

THE LEGAL PROTECTION OF BIRDS

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Is it against the law "to kill a mockingbird"? What about a loquacious catbird? A noisy woodpecker?

Think twice, for the answer, as many people are surprised to learn, is "yes." The reason is that these birds are members of families that are covered by certain international conventions on migratory birds to which the U.S. is a party; and the Migratory Bird Treaty Act, the Federal law which implements these international agreements, makes it a crime to harm the birds. In addition, the birds are "protected wildlife" under New York State law.

The Federal Act, and the related regulations of Department of the Interior, make it generally illegal to kill, pursue, hunt, capture or possess migratory birds, or even to attempt to do so. They also forbid taking their eggs. New York's Environmental Conservation Law prohibits killing—or even "disturbing, harrying or worrying"—any "protected bird," which is defined to include all wild birds except the House Sparrow, Starling, pigeons and psittacine birds (parrots) "existing in a wild state." The net result is that most of our songbirds—including cardinals, robins, wrens, swallows, woodpeckers, tanagers, warblers, chickadees and hummingbirds—as well as most other birds (including shorebirds, raptors and others) are protected by the majesty of Federal and State law.

Violation of the Federal Act is a misdemeanor, carrying the penalty of a \$500 fine, up to six months of imprisonment, or both. Violation of the New York law is likewise a misdemeanor, also punishable by various fines and imprisonment.

Although the States have generally been free to regulate the taking of birds, Federal law arrived at its present state by a difficult road.

In ancient England, the right to hunt birds was viewed as the personal prerogative of the sovereign himself. However, after the granting of the Magna Carta in 1215 and the Charter of the Forest in 1225, the "property" right to wild birds, although still vested in the sovereign, existed for the use and benefit of the people. This principle became the common law of the American colonies, and then of their successors, the States of the United States. Numerous U.S. cases hold that wild creatures are owned by the several States as "trustee" or for the benefit of their citizens. New York law expressly

provides that the State of New York "owns" all wildlife in the State. The State retains "title" (for regulatory purposes) even as to those wild creatures lawfully reduced to possession.

State regulation was generally insufficient, however, to prevent hunting pressure on numerous species of shorebirds and others from seriously threatening their existence. The Federal Government first attempted to protect migratory birds in 1913. The Department of Agriculture Appropriation Act of that year provided that all "migratory game and insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any state or territory, shall hereafter be deemed to be within the custody and protection of the United States," and authorized the Department of Agriculture to prevent their destruction. However, the courts held this law unconstitutional, invoking the old common law that wild birds are owned by the States in their sovereign capacity as representatives of the people, and not by the Federal Government. Therefore Article 4 of the Federal Constitution (enabling Congress to legislate concerning "property belonging to the United States") did not apply and the Federal attempt failed.

The legal situation was altered on December 8, 1916, when a treaty was proclaimed by President Wilson between the United States and Great Britain (which was then in possession of Canada). The treaty recognized that many migratory birds "are of great value as a source of food or in destroying insects which are injurious" and stated that the U.S. and His Majesty the King of England were "desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless." Accordingly, the agreement provided for the establishment by each country of "close seasons" and other forms of protection for most birds, including certain designated ornithological families and also all "perching birds which feed entirely or chiefly on insects." On July 3, 1918, the first version of the Migratory Bird Treaty Act was passed to implement the terms of the treaty. This time the attempt was upheld by the U.S. Supreme Court: declaring that "a national interest of very nearly the first magnitude is involved." Justice Oliver Wendell Holmes held that the law was made in pursuance of a valid treaty, and therefore could be upheld under the Constitution's treaty-making power.

Subsequently a 1936 treaty between the U.S. and Mexico and a

1972 treaty between the U.S. and Japan tightened up birds' legal "rights." Federal law sets the standard: State law may be *more* protective of birds than the Federal law, but is always superseded by Federal law.

The legal prohibitions on harming birds are by no means absolute. As in other areas of law, the exceptions may be as important as the rule.

The principal exception, of course, under both Federal and New York law, is for the hunting of ducks, geese, rails and certain other "game" birds, which is permitted within stated limits and pursuant to appropriate licenses. Certain *methods* of hunting are prohibited, such as hunting from sinkboxes, the use of traps, machine guns or electrically amplified birdcalls, baiting with grain and various other practices. Other exceptions in the Federal regulations generally relate to subsistence hunting (for example, Snowy Owls may be killed in Alaska for food) or to the special destructiveness of a particular species (such as Purple Gallinules damaging rice crops in Louisiana or Scrub Jays damaging nut crops in Oregon or Washington). New York law permits the owner of any crop, or his employee, to kill Red-winged Blackbirds, Common Grackles and cowbirds during the months of June through October if the birds are destroying the crop. There are various other specialized exceptions. A few birds, such as grouse and pheasant, are not covered by the Federal Regulations at all.

Great Horned Owls were removed only in 1974 from the Federal list of birds which could be killed for depredation reasons. Similarly, it became illegal under New York law, effective July 1, 1975, to kill a Great Horned Owl or a hawk, even if thought to be "harassing poultry."

Federal and State permits may be granted to authorize the banding or marking of birds, scientific collection, and certain other limited activities. A serious loophole in current Federal protection is the absence of meaningful control on falconry; Federal law permits the taking of raptors in any State to the extent authorized by that State's law, subject to the limit that no more than three raptors may be taken from the wild per year by any one individual. But State controls on falconry are generally lax. In New York the sport is permitted pursuant to a license, requiring payment of a small fee and the possession of a hunting license or a combination hunting and fishing license. Bald and Golden Eagles and Peregrine Falcons may

not be used; but otherwise the restrictions are few. In view of the nationwide decline in many hawk and owl populations, this loophole should be closed by affirmative legislation.

Miscellaneous laws in addition to what is outlined above contribute to the protection of birds. For example, both Bald and Golden Eagles are protected by the Bald Eagle Protection Act. The Endangered Species Acts, first enacted in 1966, give special protection to some fifty endangered species of U.S. birds, such as the Peregrine Falcon, Whooping Crane, Everglade Kite, Red-cockaded Woodpecker, Brown Pelican and many others less well known. Since the Federal Government has the power to regulate activities taking place on or in proximity to Federal land, certain Federal laws and regulations, such as those relating to the National Wildlife Refuge system, protect birds further, both directly and by protecting their habitat. The Lacey Act, a Federal law first passed in 1900, buttresses State law by prohibiting the transportation in interstate or foreign commerce of wildlife taken in violation of State Law.

New York law permits a person to capture and assist a bird that is "in distress" (*i.e.*, that is apparently unable to survive in the wild and thus requires human assistance); it should be noted, however, that the law requires notification of such capture as soon as possible to a conservation officer by telephone, with written confirmation of the capture to the conservation officer within twenty-four hours after the notification. In addition, the law requires that a veterinarian's certificate be obtained within forty-eight hours after the capture, to the effect that the creature is "in distress."

It is worth noting that under New York's Environmental Conservation Law, the Department of Environmental Conservation has the power, after a public hearing, to grant protection to any wildlife in addition to that already afforded by the law if ten or more New York citizens file with the Department a petition signed by them (giving their addresses) stating the grounds on which such protection is necessary.

Communications on enforcement of the Federal Act should be addressed to the Special Agent in Charge, Fish and Wildlife Service, U.S. Department of the Interior, Hangar 11, Room 1-49, John F. Kennedy Airport, Jamaica, New York 11430 (telephone: (212) 995-8613). A complete list of birds covered in the Federal Act and regulations is set out in Title 50 of the Code of Federal Regulations. Communications with respect to enforcement of the New York Law

should be directed to a regional office of the Department of Environmental Conservation.

There is plenty of room for improving the legal protection of birds. But that does not detract from the importance of the existing rules. As Justice Holmes said while upholding the Migratory Bird Treaty Act against the attacks on Congress' powers in this area, "But for the treaty and the statute, there might soon be no birds for any powers to deal with."

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ABOUT THE AUTHOR

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