

Jon Hyman - From Legal Digests to the Merlin App: Becoming a Birder

Around the year 2000, after our sons had finished college and we could leave the home where they had grown up, Elaine and I moved from northern New Jersey to New York City. The move fit with Elaine's work and, for me, was an easy commute to Newark, where I was still teaching at Rutgers Law School. (The Law School was also where our late classmate Nadine Taub was massively reforming the law of women's rights.) I had started to become interested in birds in New Jersey, where they visited the feeders on our back deck. Our New York apartment was only a few blocks from Central Park, a huge green magnet for birds, particularly migrating ones looking for respite after flying over acres of concrete and asphalt. So I started spending mornings in the Park with groups of avid and knowledgeable birders, leading me after a time to the Linnaean Society of New York, and, after retiring from Rutgers, to editing their research journal, *TRANSACTIONS*.

I quickly found birding to be the engrossing activity that others have described. It's refreshing to be out in nature. The birds can be beautiful, and hunting for them can be a challenge. I even keep a modest and partial list of sightings. Finding a previously unseen species is always a thrill.

I've come to think that there's some mental similarity between birding and the legal work I used to do. One of the challenges, and rewards, of litigation was searching for the cases and legal descriptions that would most likely persuade the court or, more frequently, your negotiating opponents. Those old printed Westlaw digests provided a complex, sometimes misleading, and sometimes inconsistent guide to a moving target. That kind of puzzle-solving seems similar to using a Peterson field guide or the Merlin app for birds. Hmm, this bird is warbler size and has a rather drab back, but it's walking on the ground, not hopping. Is it a Connecticut Warbler? Or, that bird's lower bill is yellow, and it has more white on its tail. Is it a Yellow-billed Cuckoo, not a Black-billed one? Or, the next bird has a flatter head and more

distinct streaks on its breast. Is it a Saltmarsh Sparrow, not a Seaside one? I've been told that Merlin's audio identification of a bird call should be treated as a suggestion, not conclusive proof. As with those digests, maybe I should keep looking, or think differently about what's at hand.

I've been happy to put nitpicking legal analysis aside and simply use birding for whatever pleasure comes from this kind of mental exercise. Despite my current choice of birding distinctions over legal ones, however, birding categories and legal categories may inevitably be "birds of a feather." We're now being told that even the concept of species, critical for distinguishing between birds, may be no more than a construct of the human mind, not an independent reality in nature. That's something we already knew about those "objective" legal rules and principles.