT'L MARINE FISHERIES SERV., *supra* note 31, at 68 (noting that bycatch of Gulf sturgeon has been mitigated by TEDs and Bycatch Reduction Devices).

65. *See* Cain Burdeau, *Scientists Urge La. To Protect Netted Sea Turtles*, HUNTSVILLE TIMES, Nov. 3, 2011, at 04C ("Louisiana's fishermen were outraged by the new devices . . . .").

66. NAT'L MARINE FISHERIES SERV., *supra* note 31, at 167–68 (calculating the cost of purchasing and maintaining TEDs and analyzing the reduction in profits for Gulf fisheries, including those in Louisiana).

67. *See id.* at 167 (estimating that this cost would be approximately 9.4 percent of a Louisiana shrimp fisherman's average annual shrimp revenue).

any future federal TED requirements in Louisiana waters.[68] The law asserts "the imposition of TEDs on Louisiana shrimpers is unjustified, inequitable, and unworkable," and questions the evidence that shrimp trawling harms turtles.[69]

The law also directs Louisiana's attorney general to "file a class action suit . . . to enjoin the implementation" of any TED regulations.[70] Thus, after NMFS adopted the final rule,[71] the state of Louisiana and the Concerned Shrimpers of Louisiana challenged the regulation in federal court as a violation of the Administrative Procedure Act[72] and the constitutional guarantees of equal protection and due process.[73] The district court upheld the TED regulations.[74] The Fifth Circuit affirmed,[75] finding that "[t]he relationship of shrimping to sea turtle mortality is strongly demonstrated by data contained in the administrative record."[76] It held that it was not arbitrary for Congress to determine that the "'incalculable' value of genetic heritage" outweighed the cost and inconvenience that would be placed on the Louisiana shrimp industry.[77] Undeterred, Louisiana sought a preliminary injunction to prevent the implementation of the regulations; this effort was also unsuccessful.[78]

Meanwhile, every other Gulf state has formed an agreement with NMFS to enforce TED regulations in exchange for the necessary funds and resources.[79] Conservation groups have lobbied Louisiana's legislature and governor with information demonstrating the need for TEDs.[80] In June 2010, the Louisiana legislature unanimously passed a bill that would have repealed the law and enabled state officials to

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68. Act of July 28, 1987, 1987 La. Acts 713 (codified at LA. REV. STAT. ANN. § 56:57.2 (2004)).

69. LA. REV. STAT. ANN. § 56:57.2(A)(1).

70. *Id.* § 56:57.2(D).

71. *See supra* note 53 and accompanying text.

72. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012).

73. Louisiana *ex rel.* Guste v. Verity, 681 F. Supp. 1178, 1181 (E.D. La. 1988), *aff'd*, 853 F.2d 322 (5th Cir. 1988).

74. *See id.* at 1185 (granting summary judgment for the defendants).

75. Louisiana *ex rel.* Guste v. Verity, 853 F.2d 322, 334 (5th Cir. 1988).

76. *Id.* at 327.

77. *Id.* at 331 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 179 (1978)).

78. Louisiana *ex rel.* Guste v. Mosbacher, No. 89-1899, 1989 WL 87616, at *5–6 (E.D. La. Aug. 1, 1989).

79. NAT'L MARINE FISHERIES SERV., *supra* note 3, at 11; Alexander-Bloch, *supra* note 5.

80. Janet McConnaughey, *Groups: Repeal Law Against Trap Door in Shrimp Nets*, HUNTSVILLE TIMES, Feb. 7, 2012, at 04C.

enforce TED regulations.[81] Louisiana Governor Bobby Jindal vetoed the bill, expressing concern for Louisiana shrimpers after the Deepwater Horizon oil spill, which had occurred just two months earlier.[82] As of this writing, the Louisiana law still stands, and Governor Jindal has not shown any sign of reversing his position.[83]

C. Political and Legal Options To Overcome Louisiana's Refusal To Comply with TED Regulations

There are several possible strategies that could be employed to increase the use of TEDs in the Louisiana shrimp fishery. First, the Louisiana legislature could repeal the law again, although it may continue to face Governor Jindal's veto until his term ends in 2016. The legislature can override a veto with the support of two-thirds of its members;[84] however, it did not do so in 2010.

Congress could also step in. Although it cannot require the states to enforce federal laws,[85] Congress could condition certain funding on the state's enforcement of TED regulations.[86] This is improbable, however, because the current Republican-led U.S. House of Representatives is unlikely to support measures to strengthen the ESA, particularly through increased spending.[87] Furthermore, other

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81. H.R. 1334, 2010 Reg. Sess. (La. 2010); *see Votes*, LA. ST. LEGISLATURE, http://www.legis.la.gov/legis/BillDocs.aspx?i=216366&t=votes (last visited Feb. 23, 2014) (providing the history of the legislation, including the vote record of 92–0 in the Louisiana House of Representatives and 34–0 in the Louisiana Senate).

82. Letter from Bobby Jindal, Governor of La., to Alfred W. Speer, Clerk of the House, La. House of Representatives (June 29, 2010), *available at* http://legis.la.gov/archive/10RS/veto/HB1334v.pdf.

83. Several environmental groups have encouraged Governor Jindal to support a repeal. A group of twenty-six environmental groups sent a letter to the governor in 2012 with that message. Their letter has gone unanswered. McConnuaghey, *supra* note 80.

84. LA. CONST. art. 3, § 18(C).

85. *See* New York v. United States, 505 U.S. 144, 166 (1992) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.").

86. *See* South Dakota v. Dole, 483 U.S. 203, 206, 207–08 (1987) (allowing Congress to issue spending conditions that it could not impose directly through legislation, and defining the constitutional limits on those conditions).

87. *See Endangered Species Act*, COMMITTEE ON NAT. RESOURCES, http://naturalresources.house.gov/issues/issue/?IssueID=5923 (last visited Feb. 23, 2014) (stating the opinion of the committee's Republican majority that the ESA "is failing to achieve its primary purpose of species recovery and instead has become a tool for litigation that drains resources away from real recovery efforts and blocks job-creating economic activities," and detailing some of the majority's efforts to reform the law). *See generally* MINORITY STAFF, COMM. ON ENERGY AND COMMERCE, U.S. HOUSE OF REPRESENTATIVES, THE ANTI-

Gulf states have agreements with NMFS to enforce TED regulations in exchange for funding,[88] and Louisiana has not shown interest in a similar agreement.

Many environmental advocates hope that NMFS will play a more active role in correcting Louisiana's noncompliance.[89] NMFS could use federal officials to enforce the regulations itself, but effective enforcement throughout the Louisiana shrimp fishery would be expensive and challenging.[90] NMFS could also severely restrict or even shut down Louisiana's shrimp fishery, if that was necessary to protect sea turtles.[91] However, the shrimp industry plays a significant role in Louisiana's economy; shutting down the fishery could lead to serious economic damage and political backlash.[92]

Finally, environmental groups could pursue litigation. For example, they could sue NMFS for failing in its duty to protect sea turtles.[93] Groups also could bring suit against individual shrimp

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ENVIRONMENT RECORD OF THE U.S. HOUSE OF REPRESENTATIVES 112TH CONGRESS (2013), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Anti-Environment-Voting-Record-of-112th-Congress-Summary-Final.pdf (listing over three hundred votes taken by Republican members of Congress that could be harmful to the environment).

88. Alexander-Bloch, *supra* note 5.

89. *See id.*

90. *See* Jean O. Melious, *Enforcing the Endangered Species Act Against the States*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 605, 608 (2001) ("Federal enforcement efforts are limited by budget, by politics, and by the fact that federal interests may not be concurrent with private interests.").

91. NMFS has the power to create Fishery Management Plans based on what it concludes is "necessary and appropriate for the conservation and management of the fishery." Magnuson-Stevens Act, 16 U.S.C. § 1853(a)(1)(A) (2012). These plans must be "consistent with the national standards" adopted in the Magnuson-Stevens Act and comply with "any other applicable law," including the ESA. *Id.* § 1853(a)(1)(C). For instance, in 2002 NMFS effectively shut down the swordfish fishery and placed strict limits on fishing for other pelagic fish to protect endangered and threatened sea turtles. Fisheries off West Coast States and in the Western Pacific; Western Pacific Pelagic Fisheries; Pelagic Longline Gear Restrictions, Seasonal Area Closure, and Other Sea Turtle Take Mitigation Measures, 67 Fed. Reg. 40,232 (June 12, 2002) (codified at 50 C.F.R. pt. 660), *invalidated by* Haw. Longline Ass'n v. Nat'l Marine Fisheries Serv., 281 F. Supp. 2d 1 (D.D.C. 2003). Although a district court invalidated the regulation for relying on a faulty Biological Opinion, it did not deny NMFS's authority to close the fishery. *Haw. Longline Ass'n*, 281 F. Supp. 2d at 37–38.

92. *See* LA. DEP'T OF WILDLIFE & FISHERIES, THE LOUISIANA SHRIMP INDUSTRY: A PRELIMINARY ANALYSIS OF THE INDUSTRY'S SECTORS 6 (2000), *available at* http://www.wlf.louisiana.gov/sites/default/files/pdf/publication/32730-louisiana-shrimp-industry/la._shrimp_industry.pdf ("As an industry, the harvesting, handling, processing, distribution, and retailing of shrimp provides a significant contribution to the state's economy.").

93. For example, a case against NMFS led to the proposed rule to require TEDs on skimmer trawls. Settlement Agreement and Stipulation of Dismissal, Turtle Island Restoration

fishermen who violate the ESA's section 9 take provision.[94] Though this might encourage shrimp fishermen to comply with TED regulations voluntarily, holding a few individuals responsible would be costly and would not necessarily lead to systemic changes in the Louisiana shrimp fishery.

The political and practical barriers to addressing Louisiana's harmful policies are typical of the threats that face endangered species.[95] There may not be political will to face the strong private interests opposing endangered species protection. Additionally, it may be hard to track down individuals who directly cause each take.[96] Many endangered species are killed by poachers, hunters, trappers, and fishermen, often in forests or the open ocean.[97] These takes are rarely witnessed by someone other than the perpetrator, and thus are unlikely to be reported. Other species are killed by humans in more indirect ways, which can be even harder to accurately trace.[98] Finally, the federal government's budget and resource constraints prevent it from addressing many serious threats to species.[99]

Lawsuits against the state of Louisiana and others like it provide an attractive means of protecting endangered species from harmful state policies. Through such a lawsuit, advocates could secure injunctions that prevent a state's ongoing licensure of unlawful practices or place pressure on a state to voluntarily change course. To

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Network v. Nat'l Marine Fisheries Serv., No. 1:11-cv-01813-ABJ (D.D.C. Apr. 26, 2012); *Conservationists Win New Shrimping Rules To Prevent Sea Turtles from Drowning in Fishing Nets*, YUBANET.COM (May 9, 2012, 7:20 AM) http://yubanet.com/usa/Conservationists-Win-New-Shrimping-Rules-to-Prevent-Sea-Turtles-from-Drowning-in-Fishing-Nets.php.

94. *See* Endangered Species Act of 1973 § 9, 16 U.S.C. § 1538 (2012).

95. *See infra* note 131 and accompanying text.

96. *See infra* note 131 and accompanying text.

97. *See* Sierra Club v. Yeutter, 926 F.2d 429, 439 (5th Cir. 1991) (addressing logging activities' interactions with red-cockaded woodpeckers); Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d 1073, 1081 (D. Minn. 2008) (noting that the endangered Canada lynx is often caught in hunting traps); Notice of a Firearm Shooting Restriction on Public Lands Within the Red Mountain Polygon, San Bernardino County, CA, 67 Fed. Reg. 30,396 (May 6, 2002) (restricting gun use in the Mojave Desert because large numbers of endangered Desert Tortoises were found shot to death).

98. *See* Defenders of Wildlife v. EPA, 882 F.2d 1294, 1296–97 (8th Cir. 1989) (noting that pesticides applied by farmers could kill nontarget species, such as the endangered black-footed ferret); Aransas Project v. Shaw, 930 F. Supp. 2d 716, 787 (S.D. Tex. 2013) (finding a take of whooping cranes because water withdrawals damaged their habitat and prevented them from feeding).

99. For one of many accounts of the budget problems faced by the FWS and NMFS, see Josh Pollock, *Saving Endangered Wildlife: Federal Law Works, but Program Is Underfunded*, DENVER POST, Apr. 1, 2007, at 1E.

prevail, however, the litigants would have to show that Louisiana is vicariously liable for the takes committed by the shrimpers.

II. THE VICARIOUS LIABILITY DOCTRINE'S ROOTS AND BRANCHES

This Note explores the possibility of a vicarious liability suit against Louisiana and states that similarly cause people to take endangered species. Vicarious liability is a familiar concept in many areas of the law.[100] In the context of the ESA, the vicarious liability doctrine has been used to hold state and local governments liable for causing others to take endangered or threatened species.[101] This Part will briefly describe the basic structure of the ESA and the textual basis for the vicarious liability doctrine, and then it will trace the development of the theory through key court cases.

A. The ESA and the Take Prohibition

This Section will outline the ESA provisions most relevant to vicarious liability: sections 4, 7, 9, 10, and 11.[102] The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[103] Through the ESA, "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities."[104]

Protecting endangered species begins with section 4 of the ESA, which establishes guidelines for the listing of endangered and threatened species and their critical habitats.[105] The ESA defines an

100. *See, e.g.*, Meyer v. Holley, 537 U.S. 280, 285 (2003) (applying vicarious liability in the context of the Fair Housing Act and stating that "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules"). *See generally* Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755 (1999) (explaining vicarious liability's application under Civil Rights statutes); Daniel J. Koevary, Note, *Automobile Leasing and the Vicarious Liability of Lessors*, 32 FORDHAM URB. L.J. 655 (2005) (critiquing a New York law that made lessors vicariously liable for torts committed by their lessees).

101. *See infra* Part II.B.

102. For a more thorough overview of the ESA, see generally DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 1166–1349 (2002).

103. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

104. *Id.* at 194.

105. 16 U.S.C. § 1533 (2012). "Critical habitat" also must be officially listed. It is defined as "the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II)

"endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range,"[106] and a "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[107] Once a species is listed, based on the statutory criteria,[108] the protective provisions of the ESA apply, and the Departments of Interior and Commerce are required to issue regulations to protect the species.[109]

Section 7 places affirmative duties on federal agencies[110] and requires them to consult with the federal government whenever an agency action "is likely to jeopardize the continued existence" of a listed species.[111] The consulting agency is either the Fish and Wildlife Service (FWS), for most land animals, or NMFS, for most marine animals. For the purpose of clarity, this Note will refer to them interchangeably as "the Services." The substantive requirement to consult with the Services applies only to federal agencies, not to private individuals or states. If one of the Services determines that the proposed action is "likely to adversely affect any listed species or critical habitat," it will initiate formal consultation[112] culminating in a Biological Opinion (BiOp). A BiOp surveys the environmental impacts of the action and recommends "reasonable and prudent alternatives" to reduce the harm to endangered and threatened species.[113]

The vicarious liability doctrine arises out of section 9 of the ESA, which makes it unlawful for any person to take an endangered species.[114] To "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any

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which may require special management considerations or protection" or other lands that are "essential for the conservation of the species." *Id.* §§ 1532(5)(A)(i)–(ii).

106. *Id.* § 1532(6).

107. *Id.* § 1532(20). As shorthand, this Note primarily refers to "endangered species." However, unless otherwise noted, the provisions discussed here apply to both threatened and endangered species.

108. *See id.* § 1533(a)(1) (laying out the five factors to be considered in any listing decision).

109. *Id.* § 1533(d).

110. *See id.* § 1536(a)(1) ("Federal agencies shall . . . utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species . . . .").

111. *Id.* §§ 1536(a)(2), (4).

112. 50 C.F.R. § 402.14 (2013).

113. 16 U.S.C. § 1536(b)(3)(A).

114. *Id.* §§ 1538(a)(1)(B)–(C).

such conduct."[115] To "harass" is further defined as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns."[116] "Harm" is "an act which actually kills or injures wildlife," including those indirectly causing death or injury through habitat modification or degradation.[117] Section 9 prohibits the take of endangered species, and the Department of Commerce has extended the prohibition to threatened species through regulations.[118]

"Take" is broadly defined to encompass a wide range of actions.[119] Section 9 makes it unlawful for a person either to directly take a protected animal or "to attempt to commit, solicit another to commit, or cause to be committed" a take of an endangered species.[120] Additionally, "person" is broadly defined as

> an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.[121]

These provisions combine to form the basis for vicarious liability: it is unlawful for a state to cause another to commit a take.

It is important to note that the take prohibition is not absolute. Under section 10, any person may apply to the Services for an Incidental Take Permit (ITP), which approves certain takes that are "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[122] Similarly, under section 7, the Services can issue an Incidental Take Statement (ITS) as part of a BiOp. An

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115. *Id.* § 1532(19).

116. 50 C.F.R. § 17.3(c).

117. *Id.*

118. *See id.* § 17.31 (issued pursuant to the Department's authority under 16 U.S.C. § 1533(d)).

119. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704–05 (1995) (giving examples from the Senate and House reports that supported "the broadest possible" meaning for take and upholding the regulatory definition of harm that included habitat modification).

120. 16 U.S.C. § 1538(g).

121. *Id.* § 1532(13).

122. 50 C.F.R. § 17.3(c)(3). The Services must allow public comment on all ITP applications and can only approve them according to the conditions laid out in 16 U.S.C. § 1539(a)(2)(B).

ITS allows a federal agency to take endangered species during the proposed action if the taking will not jeopardize the continued existence of any listed species and is incidental to the purpose of the action.[123] As long as the action is carried out in compliance with the specification of the ITS or ITP, the agency will not be liable for a take.[124]

Despite this exemption, the ESA is one of the most demanding and far-reaching environmental laws.[125] Section 11 authorizes civil and criminal penalties for violations of the ESA,[126] and allows for citizen suits as a means of enforcement. "[A]ny person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of" the ESA.[127] These suits must demonstrate the typical requirements for justiciability, including standing.[128] Citizen suits have been a critical part of ESA enforcement.[129]

B. The Vicarious Liability Doctrine in the Text and the Courts

Under the vicarious liability doctrine, state and local governments can be liable under section 9 of the ESA if they authorize actions that take federally listed species.[130] The theory is particularly attractive because of the practical constraints on federal

123. *Id.* § 1536(b)(4).

124. *Id.* § 1536(o)(2).

125. *See, e.g.*, Patrick Parenteau, *Citizen Suits Under the Endangered Species Act: Survival of the Fittest*, 10 WIDENER L. REV. 321, 321 & n.2 (2004) (repeating the oft-quoted line from the late Senator John Chafee, a staunch supporter of the ESA, that the ESA is considered the "pit bull of environmental statutes").

126. 16 U.S.C. § 1540.

127. *Id.* § 1540(g)(1). Additionally, citizen suits can be used to "compel the Secretary to apply . . . the prohibitions . . . with respect to the taking of any resident endangered species or threatened species within any State" or to perform any nondiscretionary duty listed in the ESA. *Id.*

128. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (holding that the respondents did not have standing because they did not make "the requisite demonstration of (at least) injury and redressability").

129. *See generally* James R. May, *Now More than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1 (2003) (explaining the prevalence and importance of citizen suits in the enforcement of environmental laws).

130. *See* Jason Totoiu, *Building a Better State Endangered Species Act: An Integrated Approach Toward Recovery*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10,299, 10,322 (2010) ("It is when governments have taken affirmative steps to permit, license, or otherwise authorize activities that result in the take of listed species that courts have held such regulatory practices may also constitute a taking for purposes of §9 of the ESA.").

enforcement of the ESA and the difficulty of catching individual violators. One environmentalist explains:

> As a practical matter, enforcing the taking prohibition of the ESA against these myriad actors is exceedingly difficult. However, if the activities of these actors are subject to regulation by some intermediary, such as a city or county government, it may be much more practical to influence what the various individual actors do by influencing how the intervening regulatory body wields its authority. Indeed, if a regulatory body could itself be deemed liable for the taking of endangered species by those whose activities it regulates, then the practical alternative to enforcing the ESA's prohibitions against thousands of individual actors would be to enforce those prohibitions against the regulatory body.[131]

The textual basis for vicarious liability is fairly explicit. Section 9 forbids any person, including "any State, municipality, or political subdivision of a State,"[132] from "caus[ing] to be committed"[133] the take of any listed species.[134] Therefore, the focus of the contentious debate over the use of this doctrine boils down to the word "cause." Critics of vicarious liability under the ESA argue that state or local governments[135] cannot legally cause a take through their policies or the issuance of licenses or permits.[136] There is nothing in the ESA text or in the common-law understanding of causation that supports an exception for this certain type of causal action. If the government action satisfies the "ordinary requirements of proximate causation and foreseeability," it is a legal cause of take and is prohibited by section 9.[137]

The vicarious liability doctrine is not merely theoretical; courts have endorsed it in varying forms. The early roots of the doctrine can be found in *Palila v. Hawaii Department of Land and Natural*

131. Michael J. Bean, *Major Endangered Species Act Developments in 2000*, 31 ENVTL. L. REP. NEWS & ANALYSIS 10,283, 10,285 (2001).

132. 16 U.S.C. § 1532(13).

133. *Id.* § 1538(g).

134. *Id.* § 1538(a)(1).

135. This Note mainly refers to states, both as shorthand and because of the case study proposing a suit against the state of Louisiana. Most of the commentary would apply equally to local governments.

136. *See infra* Part III.B.

137. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 700 n.13 (1995).

Resources (*Palila I*),[138] which held that the state of Hawaii was liable for indirectly causing the take of the palila, an endangered bird.[139] Hawaii's game management program introduced feral goats and sheep into the palila habitat.[140] These animals damaged the plant life that was essential for the palila population.[141] Even though Hawaii's action did not directly harm the birds, the Ninth Circuit found that it still had a "prohibited impact on an endangered species."[142] The court ordered the state to remove all feral goats and sheep from the palila habitat.[143] Eight years later, in *Palila v. Hawaii Department of Land and Natural Resources* (*Palila II*),[144] the Ninth Circuit reaffirmed this reasoning in a similar case, holding Hawaii liable for introducing mouflon sheep into the palila habitat.[145]

The Fifth Circuit applied similar reasoning in *Sierra Club v. Yeutter*,[146] in which environmental groups challenged the U.S. Forest Service's tree-harvesting methods that were harming the habitat of the endangered red-cockaded woodpecker.[147] The Fifth Circuit affirmed the district court's holding that the Forest Service's policy resulted in a take of the woodpecker and therefore violated section 9 of the ESA.[148]

Moving the doctrine a step further, *Defenders of Wildlife v. EPA*[149] is considered the first true example of the vicarious liability

138. Palila v. Haw. Dep't of Land & Natural Res. (*Palila I*), 639 F.2d 495 (9th Cir. 1981).

139. *Id.* at 498.

140. *Id.* at 496.

141. *Id.* at 495–96.

142. *Id.* at 497.

143. *Id.* at 496.

144. Palila v. Haw. Dep't of Land & Natural Res. (*Palila II*), 852 F.2d 1106 (9th Cir. 1988).

145. *Id.* at 1110.

146. Sierra Club v. Yeutter, 926 F.2d 429, 439 (5th Cir. 1991). *Yeutter* is particularly important for the purposes of the analysis in this Note because it is binding Fifth Circuit precedent, and the Fifth Circuit would most likely have jurisdiction over a case against Louisiana.

147. *Id.* at 432.

148. *Id.* at 439. The court also found that the U.S. Forest Service had violated section 7, which applies only to federal agencies, because they had not ensured that their action was not "'likely to jeopardize the continued existence of'" the woodpecker. *Id.* (quoting 16 U.S.C. § 1536(a)(2) (2012)). Some critics of the vicarious liability doctrine have argued that the section 9 holding was irrelevant and the court should have issued the injunction solely under section 7. J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, NAT. RESOURCES & ENV'T, Fall 2001, at 70, 71.

149. Defenders of Wildlife v. EPA, 882 F.2d 1294 (8th Cir. 1989).

doctrine.[150] Previous cases, like *Yeutter*, held the government liable for a take when its policies caused *government actors* to modify habitat on federal lands;[151] *Defenders* for the first time held the government liable for actions of *independent third parties* on private lands.[152] The court held that the Environmental Protection Agency (EPA) violated section 9 of the ESA by registering pesticides containing strychnine, and thus allowing farmers to legally use them.[153] The court found that the EPA's registration of the pesticides was "critical to the resulting poisonings of endangered species" and therefore "constituted takings of endangered species."[154] The causal chain in *Defenders* consisted of three steps: (1) the government authorized the use of strychnine pesticides, (2) farmers chose to use those pesticides, and (3) the pesticides killed animals, including the endangered black-footed ferret.[155] Despite the necessary involvement of a third party (the farmers), the court found that "[t]he relationship between the registration decision and the deaths of endangered species is clear."[156]

The next step in this line of cases is the quintessential vicarious liability case, *Strahan v. Coxe*,[157] and the one most comparable on the facts to Louisiana's licensing of shrimping vessels without TEDs. In *Coxe*, whale enthusiast Max Strahan[158] brought a suit against environmental agencies in Massachusetts for issuing fishing permits to commercial fishing vessels that used gillnets and lobster pots, gear that had entangled northern right whales on several occasions.[159]

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150. *See* Valerie J.M. Brader, *Shell Games: Vicarious Liability for State and Local Governments for Insufficiently Protective Regulations Under the ESA*, 45 NAT. RESOURCES J. 103, 105 (2005) ("This case was the first circuit court case to make the jump from liability for governmental actions taken as the owner and manager of public property to liability for third-party actions.").

151. *Yeutter*, 926 F.2d at 439.

152. *Defenders*, 882 F.2d at 1301.

153. *Id.* at 1296, 1300. The pesticides were registered pursuant to the EPA's authority under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a (2012). Like *Yeutter*, *Defenders* also held the agency's action illegal under both section 7 and section 9. *Defenders*, 882 F.2d at 1296, 1300; *see supra* note 148.

154. *Defenders*, 882 F.2d at 1301.

155. *Id.* at 1297.

156. *Id.* at 1301.

157. Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997). For purposes of clarity, this case will be referred to in short form as "*Coxe*" because environmental activist Max Strahan has been a party in several ESA suits.

158. For an interesting account of Strahan's colorful and controversial efforts to protect whales, see Carey Goldberg, *A Boston Firebrand Alienates His Allies Even as He Saves Whales*, N.Y. TIMES, Jan. 23, 1999, at A9.

159. *Coxe*, 127 F.3d at 158–59.

Although NMFS had not banned those gear types, it had recognized that entanglement with fishing gear was the leading threat to the highly endangered northern right whale and had issued an interim final rule to restrict their use.[160]

The First Circuit affirmed the district court's decision, finding that "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA."[161] The court relied on the explicit language of section 9, stating that causing a take to be committed counts as a violation of the ESA.[162] "[W]hen read together," these provisions prohibit "acts by third parties that allow or authorize acts that exact a taking and that, but for the permitting process, could not take place."[163] Although the defendant state agencies argued that the government regulatory scheme did not "cause" the take according to the typical common law interpretation of causation,[164] the court held that "the 'indirect causation' of a taking by the Commonwealth through its licensing scheme" is within "the normal boundaries" of causation.[165]

The defendants in *Coxe* analogized Massachusetts's actions to the licensing of automobiles, a metaphor that has been influential and oft-cited in vicarious liability cases and scholarship.[166] The defendants argued that "the Commonwealth's licensure of a generally permitted activity does not cause the taking any more than its licensure of automobiles and drivers solicits or causes federal crimes;"[167] it is the individual driver's choice to operate the car in an illegal way by using

160. *Id.* at 159, 162 (citing Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 62 Fed. Reg. 39,157 (July 22, 1997) (to be codified at 50 C.F.R. pt. 229)).

161. *Id.* at 163.

162. *Id.* (citing 16 U.S.C. § 1538(a)(1)(B), (g) (1994)).

163. *Id.*

164. *See id.* ("The defendants argue that . . . state licensure activity . . . cannot be a 'proximate cause' of the taking.").

165. *Id.*

166. *See, e.g.*, Strahan v. Linnon, No. 97-1787, 1998 WL 1085817, at *4 (1st Cir. July 16, 1998) (per curiam) (holding that the U.S. Coast Guard was not liable for takes caused by "non-Coast Guard vessels that it permits to operate" because the program was "analogous to the licensure of automobiles"); Ruhl, *supra* note 148, at 73 (discussing the automobile-licensing metaphor in his critique of *Coxe*).

167. *Coxe*, 127 F.3d at 163.

it to traffic drugs or rob a bank.[168] The court rejected this analogy, stating:

> "[W]hereas it is possible for a person licensed by Massachusetts to use a car in a manner that does not risk the violations of federal law suggested by the defendants, it is not possible for a licensed commercial fishing operation to use its gillnets or lobster pots in the manner permitted by the Commonwealth without risk of violating the ESA by exacting a taking."[169]

In the car example, "the violation of federal law is caused only by the actor's conscious and independent decision to disregard or go beyond the licensed purposes of her automobile use."[170] With the fishing gear, "the state has licensed commercial fishing operations . . . in specifically the manner that is likely to result in a violation of federal law."[171] Therefore, the court found that "the state's licensure of gillnet and lobster pot fishing does not involve the intervening independent actor" that is necessary for the car analogy to work.[172]

The *Coxe* holding was taken a step further in *Loggerhead Turtle v. County Council*,[173] in which the plaintiffs challenged the decision of Volusia County, Florida, to allow beach driving and beachfront artificial lighting, which harmed nesting loggerhead and green sea turtles and hatchlings.[174] After the case began, Volusia County petitioned the FWS for an ITP, and one was granted for takes resulting from beach driving.[175] The Eleventh Circuit held that the ITP did not extend to the takes caused by the lighting[176] and determined that there was "a sufficient causal connection to seek to hold Volusia County liable for 'harmfully' inadequate regulation of artificial beachfront lighting."[177] The court held that the causal connection was sufficient for standing purposes, but did not reach the causation

168. *Id.* at 164.

169. *Id.*

170. *Id.*

171. *Id. But see* Totoiu, *supra* note 130, at 10,323 (arguing that the distinction between the two licensing schemes is that a state has no discretion to deny automobile licenses, but does have the discretion to deny a fishing permit).

172. *Coxe*, 127 F.3d at 164.

173. Loggerhead Turtle v. Cnty. Council, 148 F.3d 1231 (11th Cir. 1998).

174. *Id.* at 1235–36.

175. *Id.*

176. *Id.* at 1246.

177. *Id.* at 1249.

question on the merits. The court concluded that "Volusia County need not operate every beachfront lighting source itself to be held liable under the ESA. Rather, its indirect control over lighting is sufficient—at the very least—for purposes of standing."[178] The case was remanded to the district court to determine if the record supported the causal claim under section 9.[179]

In *United States v. Town of Plymouth*,[180] the FWS sued Plymouth, Massachusetts, for "allowing off-road vehicles ('ORVs') to drive on Plymouth Long Beach" without "appropriate precautions" to protect threatened piping plovers.[181] Facing a similar situation to that in *Loggerhead Turtle*, the court held that the ORV regulations caused the take of piping plovers and issued an injunction to ban ORV driving in a designated area unless Plymouth followed the requirements of federal and state guidelines.[182] The court agreed with previous cases that "the ESA's prohibitions contemplate . . . the actions . . . of a third party authorized by the government to engage in activity resulting in a taking."[183]

Other district courts, following the *Coxe* model, have held government actors liable for issuing permits to or explicitly authorizing third parties whose actions harmed endangered species.[184]

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178. *Id.* at 1250–51. In coming to this conclusion, the court cited *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 697–98 (1995), which determined that the statutory term "harm" "encompasses *indirect* as well as direct injuries." *Loggerhead Turtle*, 148 F.3d at 1250.

179. *Loggerhead Turtle*, 148 F.3d at 1258. On remand, the district court held that, though the artificial lighting harmed sea turtles, the county's policies restricting lighting did not cause that harm. Although denying the section 9 claim, the court did not question the basic theory of vicarious liability. Loggerhead Turtle v. Cnty. Council, 92 F. Supp. 2d 1296, 1306–09 (M.D. Fla. 2000).

180. United States v. Town of Plymouth, 6 F. Supp. 2d 81 (D. Mass. 1998).

181. *Id.* at 82.

182. *Id.*

183. *Id.* at 90 (citing 16 U.S.C. § 1538(g) (1994) and Strahan v. Coxe, 939 F. Supp. 963 (D. Mass. 1996)).

184. *See* Aransas Project v. Shaw, 930 F. Supp. 2d 716, 787 (S.D. Tex. 2013) (holding the Texas Commission on Environmental Quality liable for a take because it authorized private withdrawals of freshwater from rivers that fed into endangered whooping crane habitat, harming the birds); Or. Natural Desert Ass'n v. Tidwell, 716 F. Supp. 2d 982, 1005–06 (D. Or. 2010) (holding that the U.S. Forest Service violated sections 7 and 9 of the ESA by issuing grazing permits that led to takes of the steelhead in excess of its ITS); Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d 1073, 1081 (D. Minn. 2008) (granting summary judgment for environmental groups because the Minnesota Department of Natural Resource's licensing of hunters and regulations authorizing the use of certain traps caused the take of the threatened Canada lynx); Pac. Rivers Council v. Brown, No. CV 02-243-BR, 2002 WL 32356431, at *12 (D. Or. Dec. 23, 2002) (holding that plaintiffs stated a claim that the state's authorization of certain

Additionally, some courts have not decided the vicarious liability question, but have endorsed the theory in dicta, or at least not questioned its validity.[185] Several courts have denied vicarious liability claims, but even these have not explicitly rejected the vicarious liability doctrine.[186] Some vicarious liability cases have been dismissed due to a lack of factual evidence supporting the claims.[187] Generally, courts have accepted the theory; however, only a few circuits have addressed the issue, which could make it difficult for states to accurately assess whether they are exposing themselves to liability under section 9. Understandably, state and local government reactions have been "varied and inconsistent" following the *Coxe* ruling.[188]

The text of the ESA makes clear that some form of vicarious liability must be possible for harm to endangered species, as it explicitly allows someone to be liable under section 9 if they cause another to commit a take.[189] Court cases have elaborated upon the contours of vicarious liability under the ESA and in several instances

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logging operations, which was required for the activities to begin, caused the take of the Oregon Coast coho salmon by damaging its habitat).

185. *See* Coal. for a Sustainable Delta v. McCamman, 725 F. Supp. 2d 1162, 1164, 1203, 1167–68 (E.D. Cal. 2010) (denying summary judgment for the plaintiffs on their claim that the California Department of Fish and Game's striped bass sport-fishing regulations were causing takes of other listed fish, but citing *Coxe* with approval and not reaching the merits); Seattle Audubon Soc'y v. Sutherland, No. CV06-1608MJP, 2007 WL 1300964, at *6 (W.D. Wash. May 1, 2007) (holding that two chapters of the Audubon Society had standing to challenge state agencies' authorization of forest practices that lead to the take of the northern spotted owl, but not reaching the merits).

186. *See* Animal Welfare Inst. v. Martin, 623 F.3d 19, 21 (1st Cir. 2010) (denying environmental groups' motion for summary judgment, which claimed that Maine agencies' allowance of certain trapping devices caused the take of the Canada lynx); Strahan v. Linnon, No. 97-1787, 1998 WL 1085817, at *4 (1st Cir. July 16, 1998) (per curiam) (holding that the U.S. Coast Guard was not liable for the take of whales caused by the non-Coast Guard vessels that it licensed, because it was more analogous to automobile licensure than to *Coxe*).

187. *See* Defenders of Wildlife v. Bernal, 204 F.3d 920, 922 (9th Cir. 2000) (rejecting Defenders' claim that the construction of a school would cause the take of endangered pygmy owls on grounds of insufficient evidence); Strahan v. Pritchard, 473 F. Supp. 2d 230, 239 (D. Mass. 2007) (denying Strahan a preliminary injunction against Massachusetts because of insufficient evidence of injury to whales). Additionally, one district court decision rejected the application of vicarious liability in a suit regarding the take of a nonessential, experimental population of endangered species, governed by special rules under section 10(j) of the ESA, but it distinguished the case from a typical section 9 takings claim. *See* WildEarth Guardians v. Lane, No. CIV 12-118 LFG/KMB, 2012 WL 6019306, at *8, *15 (D.N.M. Dec. 3, 2012) (arguing that previous vicarious liability cases did not apply because populations protected under section 10(j) are not afforded the same protections as other endangered species).

188. Ruhl, *supra* note 148, at 73.

189. *See* Endangered Species Act of 1973 § 9, 16 U.S.C. § 1538(g) (2012); *supra* Part II.A.

have held government actors liable for their policies and actions that authorize third parties to take endangered species.

III. DEVELOPING A PERSUASIVE FORMULATION OF THE VICARIOUS LIABILITY DOCTRINE

Although successful in several courtrooms, the vicarious liability doctrine has received an unsympathetic reaction in the academic literature,[190] which could persuade courts to reject the theory in the future. There are still many circuits with no binding precedent adopting or rejecting the vicarious liability doctrine under the ESA.[191] Courts that are not bound by precedent would be free to interpret section 9 differently, perhaps adopting the rationale of the doctrine's critics. The Fifth Circuit, which encompasses Louisiana and, therefore, could be the venue for the case proposed in this Note, is one of the circuits without binding precedent on the vicarious liability doctrine.[192] Therefore, prospective plaintiffs, here and in other states, should present the doctrine in its most persuasive light.

In response to the main criticisms of the doctrine, this Part will argue for a new, more limited formulation of the vicarious liability doctrine. It will then address some of the procedural and constitutional hurdles that a vicarious liability suit may face and explain how a properly structured suit, illustrated by the Louisiana example, could overcome these challenges.

A. Defining the Contours of the Vicarious Liability Doctrine

Professor J.B. Ruhl argues that vicarious liability is a blanket term that actually encompasses three distinct types of liability, each of

190. *See generally* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 428–30 (2005); Brader, *supra* note 150; Ruhl, *supra* note 148.

191. Only the First, Eighth, and Eleventh Circuits have held that a government actor can be liable for policies that cause third parties to take endangered species. *See* Loggerhead Turtle v. Cnty. Council, 148 F.3d 1231, 1242 (11th Cir. 1998) (holding a county liable for its lighting policy, which allowed third parties to light the beach in a way that harmed sea turtles); Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997) (holding the state of Massachusetts liable for fishermen's use of gear that harmed northern right whales); Defenders of Wildlife v. EPA, 882 F.2d 1294, 1303 (8th Cir. 1989) (holding the EPA liable for registering a pesticide that, when applied to the ground by third parties, harmed black-footed ferrets).

192. Although in *Sierra Club v. Yeutter* the Fifth Circuit held the U.S. Forest Service liable under section 9 for takes caused by tree-harvesting methods, this ruling was applied to a federal agency's actions authorizing habitat destruction on federal lands, distinguishing it from many other vicarious liability cases. *See supra* notes 146–48 and accompanying text.

which is utilized in a different set of cases.[193] First is the "Proprietary Owner/Operator" model, exemplified in *Yeutter* and *Town of Plymouth*, in which the government owns and operates the land on which the take occurs.[194] Ruhl accepts this form of vicarious liability because the government is liable in exactly the same way as a private landowner might be for the acts of third parties that they have allowed on their land.[195] Second is "Permitting and Licensing Liability," demonstrated in *Coxe* and *Defenders*.[196] This model applies whenever a government actor has the discretionary power to grant a permit for actions that can cause takes.[197] Ruhl determines that this type of liability has "no reasoned basis,"[198] an argument this Note refutes in Part IV. The third model is based on "Inadequate Regulation" and is epitomized by *Loggerhead Turtle*.[199] Under this model, "a state or local government is liable when it fails to prevent privately caused takes through exercise of its regulatory authority."[200] Ruhl finds this model indefensible because it holds states liable for failing to regulate in ways that only the federal government is required to do under the ESA.[201]

The "Inadequate Regulation" version of the vicarious liability doctrine is the most challenging to defend. The model creates practical problems because it is difficult to determine when a state would be liable. The critics contemplate the worst possible scenario: that states will be forced to issue the perfect regulations, or be liable for takes.[202] The state may be liable even for beneficial but imperfect regulations that fail to prevent some takes.[203] As Ruhl argues, in modern society "almost no private action takes place in the complete

193. Ruhl, *supra* note 148, at 73–75.

194. *Id.* at 73.

195. *Id.*

196. *Id.*

197. *Id.*

198. *See id.* (arguing primarily that Congress intended only federal agencies to be vicariously liable for takes that result from the permitting and licensing of private activities).

199. *Id.* at 75.

200. *Id.*

201. *Id.* Additionally, sometimes the risk to listed species could be addressed by either federal or state regulation. It seems unfair to "penalize states for the failures of the federal government." *Id.* at 77.

202. Shannon Petersen, Note, *Endangered Species in the Urban Jungle: How the ESA Will Reshape American Cities*, 19 STAN. ENVTL. L.J. 423, 440–41 (2000) ("[S]tate and local officials could have been fined and imprisoned for failing to implement regulations that prevent private activities resulting in illegal takes.").

203. *See supra* notes 173–78 and accompanying text.

absence of some connection to government regulation . . . . So, the theory goes, let's simply sue the government for failing sufficiently to regulate life as we know it."[204] Shannon Petersen, an environmental lawyer and another critic of vicarious liability, argues that in the licensing cases "the government entities acted affirmatively to license or permit activities that resulted in illegal takings. In *Loggerhead Turtle*, however, Volusia County was held liable for *failing* to regulate beachfront lighting in a way that would protect the turtle—a distinction, in other words, between misfeasance and nonfeasance."[205]

Petersen's distinction between misfeasance and nonfeasance is compelling. Misfeasance has been characterized as "active misconduct working positive injury to others," whereas nonfeasance is "passive inaction or a failure to take steps to protect [others] from harm."[206] These two concepts were adopted to demonstrate a key distinction in tort law: generally, a person is not liable for failing to act (nonfeasance) unless some special duty exists.[207] This reflects the notion that punishing nonfeasance may encroach on individual freedom.[208] Additionally, misfeasance might be easier to detect and deter, and in some circumstances may be seen as more morally reprehensible than a mere failure to act.[209]

These concepts provide a useful way to limit the vicarious liability doctrine. A line could be drawn between affirmative action of the state that causes take (cases of misfeasance, such as *Defenders* and *Coxe*) and a lack of appropriate regulations (cases of nonfeasance, such as *Loggerhead Turtle*). This formulation of the doctrine would exclude Ruhl's category of "Inadequate Regulation"

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204. Ruhl, *supra* note 148, at 70.

205. Petersen, *supra* note 202, at 434 (emphasis added).

206. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS 373 (5th ed. 1984).

207. *See* RESTATEMENT (SECOND) OF TORTS § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."); *id.* § 314 cmt. c ("The origin of the rule lay in the early common law distinction between action and inaction, or 'misfeasance' and 'non-feasance.'").

208. *See* Francis H. Bohlen, *The Moral Duty To Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219–20 (1908) (describing the "positive loss" of freedom that runs counter to the "attitude of extreme individualism so typical of anglo-saxon legal thought").

209. *But see* Philip W. Romohr, Note, *A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-To-Rescue Rule*, 55 DUKE L.J. 1025, 1025 (2006) (noting the morally repugnant nature of some forms of nonfeasance, and pointing out that "the absence of a duty to rescue . . . has been criticized by the vast majority of legal scholarship on the subject").

while including "Permitting and Licensing Liability." By limiting vicarious liability to affirmative state actions that cause others to commit takes, application of the doctrine would be more predictable, and states could modify their behavior accordingly.

B. Applying the Theory to Louisiana's Noncompliance with TED Regulations

This more narrow construction of the vicarious liability doctrine, adopting the misfeasance/nonfeasance distinction, would still easily encompass the proposed suit against Louisiana. Currently, Louisiana requires all fishermen, vessels, and gear employed in commercial shrimp trawling to obtain a license from the state.[210] In this case, the trawl itself, which may or may not have a TED installed, is the gear that must be licensed.[211] The argument for holding Louisiana liable would be patterned after *Coxe* and based on the theory of vicarious liability: when Louisiana issues licenses to shrimping vessels and gear that do not have TEDs installed, it is authorizing shrimp trawlers to take sea turtles.[212]

As noted, the only exemption from section 9 liability is typically an ITS or ITP.[213] However, special regulations provide a blanket exception for the incidental take of sea turtles during shrimp trawling.[214] There is one major condition on this exemption: the individual must comply with all relevant regulations, including those requiring the installation of TEDs.[215] Louisiana's shrimp fishery has violated this regulation by not installing TEDs, and therefore is not exempted from liability. Louisiana could come into compliance with

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210. LA. DEP'T OF WILDLIFE & FISHERIES, LOUISIANA COMMERCIAL FISHING REGULATIONS 2013, at 6–7 (2013), *available at* http://www.wlf.louisiana.gov/sites/default/files/pdf/publication/31745-commercial-fishing-regulations/2013_commercial_fishing_low-res.pdf; *see* LA. DEP'T OF WILDLIFE & FISHERIES, *supra* note 37, at 1-4 to 1-5 (noting these requirements).

211. LA. DEP'T OF WILDLIFE & FISHERIES, *supra* note 210, at 30 (noting that fishing gear includes any shrimp trawl).

212. *See* Bean, *supra* note 131, at 10,286 (suggesting that states could be "liable for the drowning of sea turtles by the boats that they license to fish for shrimp" and comparing the situation to *Coxe*).

213. *See supra* notes 122–24 and accompanying text. The ITS for the southeastern shrimp fishery sets guidelines for NMFS's regulation of the shrimp fishery, but it does not provide instructions for states. NAT'L MARINE FISHERIES SERV., *supra* note 3, at 196–205.

214. 50 C.F.R. § 223.206(d) (2013).

215. *Id.*

the ESA by obtaining an ITP,[216] but NMFS is unlikely to grant an ITP to a state that refuses to enforce federal TED requirements.

Critics warn that state sovereign immunity will bar most vicarious liability suits.[217] As a general rule, a state cannot be sued by a citizen of the United States without its consent.[218] However, the Supreme Court's ruling in *Ex parte Young*[219] provides a large exception to the sovereign immunity defense by upholding the longstanding tradition of suits for prospective injunctive relief against individual officers of a state for violations of the Constitution.[220] *Ex parte Young* essentially creates a legal fiction: although the officer must be the named party, the state's actions can be enjoined.[221] In 2002, the Court reaffirmed *Ex parte Young*, holding that suits against state officers can be brought for violations of federal statutes, not just the Constitution.[222] These rulings provide clear guidelines for how to bring a vicarious liability suit without being blocked by state sovereign immunity. In the Louisiana example, the case should be brought against the state officers who are responsible for issuing shrimp vessel licenses, such as the head of the Louisiana Department of Wildlife and Fisheries.[223] As *Ex parte Young* allows, the suit would name the individual state officers but could effectively hold the state of Louisiana responsible. Additionally, *Ex parte Young* requires a

216. *See id.* § 223.206(a)(2) (authorizing the issuance of ITPs).

217. *See* Melious, *supra* note 90, at 636–52 (discussing dual sovereignty concerns raised by the ESA); Petersen, *supra* note 202, at 447 ("The doctrine of sovereign immunity provides a . . . reason why the holdings of at least *Strahan* and *Loggerhead Turtle* should be limited or overturned."); *see also* Endangered Species Act of 1973 § 11, 16 U.S.C. § 1540(g)(1)(A) (2012) (providing that any person can bring suit under the ESA to enjoin "the United States and any other governmental instrumentality or agency (to the extent permitted by the [E]leventh [A]mendment to the Constitution), who is alleged to be in violation of" the ESA).

218. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. This language enacts the common law understanding of state sovereign immunity, which bars any suit against a state without its consent by any citizen of that state or any other state. *See* Hans v. Louisiana, 134 U.S. 1, 10, 16–21 (1890) (interpreting the amendment to bar suits by a state's own citizens, despite no textual basis in the Eleventh Amendment).

219. *Ex parte* Young, 209 U.S. 123 (1908).

220. *Id.* at 155–56.

221. Verizon Md. Inc. v. Public Serv. Comm'n, 535 U.S. 635, 649 (2002) (Kennedy, J., concurring) (calling *Ex parte Young* a "legal fiction").

222. *Id.* at 645.

223. *See* LA. REV. STAT. ANN. § 56:30.1 (2004) (granting the Department the power to issue hunting and fishing licenses).

prospective remedy,[224] so the suit should ask for an injunction against the future licensing of shrimping vessels and gear that do not comply with TED regulations. Several other vicarious liability cases have requested similar relief and were not barred by state sovereign immunity.[225]

Critics also warn of Tenth Amendment obstacles.[226] The United States' federalist system dictates that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[227] Doing so would "infring[e] upon the core of state sovereignty reserved by the Tenth Amendment."[228] The anticommandeering doctrine therefore bars certain remedies against states.

Though the courts cannot force a state to enact a particular regulation,[229] they may order a state to stop affirmative actions that violate federal law without unconstitutionally commandeering state officials. The proposed Louisiana case is analogous to the situation in *South Carolina v. Baker*,[230] in which the Supreme Court "upheld a [federal] statute that prohibited States from issuing unregistered bonds because the law 'regulate[d] state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'"[231] Similarly, in the Louisiana case, the vicarious liability doctrine does not require the state to regulate private

224. Edelman v. Jordan, 415 U.S. 651, 671 (1974) (holding that the *Ex parte Young* doctrine only allows for prospective relief); *Ex parte Young*, 209 U.S. at 156 (allowing for state officers to be enjoined).

225. *See* Strahan v. Coxe, 127 F.3d 155, 166–67 (1st Cir. 1997) (rejecting defendants' argument that the relief requested was barred by the Eleventh Amendment); Seattle Audubon Soc'y v. Sutherland, No. C06-1608MJP, 2007 WL 1577756, at *2 (W.D. Wash. May 30, 2007) (recognizing that *Ex parte Young* allowed a suit against state officers responsible for enforcing a challenged state law); Pac. Rivers Council v. Brown, No. CV 02-243, 2002 WL 32356431, at *1, *5–6 (D. Or. Dec. 23, 2002) (finding that plaintiffs' suit against the State Forester of Oregon was not barred by the Eleventh Amendment).

226. *E.g.*, Brader, *supra* note 150, at 125–28.

227. New York v. United States, 505 U.S. 144, 161 (1992) (alteration in original) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

228. *Id.* at 177.

229. *See* Sierra Club v. Yeutter, 926 F.2d 429, 440 (5th Cir. 1991) ("The court's injunction eviscerated the consultation process by effectively dictating the results of that process. Thus, the court exceeded its authority to enjoin violations of the ESA.").

230. South Carolina v. Baker, 485 U.S. 505 (1988).

231. Reno v. Condon, 528 U.S. 141, 150 (2000) (second and third alterations in original) (quoting *Baker*, 485 U.S. at 514–15).

individuals; it simply requires the state to comply with federal law when undertaking its own regulatory activities. Here, again, the distinction between misfeasance and nonfeasance is useful: if the state chooses not to regulate at all (nonfeasance), it cannot be liable. If the state chooses to regulate but does so in a way that violates federal law (misfeasance), then the federal government has the authority to hold the state responsible for that action. Just as South Carolina could not issue unregistered bonds in *Baker*, Louisiana may not issue a license for the use of illegal gear that will necessarily lead to the take of sea turtles.

Therefore, the anticommandeering doctrine should not bar a suit against Louisiana seeking an injunction to stop the licensing of shrimp trawls that do not have TEDs installed. Several vicarious liability cases have overcome Tenth Amendment defenses.[232] Additionally, some of the leading critics concede that a properly structured suit would not violate the anticommandeering doctrine.[233] Ruhl, for example, states that a permissible remedy for a licensing/permitting case would be "to order the state to either stop issuing the permits or obtain its own ESA permit to continue issuing the permits."[234] As long as a suit is properly structured, state sovereign immunity and the Tenth Amendment do not present insurmountable barriers to a vicarious liability suit.

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232. *See, e.g.*, Strahan v. Coxe, 127 F.3d 155, 170 (1st Cir. 1997) ("Here, the defendants are not being ordered to take positive steps with respect to advancing the goals of a federal regulatory scheme. Rather, the court directed the defendants to find a means of bringing the Commonwealth's scheme into compliance with federal law."); *Yeutter*, 926 F.2d at 439 ("[T]he court may enjoin the agency from continuing activity that has resulted in past violations and, to the extent necessary, may dictate temporarily the actions the agency must take with regard to that activity until the party has submitted to the court an acceptable plan of its own."); Seattle Audubon Soc'y v. Sutherland, No. C06-1608MJP, 2007 WL 1300964, at *14 (W.D. Wash. May 30, 2007) ("If the Court finds for Plaintiffs on the merits, it can craft an injunction that orders state officials to stop violating the ESA, but avoids ordering the state to take 'positive steps with respect to advancing the goals of a federal regulatory scheme.' Thus, the Tenth Amendment does not bar Plaintiffs' action, nor does it undermine Plaintiffs' standing." (citation omitted) (quoting *Coxe*, 127 F.3d at 170)).

233. *See, e.g.*, Petersen, *supra* note 202, at 443 (arguing that *Loggerhead Turtle* and *Plymouth* should be overturned because they violate the Tenth Amendment, but conceding that *Coxe* "probably does not violate the Tenth Amendment, or the Supreme Court decisions"); Ruhl, *supra* note 148, at 76 ("[O]nly the inadequate regulation theory presents any real Tenth Amendment concern.").

234. Ruhl, *supra* note 148, at 77.

IV. DEFENDING THE VICARIOUS LIABILITY DOCTRINE

Vicarious liability in the context of the ESA offers an appealing option for environmentalists and other interested parties to hold state and local governments liable when their authorization causes a third party to take endangered species. As described in Part III.B., under the vicarious liability doctrine, Louisiana could be liable for licensing shrimp trawling vessels and gear that do not have TEDs installed. This theory, however, has faced almost unanimous disapproval in the academic literature, and there is binding precedent upholding it in only a few jurisdictions.[235] The doctrine may be on thin ice.

A limited version of vicarious liability that focuses on state or local governments' misfeasance (that is, affirmative actions that cause others to commit a take) is much more likely to persuade a court than a broader theory encompassing nonfeasance.[236] The narrower version of vicarious liability proposed in this Note is consistent with the text and general purpose of the ESA, would be a desirable and reasonable practical tool for conservation, and could form the basis for a successful challenge to Louisiana's regulatory program.

A. Vicarious Liability Is Supported by the Text and Legislative History of the ESA

The ESA's purpose is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved[] [and] to provide a program for the conservation of such endangered species and threatened species."[237] The statute recognizes that protected species "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[238] The Supreme Court, reflecting on the ESA, explained that "Congress intended endangered species to be afforded the highest of priorities."[239]

The text of the ESA should therefore be read in the context of this overarching purpose. Section 9 of the ESA forbids any person,

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235. *See supra* Part II.B.

236. *See supra* Part III.A.

237. 16 U.S.C. § 1531(b) (2012).

238. *Id.* § 1531(a)(3).

239. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 174 (1978). In *Tennessee Valley Authority v. Hill*, the Court affirmed an injunction barring the completion of a nearly finished dam—despite the large government investment in the project—because completion of the dam would eradicate a newly listed endangered species called the snail darter. *Id.* at 156–71, 195.

including "any State, municipality, or political subdivision of a State," from "caus[ing] to be committed" the take of any listed species.[240] Its provisions explicitly declare that a state violates section 9 if it causes a person to commit a take. With the clear language of the ESA supporting vicarious liability, the question is really one of degree: what level of state action is sufficiently coercive to cause another to commit a take?

The federal regulations requiring TEDs follow the same format as the statutory language, thus creating a second textual basis for the vicarious liability theory in the Louisiana case, and a second potential claim. According to the regulations, "it is unlawful for any person . . . to . . . [o]wn, operate, or be on board a vessel"[241] or to "[f]ish for, catch, take, harvest, or possess, fish or wildlife while on board a vessel, except if that vessel is in compliance with all applicable provisions of § 223.206(d)."[242] Section 223.206(d) requires TEDs to be installed in most shrimp trawls.[243] Like the ESA, the regulations specify that it is also unlawful to "[a]ttempt to do, solicit another to do, or cause to be done" any of the listed violations.[244] If a state government causes a third party to operate a vessel or harvest shrimp from a vessel that does not comply with TED regulations, that government has violated the TED regulations.

The statutory text creates the foundation for the vicarious liability doctrine, and the legislative history and relevant cases clarify and provide support for the text. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[245] the Supreme Court determined that section 9's take prohibition, and specifically the definition of "harm,"[246] should be interpreted broadly and encompasses indirect takes.[247] In contrast to previous versions of the ESA passed in 1966 and 1969, which restricted only those takes that occurred on federal land, "the 1973 Act applied to all land in the United States and to the Nation's territorial seas."[248] Additionally, the 1973 Act was the first to

240. *See supra* notes 132–34 and accompanying text.
241. 50 C.F.R. § 223.205(b)(1) (2012).
242. *Id.* § 223.205(b)(2).
243. *Id.* § 223.206(d)(2).
244. *Id.* § 223.205(b)(22).
245. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).
246. 16 U.S.C. § 1532(19) (2012).
247. *Sweet Home*, 515 U.S. at 700.
248. *Id.* at 698.

include the word "harm" in the definition of "take,"[249] indicating Congress's intention to expand liability under section 9 to reach a greater category of actions. Further, in 1982 Congress authorized ITPs, which allow people to commit a take that is otherwise prohibited "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[250] The Court found this "strongly suggest[ed]" that section 9 intended "to prohibit indirect as well as deliberate takings."[251]

Contrastingly, Petersen argues that the legislative history demonstrates that "Congress never intended [section 9] to extend to state and local regulatory regimes."[252] Petersen interprets the fact that "Congress debated little over the scope and meaning of section 9" to mean that it intended to cover only direct takes.[253] Petersen's interpretation of the legislative history contradicts section 9(g), which explicitly states that a person is liable if they "cause to be committed" any violation of the ESA.[254] As the Court in *Sweet Home* concluded, when Congress inserts a broad term like "harm" into the definition of take and does not extensively debate that addition, a court should give the provision "a respectful reading" and not dismiss its plain meaning.[255]

Sweet Home upheld the regulatory definition of harm,[256] which included "significant habitat modification or degradation where it actually kills or injures wildlife,"[257] and did not specifically address vicarious liability. But the same rationale can apply to both questions. In fact, banning indirect takes exacted through habitat modification but not through the states' authorization of actions that will harm endangered species would lead to an illogical result. For example, if Louisiana chose to dump a chemical in the water that harmed sea turtles, that would be a significant habitat modification that actually injures or kills a listed species, and the state would be liable for an

249. *Id.* at 705.

250. *Id.* at 700 (quoting 16 U.S.C. § 1539(a)(1)(B) (1988 & Supp. V 1993)).

251. *Id.*

252. Petersen, *supra* note 198, at 442.

253. *Id. But see Sweet Home*, 515 U.S. at 705 (expressing disagreement with "a narrow interpretation" of "harm").

254. 16 U.S.C. § 1538(g) (2012).

255. *Sweet Home*, 515 U.S. at 705.

256. *Id.* at 695.

257. 50 C.F.R § 17.3 (1994).

indirect take through the "harm" prong of the take provision.[258] Similarly, the state creates a dangerous habitat for sea turtles by licensing illegal shrimp-trawling gear: throughout the Louisiana state waters, sea turtles can be captured, injured, and killed by the thousands due to the inescapable nets that trawl through their feeding grounds. Given Congress's intent to protect endangered species "whatever the cost,"[259] both of these indirect but foreseeable ways of causing a take should be prohibited.

The definition of person[260] shows that Congress intended section 9 of the ESA to apply equally to federal and state governments. However, other provisions of the ESA do limit federal action more strictly than states. Section 7 creates an affirmative duty for the federal agencies to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species."[261] The ESA requires federal agencies to consult with the Services to insure that any agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[262] Ruhl and attorney Valerie Brader both assert that vicarious liability confuses the affirmative duties assigned to the federal government in section 7 and the take prohibition of section 9 that applies more broadly.[263] According to Brader, the vicarious liability theory requires states to perform the same level of analysis as the federal government and comply with the ESA as if it had gone through consultation.[264]

This argument is flawed because it ignores the many, well-reasoned differences between the section 7 and section 9 requirements. Section 7(a)(2) uniquely requires federal agencies to undergo a thorough consultation process whenever an action could harm an endangered species.[265] Imposing such a requirement on the states would be time consuming and would greatly expand the Services' administrative responsibilities. The ESA's structure makes

258. *See* 50 C.F.R. § 17.3 (2013) ("Harm in the definition of 'take' . . . . include[s] significant habitat modification or degradation where it actually kills or injures wildlife . . . .").

259. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).

260. 16 U.S.C. § 1532(13) (2012); *see supra* note 121 and accompanying text.

261. 16 U.S.C. § 1536(a)(1).

262. *Id.* § 1536(a)(2).

263. Brader, *supra* note 150, at 109; Ruhl, *supra* note 148, at 74.

264. Brader, *supra* note 150, at 120.

265. *See supra* notes 110–13 and accompanying text.

sense: it holds states liable for the actual unauthorized taking of species but does not require states to undergo a specific administrative process. States are free to request advice from the Services on a particular action[266] or to form a cooperative agreement with the federal government,[267] but neither option is mandated.[268] This mitigates the problem that requiring states to consult might violate the principles inherent in our system of federalism.[269] The differing requirements in sections 7 and 9 also are practical: because liability for a take is bound by the ordinary requirements of foreseeability,[270] states should know that they are authorizing third parties to commit a take and be able to avoid that action without conducting a time-consuming consultation.

Additionally, the prohibition against causing "jeopard[y]" in section 7[271] is distinct from the prohibition against "take[s]" in section 9.[272] First, the take provision applies to fish and wildlife, but the jeopardy provision also extends to listed plants.[273] Second, the jeopardy provision covers actions that are likely to "result in the destruction or adverse modification of [critical] habitat,"[274] whereas the take provision is narrower, banning "significant habitat modification or degradation where it actually kills or injures wildlife."[275] Lastly, jeopardy is a species-level evaluation, whereas a

266. 16 U.S.C. § 1535(a).

267. *Id.* § 1535(c).

268. *See* Seattle Audubon Soc'y v. Sutherland, No. CV06-1608MJP, 2007 WL 1300964, at *8 (W.D. Wash. May 1, 2007) ("[T]he fact that Congress imposed increased regulatory responsibilities on federal agencies and made state participation in a regulatory program voluntary is a separate issue from whether Congress intended to make states liable when they authorize others to take endangered species.").

269. *See* New York v. United States, 505 U.S. 144, 162 (2004) ("While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."); South Carolina v. Baker, 485 U.S. 505, 513 (1988) ("[T]he Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests." (citing FERC v. Mississippi, 456 U.S. 742, 761–64 (1982)).

270. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 700 n.13 (1995).

271. 16 U.S.C. § 1536(a)(2).

272. *Id.* §§ 1532(19), 1538(a)(1)(B)–(C).

273. Loggerhead Turtle v. Cnty. Council, 148 F.3d 1231, 1246 (11th Cir. 1998) (citing 16 U.S.C. §§ 1532(16), 1536(a)(2), 1538(a)(1) (1994)).

274. *Id.* (alteration in original) (quoting 16 U.S.C. § 1536(a)(2)).

275. *Id.* at 1238 (quoting 50 C.F.R. § 17.3 (1997)) (quotation mark omitted); *see also Sweet Home*, 515 U.S. at 703 ("Section 7 imposes a broad, affirmative duty to avoid adverse habitat

take occurs if an individual member of the species is harmed. Therefore "some activities—especially those relating to land use—are more likely to result in 'jeopardy' than a 'take.'"[276]

Ruhl argues that having both section 7(a)(2) and a broadly applicable section 9 imposing duties on the federal government would be redundant, as any federal agency action that indirectly or directly takes a listed species would be controlled by both sections.[277] However, both provisions typically will not apply concurrently to the same action because once a federal agency has consulted on an action and obtained a BiOp and ITS, it will not be liable under section 9 as long as it complies with the ITS. Additionally, any overlap that exists would not be eliminated by rejecting vicarious liability, because there could still be instances in which the federal government *directly* commits a take and violates section 7's jeopardy provision. As the Court in *Sweet Home* concluded, "Any overlap that . . . § 7 may have with § 9 in particular cases is unexceptional, and simply reflects the broad purpose of the Act set out in § 2 . . . ."[278]

Ruhl also argues that "Congress knew exactly how to extend vicarious liability for permitting and licensing and did so with respect to *federal* agencies only."[279] Section 7 defines an agency action as "any action authorized, funded, or carried out by such agency,"[280] whereas section 9 does not state that any action authorized, funded, or carried out by a state is subject to the take provision.[281] However, this fact is not detrimental to the theory of vicarious liability. It was necessary to define an agency action in section 7 because the federal agencies have to know with certainty when to initiate consultation with the Services. Section 9 does not impose procedural requirements on the states or any other person. It is more focused on the end result of the action—

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modifications that § 9 does not replicate, and § 7 does not limit its admonition to habitat modification that 'actually kills or injures wildlife.'").

276. *Loggerhead Turtle*, 148 F.3d at 1246 (citing *Sweet Home*, 515 U.S. at 703); *see also* Andrew J. Doyle, Note, *Sharing Home* Sweet Home *with Federally Protected Wildlife,* 25 STETSON L. REV. 889, 911 n.174 (1996) ("[I]t is easier to 'jeopardize' than it is to 'harm.'").

277. *See* Ruhl, *supra* note 148, at 74 ("If Section 9 covers actions governments authorize, it would have been unnecessary for Congress in Section 7(a)(2) expressly to refer to government authorizations by federal agencies.").

278. *Sweet Home*, 515 U.S. at 703 (citation omitted); *see also* Russello v. United States, 464 U.S. 16, 24 n.2 (1983) ("There may well be factual situations to which both subsections apply. The subsections, however, are clearly not wholly redundant.").

279. Ruhl, *supra* note 148, at 73.

280. 16 U.S.C. § 1536(a)(2) (2012).

281. *Id.* § 1538(g).

the harm imposed on listed species. Moreover, section 9 applies to both government and non-government actors; creating an exhaustive list of each type of action that could be carried out by this myriad of actors and could potentially cause take would be impractical.

Overall, the vicarious liability doctrine fits logically with the statutory scheme of the ESA. It has a strong textual basis, is consistent with the overall purpose of protecting listed species, and maintains a reasonable structural balance between state and federal responsibility.

B. Vicarious Liability Would Be a Desirable and Practical Way To Protect Species

The practical implications of vicarious liability also support the theory's application. Critics claim that the vicarious liability doctrine would be catastrophic for the states, but many of these fears are in reaction to the "Inadequate Regulation" model of vicarious liability exemplified in *Loggerhead Turtle*.[282] However, this Note proposes a more limited version of vicarious liability that does not hold states liable for nonexistent or imperfect regulations.[283] Instead, vicarious liability should focus on holding states liable when they perform an affirmative action—such as issuing a license—to authorize behavior that is known to cause takes. This limited version of vicarious liability accomplishes the doctrine's primary goals, both generally and in the proposed case against Louisiana, while avoiding some of the practical obstacles.

The vicarious liability doctrine is useful to protect species that are "threatened by diffuse, untraceable actions of private actors."[284] The take of sea turtles by shrimp trawls is usually first noticed when someone spots an injured or dead turtle, after the perpetrator of the take is nowhere to be found.[285] Government inspectors could observe an occasional take through extensive monitoring, but it would be very challenging for private individuals to witness and document a take in order to raise a citizen suit. Individual enforcement simply would not be an efficient way to combat the unlawful operation of an entire

282. For a description of the "Inadequate Regulation" model and its weaknesses, see *supra* notes 199–205 and accompanying text.

283. *See supra* Part III.A.

284. Ruhl, *supra* note 148, at 70.

285. *See id.* (providing the same rationale in the context of the take of manatees, whose carcasses are discovered after being hit by a boat, when "the boater is long gone").

fishery.[286] In the Louisiana example and many other potential situations, vicarious liability may be the only practical way for private individuals to remedy the large-scale taking of endangered species.

There are several key limitations to the vicarious liability doctrine to ensure that states will not face an onslaught of unpredictable suits. For instance, there are alternative ways that states can avoid liability for takes. Professor Jean Melious argues that "states may take advantage of flexible ESA mechanisms"[287] like obtaining an ITP that allows for takes in accordance with the state's Habitat Conservation Plan.[288] There also are four inherent limits built into all vicarious liability litigation: First, the plaintiffs must demonstrate standing. Second, the action must result in a take, so it must actually harm or harass an endangered species.[289] Third, the resulting take must have been foreseeable when the state committed the action.[290] Fourth, the action must be the proximate cause of the take.[291] Because of these clear limits, the state should be able to predict and avoid liability under section 9, but will be liable when its actions actually cause others to commit a take, in accordance with section 9(g).[292]

The Louisiana example provides a good demonstration of these limitations. First, the plaintiffs must demonstrate standing,[293] which requires an "injury in fact" that "is fairly traceable to the challenged action" and likely to "be redressed by a favorable decision."[294] The

286. *See supra* Part I.C.

287. Melious, *supra* note 90, at 620.

288. *Id.* at 621. Melious also lists other mechanisms that allow for flexibility in states' compliance with the ESA. *Id.* at 621–30.

289. *See* Endangered Species Act of 1973 § 9(a)(1), 16 U.S.C. § 1538(a)(1) (2012); 50 C.F.R. § 17.3 (2013). *But see* Brader, *supra* note 150, at 110 (arguing that under vicarious liability, state regulations that cause some habitat modification, even if no actual harm occurs, could be considered a take).

290. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 700 n.13 (1995) (noting that section 9 liability is limited by the "ordinary requirements of proximate causation and foreseeability").

291. *Id.*

292. *See* 16 U.S.C. § 1538(g) ("It is unlawful for any person . . . to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.").

293. *See* Allen v. Wright, 468 U.S. 737, 789–90 (1984) (Stevens, J., dissenting) ("[I]f the plaintiff lacks Art. III standing to bring a lawsuit, then there is no "case or controversy" within the meaning of Art. III and hence the matter is not within the area of responsibility assigned to the Judiciary by the Constitution.").

294. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) (restating the requirements laid out in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

standing test will be applied strictly in vicarious liability cases because when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed" to establish standing than when the plaintiff is "himself an object of the [challenged] action."[295] Plaintiffs who can demonstrate an injury in fact, such as those who study sea turtles or regularly observe sea turtles recreationally, could have standing.[296] The injury would not be "conjectural or hypothetical"[297] because there is conclusive evidence of sea turtle mortality from interactions with shrimp trawls that do not use TEDs.[298]

To satisfy the next prong of the standing analysis, the prospective plaintiffs would have to demonstrate that their injury is fairly traceable to the challenged action—for example, Louisiana's licensing of shrimping vessels with unlawful gear. The injury cannot "result[] from the independent action of some third party not before the court."[299] Brader thinks that these cases will fail because they are based on independent, third-party action—in this case, that of the shrimp fishermen.[300] She also argues that "issuing a permit for an illegal activity may not cause a take if the third-party permittee does not then independently choose to engage in the activity."[301]

Brader's argument fails to recognize that an "injury can be fairly traced to the actions of both parties and non-parties."[302] The issue of traceability turns on whether the shrimper's action was a *superseding* cause of the take. The Restatement (Second) of Torts states that "[w]here the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is

295. *Lujan*, 504 U.S. at 561–62.

296. *See id.* at 562–63 ("[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.").

297. *Friends of the Earth*, 528 U.S. at 180.

298. *See* Seattle Audubon Soc'y v. Sutherland, No. CV06-1608MJP, 2007 WL 1300964, at *5 (W.D. Wash. May 1, 2007) ("[I]t is not 'hypothetical or tenuous' that timber companies will actually conduct the forest practices for which they have requested and received Department approval . . . .").

299. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976).

300. Brader, *supra* note 150, at 116.

301. *Id.*

302. Loggerhead Turtle v. Cnty. Council, 148 F.3d 1231, 1247 (11th Cir. 1998); *see also* Nat'l Audubon Soc'y, Inc. v. Davis, 307 F.3d 835, 849 (9th Cir. 2002) (stating that a "chain of causation" can have "more than one link").

not a superseding cause."[303] Additionally, it declares that if the state's action is negligent because it creates "the likelihood that a third person may act in a particular manner," then "such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby."[304] The Restatement (Third) of Torts consolidates the intervening cause sections of the Restatement (Second) into one rule: "When a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."[305] An actor is liable "when there is a foreseeable risk of improper conduct, including criminal activity, by another."[306] In accordance with these principles, the Supreme Court has recognized that third-party action could potentially break the chain of causation but does not do so if the third-party action was caused or influenced by the defendant.[307]

The licensing of gear without TEDs creates and increases the foreseeable risk that shrimpers will not use TEDs, given that the shrimpers know that they have satisfied all state requirements and that federal requirements will not be enforced.[308] In fact, the state's issuance of a license could affirmatively encourage the illegal action because the shrimpers might assume that obtaining the permit means that they have complied with all necessary rules, including federal regulations.[309] Either way, Louisiana's licensure of illegal gear is a "substantial factor in causing the harm"[310] to sea turtles and creates a "foreseeable risk of improper conduct" by the shrimpers,[311] and therefore, the shrimpers' failure to use TEDs is not a superseding cause.

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303. RESTATEMENT (SECOND) OF TORTS § 442A (1965).

304. *Id.* § 449.

305. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 34 (2010).

306. *Id.* § 34 cmt. d; *see also id.* § 19 ("The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of . . . a third party.").

307. Bennett v. Spear, 520 U.S. 154, 169 (1997).

308. *See* Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d 1073, 1079 (D. Minn. 2008) ("[T]he DNR's licensure and regulation of trapping is the 'stimulus' for the trappers [*sic*] conduct that results in incidental takings. Accordingly, the trappers [*sic*] conduct is not an independent intervening cause that breaks the chain of causation between the DNR and the incidental takings of lynx.").

309. I would like to thank Professor Ernest Young for pointing out this possibility.

310. *See supra* note 303 and accompanying text.

311. *See supra* note 306 and accompanying text.

The traceability requirement can also be examined through the lens of but-for causation, which is closely tied to the third prong of the standing requirement, redressability.[312] In this case, shrimp trawling cannot occur until the operator, vessel, and gear obtain the necessary licenses from Louisiana, making the licenses a but-for cause of the shrimp trawling.[313] Seen from a redressability perspective, if Louisiana stopped granting licenses to vessel operators who used illegal gear and gave licenses only to those who complied with TED regulations, then Louisiana shrimpers would either use TEDs or choose to leave the shrimp-trawling business. As a result, the harm to sea turtles would drastically decrease.

Some critics argue that licensing cannot be a but-for cause of a take.[314] According to Professor Jonathan Adler, if states stop issuing licenses altogether there is still likely to be the exact same use of gear that can harm endangered species.[315] Adler's point is not necessarily true: without a state licensing scheme, perhaps more fishermen would pay attention to and feel bound by the federal laws requiring TEDs.[316] Regardless, Adler's argument manipulates the framing of the question. If the state continued to run a licensing program but stopped licensing vessels that had unlawful gear (meaning without TEDs), it would certainly reduce the harm being done to sea turtles. Lastly, Adler's argument depends on an unrealistic premise: if states might be liable for licensing illegal gear, they will choose to stop licensing all together. Shutting down all licensing would eliminate the state's ability to enforce many fisheries regulations, many of which have economic and political importance.

The car-licensing analogy in *Coxe* demonstrates why licensing illegal gear can violate federal law: a state can choose to license a car, and the state will not be liable if the car owner chooses to traffic drugs in that car.[317] In that case, the state has had no knowledge of the car

312. *See* Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 74–75, 81 (1978) (determining that a but-for causal connection "would likely satisfy the second prong of the constitutional test for standing" and holding that the plaintiffs had standing).

313. *See supra* Part II.B.

314. *See* Adler, *supra* note 190, at 429.

315. *Id.*; *see also* Ruhl, *supra* note 148, at 77 ("[T]he state has an option that relieves it of the burden of adjusting its program so as to avoid ESA violations—don't regulate in the first place.").

316. *See supra* note 261 and accompanying text.

317. Strahan v. Coxe, 127 F.3d 155, 163–64 (1st Cir. 1997).

owner's illegal intentions and no role in encouraging that behavior.[318] However, Louisiana, like Massachusetts in *Coxe*, has licensed gear in precisely the way that is guaranteed to threaten endangered sea turtles.[319] There is no unpredictable, independent action interposed between the licensing and the illegal act.[320] The licensing of illegal gear is the but-for cause of sea turtle mortality. If the requested remedy—an injunction against licensing illegal gear—were granted, it would redress the injury. Therefore, prospective plaintiffs in the Louisiana case should be able to demonstrate standing.

After establishing standing, to succeed on the merits the prospective plaintiffs would need to show that a take actually occurred and that Louisiana was the cause of that take, according to the traditional notions of proximate cause.[321] Causation on the merits will be similar to the traceability analysis in the standing determination,[322] but may be more difficult to prove. Standing is the constitutional minimum necessary for a case to be justiciable,[323] so an analysis of causation on the merits also must incorporate any particular statutory requirements. In this case, the statute comes with implied requirements of foreseeability and proximate causation.[324]

The fact that sea turtles are being taken by shrimp trawls that do not use TEDs is indisputable,[325] and the harm caused by Louisiana's licensing of illegal shrimp trawling gear is easily foreseeable. The Louisiana law codifying the state's refusal to enforce TED regulations questioned the connection between TEDs and reduced sea turtle mortality,[326] but before that law was passed in 1987, NMFS had found that "[i]ncidental capture and drowning of sea turtles by shrimp

318. *Id.*

319. *Id.* at 164.

320. *See supra* notes 132–37 and accompanying text.

321. *See* Endangered Species Act of 1973 § 9, 16 U.S.C. § 1538(a)(1)(B), (g) (2012) (noting that it is an offense to "take any such species within the United States or the territorial sea of the United States" or to cause the commission of a take).

322. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.").

323. *Id.* at 560.

324. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 700 n.13 (1995).

325. *See supra* Part I.A.

326. *See* LA. REV. STAT. ANN. § 56:57.2(A)(1)(d) (2004) ("TEDs have not been tested in Louisiana inshore waters to determine their effectiveness in excluding turtles or their efficiency in harvesting shrimp.").

trawlers is a significant source of mortality for sea turtles" and estimated that roughly eleven thousand sea turtles were killed by shrimp trawls each year.[327] NMFS addressed shrimpers' concerns during the public comment period for the TED regulations, and provided data to back up its assertions that trawls do catch and kill sea turtles and that TEDs effectively reduce the mortality rate of sea turtles that interact with trawl fisheries.[328] Since that time, numerous studies by NMFS and independent scientists have reinforced these two conclusions.[329] A reasonable person would foresee that failing to enforce TED regulations would lead to a lack of compliance,[330] and increase the number of lethal takes of sea turtles.

Louisiana's licensing of shrimping vessels and gear that do not use TEDs is also a proximate cause of the take of sea turtles. Section 9 explicitly indicates that "to cause [a violation] to be committed" is a violation of the ESA in itself.[331] The ESA does not require that a person be the only actor or even the principal actor to be liable under section 9.[332] As long as the result is foreseeable and not too attenuated from the alleged cause, it satisfies the requirements laid down in *Sweet Home* and inherent in section 9. Here, the state of Louisiana licenses shrimp trawls without TEDs installed, thereby authorizing shrimp trawling that cannot be carried out "without risk of violating the ESA by exacting a taking."[333] In conclusion, the Louisiana example could probably overcome the limitations placed on vicarious liability litigation, but the limitations ensure that the vicarious liability

327. Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. 24,244 (June 29, 1987) (codified at 50 C.F.R pts. 217, 222, 227 (2013)); *see also* T.A. Henwood & W.E. Stuntz, *Analysis of Sea Turtle Captures and Mortalities During Commercial Shrimp Trawling*, 85 FISHERY BULL. 813, 813 (1987) ("Each of these [sea turtle] species are captured by commercial shrimp trawlers, and these incidental captures have been identified as a source of sea turtle mortalities.").

328. Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. at 24,244.

329. *See, e.g.*, Paolo Casale, Luc Laurent & Gregorio De Metrio, *Incidental Capture of Marine Turtles by the Italian Trawl Fishery in the North Adriatic Sea*, 119 BIOLOGICAL CONSERVATION 287, 287–95 (2004); Sheryan P. Epperly, Joanne Braun, Alexander J. Chester, Ford A. Cross, John V. Merriner & Patricia A. Tester, *Winter Distribution of Sea Turtles in the Vicinity of Cape Hatteras and Their Interactions with the Summer Flounder Trawl Fishery*, 56 BULL. MARINE SCI. 547, 547–68 (1995); Sasso & Epperly, *supra* note 59, at 86–88.

330. *See* NAT'L MARINE FISHERIES SERV., *supra* note 3, at 136 ("[C]ompliance remains strongly correlated with the level of enforcement efforts.").

331. Endangered Species Act of 1973 § 9(g), 16 U.S.C. § 1538(g) (2012).

332. *Id. But see* Petersen, *supra* note 202, at 439 ("The term 'person' includes state and local governments, but state and local government liability ensues only when an agent of state or local government is the principal actor in taking protected species.").

333. Strahan v. Coxe, 127 F.3d 155, 164 (1st Cir. 1997).

doctrine is not overly permissive and will not open the door to harassing or frivolous lawsuits.[334]

Finally, vicarious liability is practical because it helps to ensure that states are uniformly complying with federal law. It is not fair for one state to be able to disregard federal laws and gain advantage over all of the states that are in compliance. Assuming that TEDs lead to a loss of profit for shrimp trawlers, Louisiana's shrimp vessel operators have an unfair advantage over those in Alabama, Florida, Mississippi, or North Carolina who do use TEDs. The vicarious liability doctrine could help address this inequality.

Overall, acceptance of the vicarious liability doctrine would protect endangered species without subjecting states to frivolous suits. The fears of unfettered liability are largely unfounded, particularly in the context of a well-defined version of vicarious liability focused on affirmative state actions. Vicarious liability would help fulfill the goal of the ESA by addressing large-scale permitting or authorization policies that cause third parties to commit a large number of takes.

CONCLUSION

The vicarious liability doctrine has faced serious criticism from legal scholars. However, it plays a valuable role in effectuating the objectives of the ESA and the regulations put in place to protect sea turtles. This Note is the first piece of legal scholarship to defend the vicarious liability doctrine as consistent with the text and structure of the ESA and important for furthering the ESA's ultimate goal of protecting endangered species. A limited version of the vicarious liability doctrine, focused on misfeasance, would provide a useful tool for conservationists to prevent large-scale takes without also exposing states to unpredictable liability.

The current state of the shrimp fishery in Louisiana demonstrates how this doctrine implements the ESA's text and purpose. It would be extremely difficult to catch each individual who takes sea turtles as he raises his nets, but it would be both possible and justifiable to hold Louisiana responsible for authorizing these takes. A suit against Louisiana would protect vulnerable sea turtle populations and set an important precedent that states cannot act with complete disrespect for the requirements of the ESA.

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334. *See supra* notes 289–92 and accompanying text.