Public Access to Private Land for Walking: Environmental and Individual Responsibility as Rationale for Limiting the Right to Exclude

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Public Access to Private Land for Walking: Environmental and Individual Responsibility as Rationale for Limiting the Right to Exclude

HEIDI GOROVITZ ROBERTSON*

ABSTRACT

Whether people have an independent right of access to walk on land they do not own is a question answered differently throughout the world, largely due to cultural, historical, and political variations amongst regions. In this decade, English citizens gained a legislated right to roam on privately owned land designated by the government for public access. The British government now designates land as access land by evaluating the nature of the land itself, not its ownership status. In Sweden, the right to roam on land owned by another has long been a deeply rooted cultural tradition, though not codified in law. Other countries have adopted variations of a right of access, while some, like the United States, continue largely to resist it, choosing instead to hold property owners’ right to exclude above a public right of access. This paper looks at some of the historical and cultural reasons countries have adopted, cherished, or rejected a public right of access to privately owned land. In particular, it focuses on the degree to which each culture values environmental and individual responsibility. To do so, it considers the Scandinavian countries, with an emphasis on Sweden, where a public right of access is longstanding and cherished, and there is a corresponding deep respect for the environment and individual responsibility. It then considers England, which has moved decisively toward granting broader rights of access to certain types of land through legislation, grounding that expansion on the satisfaction of certain rules pertaining to environmental and individual responsibility. It also looks briefly at several countries in Europe,

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where environmental and individual responsibility, as well as other cultural factors, have supported expanded rights of access. Finally, it raises the question why the United States does not have, and will not likely achieve, a similar legislated or cultural right of access to private land for walking.

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### I. INTRODUCTION

English citizens have long had access rights to cross privately owned open spaces via public footpaths that traverse private land. Still they campaigned for

1. Sir Lawrence Chubb, The Rights of Way Act, 1932—Its History and Meaning, THE COMMONS, OPEN SPACES, AND FOOTPATHS PRESERVATION SOCIETY 4 (1938), www.ramblers.co.uk/files/ai/BBE02_COSFPS_1932_Act_text.doc ("It is safe to assume that most paths, especially in rural areas, came into existence to meet local convenience. Before the days of turnpikes most high roads were un repaired and untended; they were often little better than morasses to be avoided as highways by the pedestrians. The villagers therefore trod out alternative tracks or made use of the short cuts of agricultural labourers. Gradually such tracks were taken to by a wider public without question, and their antiquity and utility are often testified to by references in the Court Rolls of a Manor or by the Tithe map or by even earlier maps and records"); see Jerry L. Anderson, Britain’s Right to Room: Redefining the Landowner’s Bundle of Sticks, 19 GEo. INT’L ENVTL. L. REV. 375, 378 (1997) ("Numerous public footpaths crisscross private lands, and both the government and private groups such as the Ramblers Association zealously guard these rights-of-way against encroachment. Under a theory of implied dedication, British courts have consistently recognized the public’s continued enjoyment of common rights to certain private lands historically used by the citizenry"); see also RAMBLERS ASSOCIATION, www.ramblers.org.uk (last
broader access to the many large privately owned open spaces of the English countryside. They sought the right to wander or roam across open land unconstrained by the width of a footpath, even when the land was privately owned. Britain’s parliament responded to this quest by enacting the Countryside and Rights of Way Act (CRoW Act) in 2000. This law eventually granted citizens the right to wander across government-designated privately owned countryside land and created new recreational opportunities for the public similar to those that have long existed in Scotland, Scandinavia, and elsewhere.

The CRoW Act has increased the English public’s access to privately owned open space but in doing so, it has statutorily limited some property owners’ right to exclude non-owners from their land. It has been called “the most significant piece of rural legislation since the Second World War . . . huge tracts of England and Wales are finally opened up to walkers.” In interpreting the CRoW Act, one British judge stated that “the rights conferred by the [Countryside and Rights of Way Act] wrought a sea change in the law’s approach to the rights of members of the public to reasonable enjoyment of the English countryside, even when in private ownership.” The converse must be true as well, that the Act represents a sea change in the law’s approach to the rights of landowners, in particular, to the property owner’s right to exclude. By guaranteeing public access to designated private lands, the law presents a statutory limitation on the landowners’ right to exclude. It limits landowners’ rights to exclude in favor of the public’s positive right to freer access to those lands. Americans might expect those landowners to feel that their rights are already severely limited by the positive rights of others, conferred either by statute or common law, and to rebel against this further reduction in their right to exclude. But the response to this law in England has


2. During the 19th century, many public interest groups formed, in part, to pressure the government to increase access to the countryside. These include: The Commons and Open Spaces Preservation Society (1865), the Cyclists Touring Club (1876), the National Trust (1905), The Camping and Caravan Club (1901), The Ramblers’ Federation (1930) and The Ramblers’ Association (1935). See Nigel Curry, Countryside Recreation, Access and Land Use Planning (2003); see also Nigel Curry & Neil Ravenscroft, Countryside Recreation Provision in England: Exploring a Demand-Led Approach, 18 LAND USE POL’Y 281, 282 (2001), (indicating increasing frustration with lack of access to the countryside followed by steady growth in access over a fifty year period); see also Deborah Pearlman & J.J. Pearlman, Is the Right to Roam Attainable? An Aspiration or a Pragmatic Way Forward?, in RIGHTS OF WAY: POLICY, CULTURE, AND MANAGEMENT 52-53 (Charles Watkins ed., 1996); see also George Kay & Norma Moxham, Paths for Whom? Countryside Access for Recreational Walking, 15 LEISURE STUDIES, 171-83 (1996) (indicating that the 1996 Survey of Public Attitudes to the Countryside shows “a very strong desire for greater opportunities for access to the countryside”); see also Angela Sydenham, Public Rights of Way and Access to Land 221 (3d ed. 2007).

3. See Curry & Ravenscroft, supra note 2, at 284 (indicating that the Countryside Agency (now Natural England) has recognized a more demand-led approach to the countryside recreation provision, rather than the traditional planning-led approach).

4. Countryside and Rights of Way Act, 2000, c. 37 (Eng.).

5. See id.


been mostly positive.  

This newest limitation on property rights affects some landowners in England, though of course, the vast majority of English landowners own small plots of land\(^8\) that do not meet the Act's definition of land that could be designated for public access,\(^9\) and therefore, their rights to their own land are unaffected by the CRoW Act. The CRoW Act thus became effective with extremely limited protest or fanfare.\(^11\) Imagine what the public reaction would be in the United States should the U.S. Congress attempt to pass a similar law. The public response would likely be swift and strong should Congress, or any state legislature, attempt to use its statutory authority to diminish the core property rights of landowners such that non-owners could wander freely across their land. The property right to exclude, a central right of property ownership, would be diminished by statute in favor of increasing the converse right of the public to access. Although we see varying levels of tolerance for public access to private lands throughout the United States, when that access is granted, it is largely voluntary, rather than imposed by statute.\(^12\)

The idea of public access to identified privately owned lands did not cause much of a stir in England, and it has never caused much negative reaction in Sweden, where "all man's right" of access to private land is an accepted, even

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   The UK has sixty million acres of land in total. 70% of the land is owned by 1% of the population. Just 6,000 or so landowners—mostly aristocrats, but also large institutions and the Crown—own about forty million acres, two thirds of the UK. Britain's top twenty landowning families have bought or inherited an area big enough to swallow up the entire counties of Kent, Essex and Bedfordshire, with more to spare. Big landowners measure their holdings by the square mile; the average Briton living in a privately owned property has to exist on 340 square yards. Each home pays $555/year in council tax while each landowning home receives $512,169/year in subsidies. The poor are subsidizing the super rich. In Ireland where land redistribution occurred, there is no council tax. For a building plot, the land now constitutes between half to two-thirds of the cost of a new house. Sixty million people live in twenty-four million "dwellings." These twenty-four million dwellings sit on approximately 4.4 million acres (7.7% of the land). Of the twenty-four million dwellings, 11% are owned by private landlords and 65% are privately owned. Nineteen million are privately owned homes, including gardens, sit on 5.8% of the land. The average dwelling has 2.4 people in it. 77% of the population of sixty million (projected to be more in new census) live on only 5.8% of the land, about 3.5 million acres (total sixty million). Agriculture only accounts for 3% of the economy. Average density of people on one residential acre is twelve to thirteen.

10. See infra notes 234-37 and accompanying text; see also *Countryside and Rights of Way Act, 2000, c. 37* (Eng.).

11. A search of Westlaw’s UK Reuters News database between the years of 1998 and 2000 yielded many stories about the efforts to pass the Countryside and Rights of Way Act of 2000. Stories addressed efforts of local agencies to prepare for compliance, efforts by ramblers groups to expand the scope of the law, and a few stories about Tory efforts to limit it. It showed no major fights or news stories about citizen protests.

celebrated, foundation of Swedish culture.\textsuperscript{13} Sweden's "allemansrätt" allows members of the public to use land owned by another in a responsible and limited manner: to walk there, to camp there, and otherwise to use the land in ways that do not damage the land or interfere with the landowner's use of it.\textsuperscript{14} The right of access is not limited to designated land, but applies to all land, with minimal exception.\textsuperscript{15} Throughout Europe, there are varying degrees of access to land. Some countries support broad public access, while others favor the landowner's right to exclude.\textsuperscript{16} This article will show that in countries with broader rights of access to land, either through a deep cultural respect for the concept of rights of access or through legislation, there are corresponding responsibilities to respect the environment of the land and the privacy and other rights of the landowner.

This article investigates the history of and rationale for liberal access rights in Sweden, and the other Scandinavian countries, and considers some representative countries of Western Europe. It explores the variety of systems these countries present concerning rights of access and suggests that these rights, whether assumed by custom or granted by statute, must be supported by corresponding individual and environmental responsibility, whether legislated or customary. It considers the responsibility-based rules associated with Britain's legislated expansion of access rights as a supporting rationale for expanding the right of access. Finally, it raises the question of legislating public access rights to privately owned land in the United States.

II. PUBLIC RIGHTS OF ACCESS TO PRIVATE LANDS IN SCANDINAVIA

A. SWEDEN: ALLEMANSRÄTT

Perhaps the most interesting example of rights of access, from an American perspective, is Scandinavia's historic and cultural commitment to public access to the countryside for all people. The Swedish "allemansrätt," or "everyman's right," gives anyone in Sweden, whether a local or a tourist, the right to roam almost wherever they would like.\textsuperscript{17} It is an important part of the cultural life in Scandinavia, and exists in slightly varying degrees and forms in Norway.

\textsuperscript{13} Sweden has a traditional policy called "allemansrätten" or "everyman's right" which allows a non-owner of land to pitch a tent for a single night anywhere, provided that doing so doesn't interfere with the land owner's use or enjoyment of the land. For a general description of allemansrätten in Sweden, see The Right of Public Access, NATURVÄRDSVERKET http://www.naturvardsverket.se/en/In-English/Start/Enjoying-nature/The-right-of-public-access/ (last visited Mar. 25, 2011).

\textsuperscript{14} See the Swedish Environmental Code: A Résumé of the Text of the Code and Related Ordinances 20, available at http://www.regeringen.se/content/1/c6/02/05/49/6736cf192.pdf.

\textsuperscript{15} See infra notes 234-37 and accompanying text.

\textsuperscript{16} See infra notes 208-10 and accompanying text.

\textsuperscript{17} STAFFAN WESTERLUND, INTERNATIONAL ENCYCLOPEDIA OF LAWS: ENVIRONMENTAL: SWEDEN 171, 173 (2007).
Sweden, and Finland, and somewhat minimally in Denmark. Allemansrätt gives Swedish residents and tourists significant freedom to use and enjoy land they do not own. Significantly, it also imposes a high degree of responsibility on non-owners for protecting the land and environment that is someone else’s property.


The Swedish Constitution mentions this right of public access, with no elaboration, in a section similar to the U.S. Takings Clause. In Chapter 2, the chapter on Fundamental Rights and Freedoms, Article 18 of the Swedish Constitution states that private property is protected from government expropriation except to satisfy urgent public interests and even when uses of private property are diminished by government restriction, the land owner is entitled to compensation. This Chapter also states that “[a]ccess to the countryside shall be open to all under the right of public access . . . .” The Swedish Constitution does not elaborate on what the “right of public access” means or from where it is derived. Instead, it is mentioned as a given, as something that is understood without further explanation. It seems to mean that while private property is highly respected and protected even against government intervention, except in the most urgent circumstances, the public’s right of access to the countryside is assumed. Private property is not protected against public access. Public access rights remain intact regardless whether private rights and uses are diminished as a result.

Allemansrätt is not regulated by any statute in and of itself. Instead, its

18. Id. at 171-73.
19. Id.
21. See Regeringsformen [RF] [Constitution] 2:18 (Swed.).
22. Id. The relevant language of Chapter 2, Fundamental Rights and Freedoms, Article 18 states:

   The property of every citizen shall be so guaranteed that none may be compelled by expropriation or other such disposition to surrender property to the public institutions or to a private subject, or tolerate restriction by the public institutions of the use of land or buildings, other than where necessary to satisfy pressing public interests.

   A person who is compelled to surrender property by expropriation or other such disposition shall be guaranteed compensation for his loss. Such compensation shall also be guaranteed to a person whose use of land or buildings is restricted by the public institutions in such a manner that ongoing land use in the affected part of the property is substantially impaired, or injury results which is significant in relation to the value of that part of the property. Compensation shall be determined according to principles laid down in law.

   There shall be access for all to the natural environment in accordance with the right of public access, notwithstanding the above provisions.
bounds are understood not only by custom, but also by examining what is regulated and what is omitted from two sections of the Swedish Penal Code and by actions that are permitted or prohibited in the Swedish Environmental Code.

Penal Code Chapter 12, Sections 2 and 4 set forth some limits of allemansrätt by establishing very few exclusions to it. The sections do this without specific reference to the concept of allemansrätt itself. Section 2 of the Swedish Penal Code includes a list of plants that a passerby may not pick or collect. It includes things like trees and grasses. If a plant is not listed as one of the plants prohibited from picking, one may pick it, assuming its collection is not prohibited elsewhere in law, for example, as an endangered flower. When on the land of another, one can collect reasonable amounts of anything not listed as prohibited, such as berries, flowers, and mushrooms.

Section 4 of the Swedish Penal Code sets forth punishments for persons who violate certain spaces within privately owned land. For example, one may not enter cultivated land without the owner’s permission or land that could be damaged by the entry. Importantly, one may not enter the area surrounding a home, which is, by law, a zone of privacy. In Swedish, this area is called the “tomt.” The code does not define “tomt” in terms of a specific distance from a home. Instead, it describes its nature—as the land surrounding the home. Some municipalities have indicated, in regulation or through individual decisions of municipal administrators, what they believe to be the distance surrounding the home that constitutes the “tomt.” A finding of this sort, called a “tomtplatsavg-
nansing," is rare and decisions are generally made on an "ad hoc" basis. Officials are reluctant to issue written decisions or rules on the size of the "tomt" because its size, nature, and location will vary according to the nature of the land and its environs. To an American, it sounds like a "know it when you see it" type of designation.

Although not set by legislation or regulation, the boundaries of the "tomt" are important for a number of reasons. First, the public has a right of access to private land that is not within the "tomt"—because it, and cultivated areas, are the only areas to which the right of public access does not apply. As a result, the landowner may not put up a fence to exclude people from an area larger than the "tomt." In fact, if a landowner does put up a fence too far from the "tomt," thus blocking people from entering land to which they should have access, the Swedish Environmental Code gives local administrators the authority to order the landowner to install a gate or stile so the public can have access to the land within the fenced area. This, of course, is a concept that would rock the foundation of American property law. The government can order you to install a gate in your fence so that non-owners can exercise their right to come onto your property. Because access is specifically prohibited in the zone of privacy around a home, Swedish law presumes that access is permitted elsewhere.

Like the Penal Code, the Environmental Code also protects the concept of allemansrätt without actually addressing it in the particular. For example, in Chapter 7, Protection of Areas, Section 1 says "Any person who exercises the right of access to private land or is in the countryside for any other reason shall treat it with due care and consideration." This is of particular interest because it mentions the right of access, or in Swedish, allemansrätt, but does not reference any definition. In fact, the right of access is not defined in the Environmental Code or anywhere else in Swedish law.

The Swedish Ministry of the Environment publishes a document, in English, entitled "The Swedish Environmental Code: A résumé of the text of the Code and related Ordinances." In this publication, the Ministry explains, in prose, the various sections of the Environmental Code. The explanation of Chapter 7 states explicitly that "the right of access is not defined in the Environmental Code or

35. Id.
36. See id.
37. See BONDE & TELJER, supra note 32, at 13.
38. See MILJÖBALK [MB] [ENVIRONMENTAL CODE] 26:11 (Swed.), available at http://www.sweden.gov.se/sb/d/574/a/22847 ("A supervisory authority may order a person who has fenced in an area that is of interest for outdoor recreation, or an adjacent area, to put up gates or other passages to allow access to an area to which the public has right of access.").
39. See id.
40. See id. at 7:1.
any other statutory provisions." It further states that "the right of access to private land must not be exercised in such a way as to damage the natural environment or cause the owner of a property significant damage or inconvenience. The right applies regardless who owns the land." The résumé then states all of the "rules" that apply to the undefined right of access, but do not actually appear in the Code itself. The résumé indicates that the rules associated with the right of access are provided under customary law.

After stating that the rules derive from customary law, that is, they are not codified anywhere, the résumé sets forth the Ministry of the Environment's interpretation of the rules:

To walk, cycle ride, ski and be in the countryside provided that there is no risk of damage to crops, forest plantings or other sensitive land. This does not include the right to enter or cross a private property.

To pick wild berries, flowers, fungi, fallen branches and dry brushwood lying on the ground;

To put up a tent for a day or two on land that is not used for agriculture and is far from housing of any kind;

To light a fire, if great care is taken and rocks are not damaged;

To use a boat in lakes and streams;

To go ashore, temporarily moor a boat and bathe, except near the grounds of a house or where access is prohibited to a bird or seal sanctuary.

As mentioned above, the Swedish Environmental Code further admonishes that those who exercise the right of access must treat the land with care and consideration. It does not elaborate, however, on what it means to treat the land with care, although there are guidelines published on this subject by many Swedish organizations. There is one court decision from 1996 that sets forth an outer boundary with respect to what it means to fail to treat a neighbors' land with the required level of respect. The case, called "the kayaking case" involves a

42. See id.
43. See id.
44. Id.
45. Id.
46. This last sentence, "This does not include the right to enter or cross a private property," seems to counter the entire intent of the allemansrätt, but I believe it does not. I believe this is a confusion in the translation and that it refers to the fact that allemansrätt does not give a non-owner the right to enter or cross the area near a house, referred to in Swedish as the 'tomt.' The translator is using the words 'private property' in two ways.
47. Id.
48. See MÅLÅRÅN [MB] [ENVIRONMENTAL CODE] 7:1 (Swed.) ("Any person who exercises the right of access to private land or is in the countryside for any other reason shall treat it with due care and consideration.").
49. See, e.g., Allemansrätt, supra note 13 (the Swedish Environmental Protection Agency’s description of the rights and responsibilities of allemansrätt); see also Claim your right to enjoy Sweden's natural wonders, VisitSweden, http://www.visitsweden.com/sweden/ Attractions/Nature-experiences/Public-access (last visited Mar. 27, 2011).
neighbor who ran a large canoe/touring operation, providing boats and walking maps of his neighbor's land. The court did not find that the commercial nature of this operation violated allemansrätt. It did not even find any violation of law for the entry onto another's land. Instead, it found the damage caused by the operation to be in violation of law.

In addition, the concept is touched on elsewhere in the Penal Code, but again, without specific reference to allemansrätt. In Chapter 4, Section 6, the Penal Code sets forth the punishment that shall apply to a person who intrudes into a living space, or who stays too long there. In legislating that there is a penalty for intruding on a living space or staying there too long, the legislation implies that intrusion into the land of another that is not living space is not prohibited. It also implies that it is acceptable to be on someone else's space, but not for too long.

This current state of affairs tracks the legal history as well. According to Italian law professor and public access expert Filippo Valguarnera's research, medieval provincial laws in Sweden set forth a pattern that remains to this day. Professor Valguarnera looked at the 1350 Magnus Erikkson national law for the countryside as well as the 1734 Sveriges Rikes Lag, both concerning the right to exclude non-owners from one's land. He found that, even historically, exclusion was permitted only for very limited and specific reasons. First, one could exclude a third party to protect the economic value of the land, for example, to protect the crops or by reserving certain natural fruits for oneself. The second
legitimate rationale for exclusion was to protect one’s “sphere of privacy,” a concept almost identical to today’s rationale of allowing exclusion from the “tomt.”59 These two historic rationales for exclusion do not include any option for excluding people from areas where they would do no harm and not invade privacy.60 Professor Valguarnera’s insights support the assertion that, even early on, rights of access were connected to individual and environmental responsibility.

It appears that what is now called allemansrätt may have grown out of historical conceptions of rights associated with the law of ownership. It emerged from an empty space, or spaces, in the laws, and may well have had no name before the last century.61 To date, the Riksdag has declined to create a law or set of laws that would regulate the allemansrätt. Many Swedes believe this is due to the fear that regulation would, by definition, restrict the interpretation and practice associated with the concept.62 Some scholars believe that regulation would help define limits and, as such, preserve the concept.63

2. Origins of Allemansrätt

Why does Sweden have this historical tradition of allemansrätt, while other countries, like the United States, are extremely protective of the rights of private landowners over the rights of the public to access? The historic background of allemansrätt is difficult to trace, especially for an American, because the relevant documents are written, unsurprisingly, in Swedish.

According to Professor Valguarnera, the term allemansrätt is relatively new, having first arrived in Swedish literature little more than 100 years ago.64 The first reference was made, perhaps, in a book on water rights by Adolf Åström.65 Following this reference, it appears in the preparatory documents for Sweden’s Water Act of 1918.66 The term appears in a property text book written in 1936 by Östen Undén67 and was used by Court of Appeals Judge Gunnar Carlesjö, who used it to presume confidently the existence in Sweden of the right for the public to enter on private land.68 He used the term and described the main features of the institution.69

59. VALGUARNERA, supra note 55, at 264.
60. Id.
62. See VALGUARNERA, supra note 55, at 266.
63. Id.
64. Id. at 263.
65. Id.
66. Id.
67. In this 1936 Property book, the term appears as “alle mäns rätt.” Id.
68. Valguarnera supra note 55, at 263.
69. Id.
Although allemansrätt is not codified, per se, it is said to be a long-standing tradition in Scandinavia, dating from the time of the Vikings. According to these accounts, its origins lie in the great uninhabited forests around the Nordic villages. In the Middle Ages, Sweden and the other Scandinavian countries were sparsely populated and there were long swaths of forest land between villages. One often could not travel from village to village without stopping overnight on land one did not own. Travelers stayed where they needed to stay and made reasonable use of the provisions that land provided. This theory is supported by Klas Sandell, who suggests that allemansrätt is traceable to the county laws of the Middle Ages. Sandell suggests that aspects of the allemansrätt derive from the pre-industrial tradition of being able to move about the countryside undisturbed, provided one did not disturb or damage the property of the local inhabitants. For example, a traveler could gather firewood or forage for berries or nuts. These were considered “life’s provisions” and no one questioned a traveler’s rights to them. Certainly, though, one could not remove or damage anything of economic value. Of course, in the Middle Ages, these forests generally were not anyone’s property, but were viewed as existing for the common good to which not only the inhabitants in the nearest village merited access. According to these accounts, the tradition included the right to take grass for horses and timber to repair carts or carriages, as regulated in medieval laws. To this day, the general idea of allemansrätt remains similar. Whether allemansrätt is best defined as a relatively new term or as a very old concept remains unclear.

Historically, one characteristic of the Swedish culture that led to allemansrätt is

71. See Kaltenborn, Haaland, & Sandell, supra note 23.
73. See Kaltenborn, Haaland, & Sandell, supra note 23.
74. Id.
75. See Klas Sandell, Access Under Stress: The Right of Public Access Tradition in Sweden, in MULTIPLE DWELLING AND TOURISM: NEGOTIATING PLACE, HOME, AND IDENTITY 278, 279 (McIntyre & Norman eds., 2006); see also Kaltenborn, Haaland, & Sandell, supra note 23, at 419.
76. See Sandell, supra note 75, at 279.
77. See Tisberg, supra note 72; see also Colby, supra note 29, at 254.
78. See Sandell, supra note 75, at 279-80.
79. See Kaltenborn, Haaland, & Sandell, supra note 23.
80. Id.
the comparatively low level of social conflict concerning land ownership.\textsuperscript{81} Certainly, this is true as when compared with the constant rebellions and revolutions taking place in England and France during the feudal period and thereafter.\textsuperscript{82} Perhaps Sweden faced less pressure on the land because of its low population density, which, of course, kept economic pressure low as well. But perhaps there were other factors, such as culture and politics. In particular, unlike France and England, Sweden had no feudal system.\textsuperscript{83} Even when the aristocracy was at the height of its power in the 17\textsuperscript{th} century, it did not own more than 40\% of the land.\textsuperscript{84} The peasants, themselves, owned 40\%, and the Crown owned 20\%.\textsuperscript{85} There was not a lot of pressure on the peasants as a result of withheld access to land, as was seen in other parts of Europe.

Further, peasants were not excluded from political debate and were even represented in Parliament.\textsuperscript{86} When tensions rose, even those concerning class conflict, peasants could use institutional channels to resolve them and did not need to resort to revolt in order to gain change.\textsuperscript{87} Peasants had access to the decision-making system so they were not left feeling so helpless that they needed to revolt to be heard.

Perhaps because Sweden did not have tremendous social tensions surrounding either exclusion from the political system or access to property, strong property rights never became a coveted or critical need, or an issue for intense political debate and controversy. Of course, like other European countries, Sweden had a bourgeoisie, but they did not gain political power until the culture of land use and land rights was well entrenched, and according to Professor Valguarnera, too late to influence the development of the laws concerning property.\textsuperscript{88} This is true to such a large degree that there is not even a definition of property, only some references to the powers of landowners.\textsuperscript{89} In addition, some have suggested that the endurance of allemansrätt is partly due to Scandinavia's Germanic tradition of legislation, which is also responsible for the freedoms and voice accorded to farmers in early Sweden, as opposed to the Roman legislative tradition, which was more elitist.\textsuperscript{90}

\begin{itemize}
\item \textsuperscript{81} See Valguarnera, supra note 55, at 16.
\item \textsuperscript{82} Id.
\item \textsuperscript{83} During the 17\textsuperscript{th} century, there was an attempt by the Swedish aristocracy to instill a modified feudal system in an effort to solidify the social hierarchy, but it largely failed to take root. See Valguarnera, supra note 55, at 263.
\item \textsuperscript{84} Id. at 264.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Id.
\item \textsuperscript{89} See Valguarnera, supra note 55, at 264.
\item \textsuperscript{90} See Sandell, supra note 75, at 280.
\end{itemize}
3. More on the "Rules" of Allemansrätt

Exclusion from land owned by another was not an option at law, except in very limited circumstances, so long as no damage occurred and one did not intrude upon the zone of privacy around a home.91 Swedes tend to see the right of access as an entrenched part of their cultural heritage and view it as almost a national symbol.92 In part because allemansrätt may have grown out of historical ideas and customs (it is sometimes called the "Old Habit"), citizens understood the customs and no precise definition emerged.93 Instead, allemansrätt became a commonly understood concept, interpreted in slightly different ways in different regions.94 For example, in one region, residents might have understood allemansrätt to mean that a traveler may fill her hat with hazelnuts when she is on another's land. In another area, the term might mean that a traveler could fill her mitten, not her hat, with hazelnuts, but only up to the base of the thumb.95 Especially in the countryside, people regularly entered land owned by others to collect berries or mushrooms.96 In the past, these likely were viewed as natural products without commercial value. Although the commercial value of these items certainly has changed, the right to pick them has not. The rationale for setting limits seems connected to the idea of respect for the land and the owner.

It appears to be immaterial, for practical purposes, that the term has remained undefined by law. Swedes do not seem to think of allemansrätt in terms of a definition.97 They think of it as something more holistic, like the air we breathe.98 Although the term has not been defined by statute in Sweden, the Swedish Institute developed a definition to explain the concept to visitors to Sweden. In 1982, the Swedish Institute defined allemansrätt:

The "Right of Common Access" (Allemansrätt) is not fully laid down in written law, but it is a so called consuetudinary law (e.g. time-honored right). The "Right of Common Access" means that everyone has the right to move freely in nature, [this includes] the right of way over another's land and overnight stays provided no damage is inflicted on the owner's property. A person is also entitled to pick berries, flowers and mushrooms anywhere. The waters owned by others may be used for boat rides, bathing and fetching water. But the Right of Common Access does not apply to private grounds, parks, croplands or gardens.99

91. See Bonde & Teljer, supra note 32, at 12-14.
92. Naturvardsverket, supra note 72.
93. See Colby, supra note 29, at 254.
94. Id.
95. See id.
96. See Kaltenborn, Haaland & Sandell, supra note 23, at 418.
97. See Colby, supra note 29, at 254. When asked to define allemansrätt, Olaf Skage, the Dean of Landscape Planning at Sweden's Agricultural University said, "It's the air we breathe!" Id.
98. See id.
99. See id. (citing the Swedish Institute (1982)).
Despite its longevity and the development of some restrictions, questions remain regarding the specific implementation of the allemansrätt. For example, it is not always certain how close non-owners may come to houses. No clear rule exists on this question, but in Sweden it is generally understood, at least in custom, that the privacy area around a dwelling is at least twenty meters. Often Swedes will not put a number to the distance and believe that it requires a "respectful distance." As this is not a hard and fast rule, but rather a custom of respect, acceptable distances will vary according to the landscape and other conditions. Many Swedes will state that the rule is: If you can hear or see other people, you are too close to them. The last sentence of the Swedish Institute’s definition, above, refers to this idea that there are some areas that are out of bounds—which is in English called the “Home Peace Zone”—but in Swedish referred to as the “tomt.” The Swedish Institute definition indicates that the rights of access do not apply to private grounds, parks, croplands, or gardens, which likely includes any area homeowners would reasonably expect to be free from outside intrusion.

One way Swedes describe allemansrätt is “[I]f it’s not forbidden, it’s allowed.” This conforms to the above analysis of Swedish law as well. Although there is no codified list of what is allowed, Swedes can rely on the legislated list of what is forbidden and assume that everything else is allowed. In addition, there are some guidelines, known as the “Golden Rules of Allemsnrått,” developed in 1985 by the Environmental Protection Board (Naturvårdsverket):

100. See id.
102. Interview with Oscar Alarik, supra note 34.
103. See Bonde & Teljé, supra note 32, at 13-14.
104. Interview with Oscar Alarik, supra note 34.
105. See Colby, supra note 29, at 254; see also Valguamara, supra note 55, at 263; Bonde & Teljé, supra note 32, at 13-14.
106. See Colby, supra note 29, at 254; see also Kaltenborn, Haaland, & Sandell, supra note 23, at 420-21 (discussing the free space in law in which allemansrått operates).
108. According to Naturvårdsverket (Sweden’s Environmental Protection Board):

You rely on the Right of Public Access whenever you go out in the Swedish countryside—whether it is to take a walk, go kayaking, climb a mountain or just sit down on a rock to think. The Right of Public Access is a unique institution. It gives us all the freedom to roam the countryside. But we must also take care of nature and wildlife, and we must show consideration for landowners and for other people enjoying the countryside. In other words: Don’t disturb—don’t destroy!

• As a rule, you may move freely over another person's land or water, but not
on his or her house plot, garden or cultivated field. Respect the privacy of the
area surrounding someone's home.
• If you pass through pastureland, don't forget to close the gates.
• You may tent anywhere out-of-doors, but ask permission if you want to tent
near a dwelling, in groups, or for a prolonged time on the same site.
• You may pick wild berries, mushrooms and wild flowers that are not
protected by law. It is forbidden to break twigs, remove birch bark or damage
trees in any way.
• You may swim, temporarily tie up your boat and go ashore—but not on a
house plot or where landings are specifically prohibited.
• You may fish with manual tackle along all coasts and in Sweden's five largest
lakes. In other waters, a fishing license is generally required. Do not interfere
with nets or other fishing gear.
• You may not drive a car, motorcycle or moped where there are no other roads.
Use discretion when choosing a parking place.
• Animal life demands special consideration. Do not disturb nests or young.
Keep your dog under surveillance. Dogs may not run free between 1 May and
20 August.
• It is forbidden to litter. Carry your refuse with you if you fail to find a
litter-disposal site.
• Be careful with fire. Make sure all fires are extinguished. If there is the
slightest danger of a fire spreading, it is prohibited to light one. Never build a
fire on flat rocks; they might split.109

In addition, this right to public access gives people the right to move about in
the woods, on the waters, and in the open landscape.110 Larger groups, whether
tour groups or otherwise must ask for permission to use privately owned lands.111
This is, of course, because their impact on the land and landowner is expected to
be larger than that of an individual or small group.

So, instead of codifying the right itself, or the rules that support the right, what
have emerged are these guidelines that amount to restrictions and limitations on
the traditional rules. The unifying principle surrounding them is that they are
largely grounded in rules of reason or basic respect and personal responsibility.
For example, there is a reason behind the guideline that a person may pass on foot
through forests and across farms but not on cultivated fields or in military areas.
These restrictions make sense because cultivated lands are in use by the land
owner, and so it would be disrespectful to disturb them. It could be dangerous to
travel across military areas. Non-owners may not cross over fences unless there is
a gate that is not locked. This is sensible because if a gate is open, visitors are
welcome. In forests, the public may pick flowers that are not protected species or

110. Id.
111. See BONDE & TELJER, supra note 32, at 35-39.
in protected locations. They may pick or collect berries, mushrooms, and fallen branches, except for those that are protected by law, such as the honored and elusive cloudberries. This also is sensible because species protected by law should be protected from all comers, not only from the landowner. Non-owners may not walk through gardens when the landowner’s house can be seen or when there is a fence (even if a gate is open). This would be too great an intrusion into the landowner’s private space. The public can swim or go boating in lakes and rivers and can take water for their own need from springs, lakes, and rivers. And the public may not interfere with any income-generating use of the land in which the landowner is engaged. Non-owners may camp in a tent on private lands, for one night only, provided the tent is set up in an inconspicuous place not visible to the landowner, and the camper leaves no trace of his or her presence. Campers may not build a fire directly on cliffs or move rocks around because that would be damaging to the environment in the area.

According to some, allemansrätt has flourished because it is part of “the Swedish nature.”[^112] Swedes have been described as “nature loving” and their lifestyle emphasis on outdoor traditions, called “friluftsliv” (free-air life), is a stronghold of the Nordic tradition.[^113] Swedes, and Scandinavians more generally have shown the depth of their commitment to the environment and the outdoors, not only by the very existence of the allemansrätt, but also by the popularity of outdoor activities in their countries.[^114]

So the restrictions, as well as the rights, seem to derive from basic personal responsibility and respect for land and people. If travelers, visitors, and others using land in Sweden do what is right, with respect to land and the people who live there, they will have abided by the restrictions to the right.

4. Future Implications for Allemansrätt

Allemansrätt has, in recent years, faced increased pressure on a number of fronts. Most people in Sweden are fully committed to its principles and will defend it as their national heritage.[^115] That said, it is clear that with increased strain on the land, due to increases in population, immigration, tourism, and commercial use, some Swedes are concerned about their ability to maintain the strongest rights of access while preserving the integrity of the land.[^116] In addition,

[^112]: See Sandell, supra note 75, at 279.
[^113]: Id.
[^114]: See id.
[^115]: Id. at 286 (A 2004 survey of attitudes concerning the current right of access concluded that 1) support for the right of access is very strong, 2) Swedes support considering a clearer statement of the right of public access in legislation and 3) there is some ambivalence regarding the use of the right by tourism businesses. There was little support for the idea of restricting the right to Swedish citizens, or for restricting the rights for non-profit organizations).
[^116]: See id. at 285-87.
whereas traditionally, the allemansrätt has been used for walking, roaming, picnicking, fishing, camping, and other activities that do not damage the land when carried out responsibly, increasingly, more damaging activities have become popular.  

### a. Commercial Exercise of Allemansrätt

Two issues arise concerning the use of the right of public access for commercial purposes. This section will discuss the idea of “induced mass invasions,” that is, circumstances that arise when many visitors enter private property at the same time, usually to engage in an organized event. Next, it will address “spontaneous mass invasions,” for example, when the invasion is not facilitated by an individual or organization.

#### i. Induced Mass Invasions

Although one often envisions the concept of allemansrätt as applying to lone hikers, or pairs of hikers, or to families out walking, it really applies to anyone. This means that organized groups can take advantage of this inherent right of access. For example, a person, or even a company, might organize to hold an event on someone’s land. Although the right applies to individuals, individuals exercising the right at the same time, and thus constituting a group, also seem to fall within the right. A person or company might lead a tour or trip that crosses someone’s land. There are no statutes prohibiting this, as it is generally conceived to be within the boundaries of allemansrätt if it is done in a way that is individually and environmentally responsible. That said, there is a limited opportunity for recourse in the event of damage to the land. Although the landowner is not entitled to any compensation for the occurrence of the invasion itself, even by many people, the landowner can, in extraordinary circumstances, get an injunction to stop the activity and recover costs for harm to the land caused

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117. See Naturvardsverket, supra note 13.
118. See BONDE & TELER, supra note 32, at 35-39; see also WESTERLUND, supra note 17, at 172.
119. See Naturvardsverket, supra note 13 (noting that although the Right of Public Access is an individual right, a Swedish Supreme Court case indicates that it may be used for commercial purposes, and by many people at the same time, except to the extent that such use would cause damage to nature or nuisance to the landowner).
120. By individually, this article refers to personal responsibility and respect for other people, their privacy, and their space.
121. Naturvardsverket, supra note 13; see also VALGUARNERA, supra note 55, at 266.
122. A 1996 ruling of the Supreme Court of Sweden held that a tour operator could use a neighbor’s land for kayaking trips, but not to the extent that such use damaged the land. The Court found no problem with the commercial nature of the use, or with the number of people exercising the right at one time, only with the damage it caused to the land. See Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1996-09-27 p. 495 T3615-95 (Swed.). NJA, or Nytt Juridiskt Arkiv, are cases from Högsta Domstolen, the Supreme Court of Sweden. Note that this case was decided in 1996 when Sweden was operating under the Nature Conservation Law—(NVL). Miljöbalken (MB), the Environmental Code, was enacted 1998, though the outcome would likely be the same.
by the organized activity. Monetary damages are available because harm to the land violates the landowner’s right to have the land free from harm caused by the exercise of the public right of access, by one person or by many. Monetary damages, in these instances, would be recovered from the organizer of the activity.

The one case that exists in Sweden on this issue, discussed briefly in reference to the lack of definition regarding what constitutes treating a landowner’s land with care, was brought by the Federation of Swedish Farmers (Lantbrukarnas Riksförbund). This case, often referred to as “the kayaking case,” dealt with the use of another’s land for commercial purposes. The kayaking case dealt with the running of a kayaking tour business in which the landowner’s neighbor rented out kayaks on his own land and handed out maps of his neighbor’s land, causing large numbers of visitors. The neighbor/organizer had for some years been arranging white-water canoeing trips through a stream that crossed his neighbor’s land. The neighbor/organizer did this without consent from the landowner. The organization grew to 3000 visitors per year, sometimes between 120–150 visitors per day. The activity caused erosion, decline in the fishing, and damage to the sides of the stream and to the local wildlife. The organizer argued that each individual person on the kayaking trips was exercising his allemansrätt, so the core question before the court was the extent of the allemansrätt and whether it could be collectivized. The court ultimately wrote that according to the Swedish constitution everybody is entitled access to the nature, and under the Nature Conservation Act, nature is an asset and should be protected and cared for. The Court’s general conclusion was that as long as the invaded landowner is not harmed in any appreciable way, or violated in his privacy of the home, or an appreciable harm to the environment occurs, then the allemansrätt could be collectivized. That said, the organizer would be responsible for the total effect of his actions, and in this case the damage caused was far more than a landowner and nature could tolerate.

The court ultimately issued an injunction to stop the activity on the invaded landowner’s land. However, the injunction was not grounded on the commercial nature of the activity—that was found acceptable—but rather, it was grounded on the intensity of the invasion and the level of damage caused to the land. The invasion was just too substantial and damaging to fall within the reasonableness

123. See Valguarnera, supra note 55, at 266.
124. Id.
125. Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1996-09-27 p. 495 T3615-95 (Swed.).
126. See id.
127. Regeringsformen [RF] [CONSTITUTION] 2:18 (Swed.).
128. Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1996-09-27 p. 495 T3615-95 (Swed.).
129. See id. My understanding of this case is based on many discussions with Swedish environmental law professors and law students at Uppsala University. It is also informed by an English language description of the case by Sigreced DeGeer (on file with the author).
bounds of allemansrätt. Respect for the land is paramount, and the invaders' failure to act responsibly such that the land was damaged led to the injunction.

ii. Spontaneous Mass Invasions

Another way Swedes find large numbers of visitors on their land is through spontaneous mass invasions. This would occur when, for example, the activity was not planned well in advance, but may result from something that just occurs, such as people coming to watch the arrival of migrating birds, or people coming to the land to pick berries they know are there. It might occur because people become aware that the land is known for its wealth of cloudberrries. In these instances, recovery of costs of damage would be extremely difficult because there is no "responsible party." Each individual person visiting the land is exercising an individual right of access and is likely doing no wrong. Even though a large number of people simultaneously exercising their rights could cause damage, at present, there is no means of recovery or injunction.

iii. Commercial Collecting of Berries and Mushrooms

Swedes collect berries and mushrooms, in season, for their own pleasure and consumption, and for commercial purposes. They have been exercising their access rights under allemansrätt to do this for generations. Virtually no one complains about this when the berry-pickers are individuals, or even small groups. But when corporations send in crowds of hired berry-pickers from overseas (often from Thailand), Swedes begin to balk at the concept of allemansrätt permitting entry onto land for berry-picking. That said, to date, there has been no case prohibiting such action.

b. Outdoor Recreation

The number of people engaging in outdoor recreation has increased in Sweden as the population has grown and as people have had more time for, and interest in, leisure activities. With increased population, there has been greater pressure

130. See Valguarnera, supra note 55, at 266.
131. See Westerlund, supra note 17, at 172.
132. See Valguarnera, supra note 55, at 266.
133. See Kaltenborn, Haaland, & Sandell supra note 23, at 418.
134. Id. at 418-19.
137. See Mortazavi, supra note 135, at 609.
138. See id. at 612; see generally Kaltenborn, Haaland, and Sandell, supra note 23, at 424-25.
on the nearby countryside areas.\textsuperscript{139} As a result, soil and vegetation in popular areas for recreation has suffered degradation.\textsuperscript{140}

In addition, the ways in which people spend time in the countryside have been changing. In the past, the primary activity was experiencing nature in its own right.\textsuperscript{141} But for many people today, the countryside provides areas for mountain-biking, paragliding, white-water rafting and other activities that are growing in popularity.\textsuperscript{142} These changes in the nature of outdoor recreation are placing new demands on the right of public access, which is founded in more traditional ways of enjoying the countryside, like hiking and camping.\textsuperscript{143}

One area of concern is the increased amount, and escalated character, of recreational activities, the result of which leads to elevated risks of degradation and damage to the land.\textsuperscript{144} Landowners must tolerate these increases and escalations by virtue of allemansrätt, but there is growing concern about what these problems will do, not only to the land, but also to the stability of the right itself.\textsuperscript{145} There is a fear that landowners may begin to resist the right of access when visitors no longer abide by the traditional rules that support it.\textsuperscript{146} As more non-Swedes exercise the right of access—for example, tourists and immigrants—who did not grow up with a deep understanding and respect for the rules of individual and environmental responsibility, some fear that support for the right may erode.\textsuperscript{147}

The problem is particularly acute in the case of the organized forms of recreation that are becoming increasingly popular.\textsuperscript{148} However, natural resources clearly do not have to be degraded by recreational activities. It is often possible for recreational uses and other forms of land use, such as forestry or agriculture, to exist side by side in the same area.\textsuperscript{149} Sweden may well struggle in the future with the tensions that are building, largely as a result of the stresses on the land, between unfettered use of the land by non-owners, and their deeply held belief in open access for all.

Sweden's deep cultural respect for the environment, and its entrenched understanding of the importance of respect not only for the land, but also for the individuals who own and visit it, support the country's open policy of public

\textsuperscript{139} See Klas Sandell, The Public Access Dilemma- The Specialization of Landscape and the Challenge of Sustainability in Outdoor Recreation, in Sustainability- The Challenge: People, Power and the Environment 121 (L. Anders Sandberg and Sverker Sorlin, eds. 1998).

\textsuperscript{140} Id.

\textsuperscript{141} See Sandell, supra note 61, at 122-23.

\textsuperscript{142} See Naturvardsverket, supra note 13.

\textsuperscript{143} See Kaltenborn, Haaland, & Sandell, supra note 23, at 426.

\textsuperscript{144} Id.

\textsuperscript{145} See Colby, supra note 29.

\textsuperscript{146} Id. at 259-63.

\textsuperscript{147} Id.

\textsuperscript{148} See infra notes 157-161 and accompanying text.

\textsuperscript{149} See Sandell, supra note 61, at 123-25.
access to private land for recreation. Strong ethics of individual responsibility—respect for people and their privacy—and environmental responsibility—respect for the land itself—support the concept of allemansrätt, and in fact, make it possible and, to date, sustainable.

B. NORWAY

Whereas Sweden's allemansrätt is largely not reflected in written law, Norway has codified allemansrätt in its law on open-air recreation. This law, called the Outdoor Recreation Act in English, passed in the Norwegian parliament in 1957 and was intended to safeguard the public's right of access to the countryside. Prior to this enactment, Norway had a right of public access that was essentially the same as that in Sweden, but Norway chose to codify this right in an attempt to protect both the land and the right itself. Norway's legislation focuses on the difference between the early village commons, for which public access was the norm in the Scandinavian tradition, and the privately owned working fields and meadows that marked more modern society. It defines cultivated land and uncultivated land and sets forth how and when one can pass through each. For example, non-owners can walk through uncultivated land at any time provided that they exercise due care. One is entitled to access, even with cultivated land, when it is frozen or snow-covered in the winter, unless access would harm plants or crops.

151. Id.
152. See Valguarnera, supra note 55, at 266.
153. See Sandell, supra note 75, at 280.
154. See Friluftsloven, No. 16, § 1 a. The relevant portion of Section 1 a states:

What is meant by the terms 'cultivated land' and 'uncultivated land.'

The following are considered to be cultivated land or equivalent to cultivated land for the purpose of this Act: farmyards, plots around houses and cabins, tilled fields, hay meadows, cultivated pasture, young plantations and similar areas where public access would unduly hinder the owner or user. Small uncultivated plots of land lying in tilled land or hay meadows or fenced in together with such areas are also considered to be equivalent to cultivated land. The same applies to areas set aside for industrial or other special purposes where public access would unduly hinder the owner, user or others.

For the purpose of this Act, uncultivated land means land that is not tilled and that is not considered to be equivalent to cultivated land in accordance with the preceding paragraph.

155. Id. § 2 (“Access to and passage through uncultivated land. Any person is entitled to access to and passage through uncultivated land at all times of year, provided that consideration and due care is shown”).
156. Id. § 3. The relevant portion of Section 3 states:

Access to and passage through cultivated land. Any person is entitled to access to and passage through cultivated land when the ground is frozen or snow-covered, but not in the period from 30 April to 14 October. However, this right of access does not apply to farmyards or plots around houses and cabins, fenced gardens or parks or other areas fenced in for special purposes where public access in winter would unduly hinder the owner or user.

The owner or user may, regardless of whether the area is fenced, prohibit passage across gardens,
The Norwegians have legislated some specific rules regarding use of land for picnicking and camping. In particular, they do not allow picnicking and camping overnight on cultivated land without permission. On uncultivated land, however, one can do these activities as long as they do not disturb others or damage the land. Camping, for example, is allowed for no more than two nights without permission of the landowner, except when in areas far from habitation and when damage or inconvenience of the landowner is unlikely. If you are organizing a large event, such as a sporting event or race, there are certain rules that apply.

Although in Sweden it is generally understood that allemansrätt requires environmental and individual responsibility and overall reasonableness of one’s actions, in Norway, the statute is more specific. In particular, the statute spells out that visitors to privately owned land must behave considerately and must exercise due care so as not to damage the land or inconvenience the landowner, or

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young plantations, autumn-sown fields and newly-established meadow even when the ground is frozen or snow-covered, provided that such passage is liable to cause significant damage.

157. *Id.* § 9. The relevant portion of Section 9 states:

Picnicking and camping. It is not permitted to use sites on cultivated land for picnicking, sunbathing, staying overnight or the like without the permission of the owner or user. In uncultivated areas, it is not permitted to use sites for purposes such as mentioned in the preceding paragraph if this unduly hinders or inconveniences others. Picnicking and camping must not take place if this may cause significant damage to young forest or to regenerating forest. A tent must not be pitched so close to an inhabited house (cabin) that it disturbs the occupants, and in any case no closer than 150 metres. However, the rules on the distance from habitation do not apply in an area that has been specifically designated for camping. Camping or another form of stay is not permitted for more than two days at a time without the permission of the owner or user. Permission for a longer stay is nevertheless not required in mountain areas or in areas distant from habitation, unless it must be expected that the stay may cause significant damage or inconvenience.

158. Friluftsloven [Outdoor Recreation Act], No. 16, § 9.
159. *Id.*
160. *Id.*
161. *Id.* § 10. The relevant portion of Section 10 states:

Outdoor meetings, etc. Outdoor meetings, sports arrangements (e.g. skiing or orienteering competitions) and similar arrangements that may entail significant damage or inconvenience may not be held without the consent of the owner or user of the land that is cordoned off, or where competitors assemble or the start or finish of the competition takes place, or other areas where crowds may be expected to gather.

162. *Id.* § 11. The relevant portion of Section 11 states:

Proper conduct and the owner's right to expel persons. Any person who passes through or spends time on another person's property or on the sea off another person's property shall behave considerately and with due care in order not to cause damage or inconvenience for the owner, user or others or damage to the environment. Such persons have a duty to ensure that they do not leave the place in a condition that may be unsightly or lead to damage or inconvenience for any other person. The owner or user of the land has the right to expel persons who act inconsiderately or who by improper conduct cause damage or inconvenience to the property or rightful interests.
other land users.\textsuperscript{163} Visitors have a duty to ensure that they do not leave the land in a condition that may be unsightly or lead to damage or inconvenience for any other person.\textsuperscript{164} If visitors do not comply with these rules of individual and environmental responsibility, the landowner may eject them from the land.\textsuperscript{165} The statute even includes the possibility of recovery of costs for damage incurred by someone misusing land under the right of public access.\textsuperscript{166} Like in Sweden, a landowner may not put up barriers or signs to discourage or block people from exercising their right of public access.\textsuperscript{167} If they do, they can be ordered to remove these things.\textsuperscript{168} So, access is assured for well-behaved, respectful visitors.

In Sweden, damage certainly occurs on properties that are made subject to the traffic of many individuals exercising their individual right of access in an unorganized or spontaneous manner.\textsuperscript{169} There is little recourse there, as no individual is exceeding or abusing the right, and no organizer is misusing it. Under the Norwegian statute, however, the landowner can ask permission of the municipality to close an area, for a limited time, in an effort to protect it.\textsuperscript{170} To ensure that the public continues to have access, the landowner may close the land

\begin{quote}
\textsuperscript{163} Friluftsloven [Outdoor Recreation Act], No. 16, § 11.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id. § 12 ("Compensation for damage or inconvenience. The normal provisions relating to compensation apply to any damage or inconvenience caused by a person during access to or stay on another person’s property.").
\textsuperscript{167} Id. § 13 ("Unjustifiable barriers and unauthorized prohibition signs. The owner or user of land may not by means of barriers or in any other way hinder access that is permitted by this Act, unless this serves his rightful interests and does not unduly hinder public access.").
\textsuperscript{168} Friluftsloven [Outdoor Recreation Act], No. 16, § 13.
\textsuperscript{169} See infra notes 48-53 and accompanying text.
\textsuperscript{170} Friluftsloven [Outdoor Recreation Act], No. 16, § 16. Section 16 states:
\end{quote}

\begin{quote}
Closure of particularly heavily used areas. If a property is particularly heavily used by the public, the municipality may with the consent of the owner or user determine that all or part of the property shall be closed to the public if public access causes significant damage to the property or is a serious obstacle to the use the owner or user makes or wishes to make of the property. Such closure will be determined for a specified period of time, not exceeding five years at a time. The municipality’s decision must be confirmed by the county governor.
\end{quote}
for no more than five years, and only to allow it to recover from the damage of excessive individual use.\textsuperscript{171}

In cases requiring interpretation of the statute, for example, whether specific lands should be considered cultivated or uncultivated, or what distances from a house are acceptable for entry, landowners or land users can ask the municipality to issue a statement of interpretation on the specific matter.\textsuperscript{172} There are also additional appeals processes available,\textsuperscript{173} and applicable agencies have the power to issue regulations.\textsuperscript{174} Fines and other penalties will apply for egregious violations of the law.\textsuperscript{175}

So, like in Sweden, Norwegians depend on certain rules of environmental responsibility and individual responsibility—respect for the land and the landowner. Unlike in Sweden, however, those rules are codified and there is a process for appeal and interpretation.

\textbf{C. FINLAND}

Finland, another Scandinavian country, has a system of rights of access very similar to that of Sweden.\textsuperscript{176} The doctrine, called "jokamiehenoikeus," is the functional equivalent of allemansrätt in Sweden, and means the same thing: "everyman's right."\textsuperscript{177} As in Sweden, the right of public access is deeply cultural

\textsuperscript{171} Id.

\textsuperscript{172} Id. § 20. Section 20 states:

Statement in cases of doubt. In the event that there is doubt or disagreement as to: a) whether a piece of land is to be considered as cultivated or uncultivated pursuant to this Act, or b) what distance there shall be between a site used for picnicking or camping pursuant to section 9 and an inhabited house or whether it must be anticipated that picnicking or camping as pursuant to the third paragraph of section 9 may cause significant damage or nuisance, or whether a barrier or other hindrance, a sign or a notice is lawful (cf. section 13), the owner, user or an outdoor recreation organization with an interest in the matter may request a statement on the matter from the municipality.

\textsuperscript{173} See id. § 22. Section 22 states:

The municipality and the county municipality have the right to act, lodge appeals and if appropriate bring action to safeguard public interests in all matters that are of interest for outdoor recreation. The county governor has the right to act, lodge appeals and if appropriate bring action on behalf of the state to safeguard public interests in all matters that are of interest for outdoor recreation.

\textsuperscript{174} Friluftsloven [Outdoor Recreation Act], No. 16, § 23 ("Regulations. The Ministry may issue further regulations to supplement and implement the Act.").

\textsuperscript{175} Id. § 39 ("Penal measures. Any person who wilfully or negligently contravenes any provisions made in or pursuant to this Act, or who is accessory to such contravention, is liable to fines unless the matter is subject to a more severe penal provision.").


in Finland.\textsuperscript{178} The right is well understood to include the same rules of individual and environmental responsibility as allemansrätt relies upon in Sweden.\textsuperscript{179} In addition, like in Sweden, the concept, though indicated in the Constitution, is defined more by what is not criminalized than by what is specifically allowed.\textsuperscript{180} According to the Finnish Ministry of the Environment, \textquoteright[w]ith the freedom to enjoy the countryside comes the obligation to leave the environment undisturbed and preserve Finland’s rich natural heritage for future generations to enjoy.'\textsuperscript{181} So, Finland, like its Scandinavian neighbors, maintains a right of access that is dependant on individual and environmental responsibility. The right of access may not be used in a way that disturbs the landowner or the land. It may not be used in a way that damages the land.

Similar to landowners in Sweden, Finnish landowners may not, as a general rule, prohibit people from entering their land, nor may they charge a fee for entry.\textsuperscript{182} In Finland, non-owners may cross land they do not own on foot, skis, horseback, or bicycle, but not by motorized vehicle.\textsuperscript{183} They may cross privately owned fields in winter when the fields are frozen or snow covered, even if those fields would be cultivated during the growing season.\textsuperscript{184} Visitors would not be allowed to cross them during the growing season, of course, because this would be disruptive and disrespectful. Visitors may pick berries, twigs and branches, mushrooms, flowers and other naturally growing products, but, like in Sweden and elsewhere, may not take protected species.\textsuperscript{185}

Like in Sweden, non-owners may not enter the area immediately surrounding a home, though also like in Sweden, there is no predetermined limit defining what distances from homes comply with the concept.\textsuperscript{186} It is incumbent upon visitors

\textsuperscript{178.} See The Finnish Ministry of the Envt, supra note 176, at 1.
\textsuperscript{179.} Id.
\textsuperscript{180.} See Council of Europe, supra note 176, at 27.
\textsuperscript{181.} Id. at 1.
\textsuperscript{182.} See id. at 26.
\textsuperscript{183.} See The Finnish Ministry of the Envt, supra note 176, at 12.
\textsuperscript{184.} Id. at 3.
\textsuperscript{186.} Författningssamling [SFS] [Penal Code] 28:11 (Fin.). Chapter 28, Section 11 states:

Whoever without permission 1) takes into their possession, moves or hides any movable property belonging to another person, 2) uses another person's yard or garden as a thoroughfare, or builds, digs or similarly exploits another person's property, or 3) takes into their possession land, buildings or part of a building belonging to another person, shall be sentenced, unless a more severe penalty for the act is provided elsewhere in the law, for criminal trespass to a fine or to imprisonment for at most three months. Actions which only result in minor inconvenience will not, however, be considered to constitute criminal trespass.
to act responsibly and respectfully. In fact, in Finland, it is a punishable offense to enter the area surrounding a home, or to disturb the homeowner.\textsuperscript{187}

Although one cannot build a structure on another's land, one could camp there but only in a manner that does not disturb the landowner.\textsuperscript{188} Reasonable camping could include overnight, or a weekend, though a longer stay would require permission of the landowner.\textsuperscript{189} Although many Finns still believe that making fires is part of the common right,\textsuperscript{190} Finland does not allow visitors to light campfires without the landowner's permission.\textsuperscript{191} This differentiates Finland from Sweden. This is likely due to the safety issues for both people and property surrounding fires and because this is the respectful, responsible way to behave.\textsuperscript{192}

Even dogs must behave. The Finnish concept of "everyman's right" requires that they be kept on a lead unless the landowner gives permission otherwise.\textsuperscript{193} The rationale for this is that dogs can be unhealthy and unhygienic, or unpleasant, and that dog owners must be responsible for them and the feces they leave behind.\textsuperscript{194}

As in Sweden, the Finnish government actively supports and promotes the concept of "everyman's right," in part, by publishing the rules, including those that are not codified. Broadly speaking, they are as follows:

The rights and responsibilities associated with Finland's right of common access apply both to Finnish and foreign visitors to Finland, and include:

"You may

- walk, ski or cycle freely in the countryside, except in gardens and the immediate vicinity of people's homes, and in fields and plantations which could easily be damaged.
- stay or set up camp temporarily in the countryside, a reasonable distance from homes.
- pick wild berries, mushrooms and flowers, as long as they are not protected species.
- fish with a rod and line.
- row, sail, use a motorboat, swim or wash in inland waters and the sea.
- walk, ski, drive a motor vehicle or fish on frozen lakes, rivers and the sea.

You may not

\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} THE FINNISH MINISTRY OF THE ENV'T, supra note 176, at 15.
\textsuperscript{190} THE FINNISH MINISTRY OF THE ENV'T, supra note 176, at 8; see also Council of Europe Report, supra note 176, at 26; The Fire and Rescue Services Act 559/1975 § 102 ("Open fires may not be lit on land owned or occupied by other persons without due permission, except in the case of an emergency.").
\textsuperscript{191} See Council of Europe Report, supra note 176, at 26.
\textsuperscript{192} See THE FINNISH MINISTRY OF THE ENV'T, supra note 176, at 6.
\textsuperscript{193} See id. at 11.
\textsuperscript{194} See id.
disturb people or damage property.
• disturb breeding birds, their nests or young.
• disturb reindeer or game.
• cut down, damage, or break branches off trees on other people’s property.
• collect moss, lichen or fallen trees from other people’s property.
• light open fires on other people’s property, except in an emergency.
• disturb the privacy of people’s homes, by camping too near them, or making too much noise, for example.
• drop or leave litter.
• drive motor vehicles off road without the landowner’s permission.
• fish or hunt without the relevant permits.

Fundamentally, the Finns believe that access issues between landowners and the public can be settled responsibly. According to the Finnish Ministry of the Environment, “[b]oth parties have rights and responsibilities. Consideration for other people is paramount here, and differences of opinion can usually be sorted out through amicable discussion.” 196 So, allemansrätt, in Finland, as in Sweden, and as codified in Norway, is a right supported by responsibility. The right of access is valued by the people and supported by their compliance with norms of individual responsibility and environmental responsibility.

D. ICELAND

Though not geographically adjacent, Iceland is culturally adjacent to the rest of Scandinavia, and its law is related. 197 Icelandic law includes public access both to privately owned and to state owned land. 198 In particular, Chapter III of the Nature Conservation Act states that “the public is entitled to free passage through the country and to dwell there for legitimate purposes.” 199 Notably, the law also includes language that specifically obligates visitors to exercise this right while treating the land with “respect” and with “utmost care to avoid damaging it.” 200 Icelandic law requires persons traveling through the countryside to show “full consideration for landowners” and to respect the landowners’ interests in livestock, cultivation, and other endeavors. 201 Although visitors may travel throughout the countryside, the law encourages visitors to follow marked paths where

195. Id. at 23.
196. See id. at 20.
197. See Rán Tryggvadóttir and Thordis Ingadóttir, Researching Icelandic Law, GLOBALEX (Mar. 2010), http://www.nyulawglobal.org/Globalex/Iceland1.htm (noting that the Icelandic legal system is heavily influenced by the systems in other Nordic countries).
198. The Nature Conservation Act [44/1999] ch. 3, art. 12 (Ice.), available at http://eng.umhverfsraduneyti.is/legislation/art389 (“The public is entitled to free passage through the country and to dwell there for legitimate purpose. Everyone is obliged to treat the natural environment with respect and take the utmost care to avoid damaging it.”); see also, Council of Europe Report, supra note 176, at 29.
200. Id.
201. Id. ch. 3, art. 13.
possible.\textsuperscript{202} Visitors may travel by foot, skis, skates, and non-motorized sleds across uncultivated lands.\textsuperscript{203} Of course, this distinction between cultivated and uncultivated land places Iceland’s law close to that of Norway’s codification.\textsuperscript{204} Cyclists and equestrians must stay on roads and cycle tracks wherever possible,\textsuperscript{205} and motorized vehicles may not be driven off-road, except on snow covered rural land and glaciers.\textsuperscript{206} Drawing a distinction between snow covered roads and non-snow covered roads is similar to distinctions in the Finnish system.\textsuperscript{207}

Unlike access rules elsewhere in Scandinavia—for example, in Sweden and Finland—Icelandic law allows landowners to put up signs to exclude visitors from fenced land.\textsuperscript{208} Visitors are excluded from cultivated lands, or land that is fenced, and must obtain the landowner’s permission to enter those lands.\textsuperscript{209} Like the other Scandinavian countries, Iceland has cultural and statutory norms regarding camping on land owned by others. Visitors may set up tents and camp in uncultivated land without permission, but must obtain permission before camping near a residence or farm, and must not set up more than three tents in a given area.\textsuperscript{210} Landowners must not put up fences that would block a traditional route, but, if a fence is necessary, it must include a gate to provide access.\textsuperscript{211} This rule draws Iceland near to the open-access orientation of the Scandinavian countries, like Sweden and Finland. While on national land and commons, visitors may pick berries, mushrooms and other vegetation, but picking on private land is subject to the permission of the landowner, unless it is for immediate consumption, in which case, it is allowed.\textsuperscript{212}

E. SCANDINAVIA CONCLUSION

Although the Scandinavian countries vary in their method of setting forth the rules that accompany the right of public access, these countries universally support the right. In Sweden, the right is not specifically defined in law, although it is mentioned in the Constitution, and is understood by what is not prohibited by the penal and environmental codes. In Sweden, the right is grounded in a deep
cultural connection to the outdoors. Finland's right of access is essentially the same as that in Sweden. Norway has codified its right of access, and specified in law, rules and norms that are similar to those defined only culturally in Sweden. Iceland lies a bit removed from Sweden/Finland on the one hand, and Norway on the other. In Iceland, the right of access is codified, similar to Norway. The Icelandic right is somewhat more limited than that of its Scandinavian cousins. In Iceland, the landowner has a more explicit right to exclude visitors by fences and posted signs, and Iceland requires visitors to have the landowner's permission before picking berries for anything other than immediate consumption. Still, the unifying theme amongst the Scandinavian countries is that the rights of access they allow are balanced, even supported, by their rules. The rules may be codified or cultural, but the unifying theme is that they demand that visitors treat the land and the landowner with respect.

III. ENGLAND'S EXPANSION OF RIGHTS OF ACCESS TO PRIVATE LAND

In the last decade, England statutorily expanded the public's right of access to privately owned land. Although this expansion was a long time coming, it is a dramatic change from both the statutory and cultural status quo in that country. This section will explore England's path to expanded rights of access, and will compare the new access rights, and the rules supporting them, with those in Scandinavia.

A. THE COUNTRYSIDE AND RIGHTS OF WAY ACT OF 2000

The British Parliament passed the Countryside and Rights of Way Act (CRoW Act) in 2000 to allow people, beginning in October 2005, to walk on designated areas of privately owned open country and registered common land. This section will present a general overview of the CRoW Act and the new rights it granted. This section will discuss the rules of environmental and individual responsibility that support the CRoW Act and will compare those rights and responsibilities to their counterparts in the Scandinavian system.

1. General Overview

The CRoW Act creates a new right to "open air recreation on foot" (which basically means the right to walk) on most land that is mapped as open country—meaning land that is mountain, moor, heath, or down, or registered common land.

213. See supra Part II.A.
214. See supra Part II.C.
215. See supra Part II.B.
216. See supra Part II.D.
217. Countryside and Rights of Way Act, 2000, c. 37 (Eng.).
There are some exceptions, of course, where the new right does not apply, such as on golf courses, land immediately surrounding buildings, and land that is cultivated. With these and other limitations, people may now walk almost anywhere they choose on designated private land and are not restricted to staying on marked footpaths or other rights of way. If the Countryside Agency (now Natural England) deems private land to be "open country," it can designate that land as "access land," thus allowing the public to walk freely across it subject to some local restrictions. The Countryside Agency's access land maps indicate land categorized as open country or registered common land and include lands dedicated for access. The maps are available to the public through local access authorities.

There was likely concern in Britain, during the planning and research stages of this new law, about the liability that might attach to the private landowner when members of the public are injured while walking across their lands. In response to that probable concern, the legislature required that for land designated as "access land," the law of trespass to lands no longer applies as it does to other privately owned lands. Members of the public who enter designated lands are not visitors under traditional liability schemes and landowners are not responsible for their injuries as they might be with respect to private lands not designated as "access land." Normal landowner liability rules still apply for those whom a landowner has invited onto his or her lands. However, for those whom a landowner has not invited, but who are walking on private lands under the new access rights provided by the CRoW Act, the higher duty of care afforded a trespasser does not apply. This exception was part of Parliament's attempt to alleviate landowners' objections to increased access due to their concerns over tort liability. The CRoW Act does not provide for any compensation to landown-
ers for the loss of their right to exclude or any diminution in the value of the land as a result of public access.  

2. Access and Responsibility

The CRoW Act provides the public with permanent access to four million acres of mountain, moor, heath, down, and registered common land in the English countryside. The specific right of access it provides is for "open-air recreation," which generally means walking, but can also include other activities such as "sightseeing, bird watching, picnicking, climbing, and running." Much of the land opened up by the CRoW Act had never before been open to the public.

Just as the CRoW Act protects landowners' liability concerns in tort law, the CRoW Act attempts to protect the privacy concerns of people who live and work on land covered by the new right of access. The Act insists that visiting individuals treat landowners' land and privacy with respect. To preserve the privacy rights of landowners, there are limitations and restrictions on what parts of access lands may be used and in what way. Where the landowner is already using land for some specified purpose, for instance as a garden, park, cultivated land, or land covered by buildings, that land is not included in the right of access and cannot be classified as "open land." Rights of access will not apply to developed land, cultivated land or gardens. Landowners will continue to be able to use and develop their land as they wish because the land remains their own.

To protect the land itself, there is a series of general restrictions that place limits on activities that can be carried out under the new right of access. Activities which impact the land more strongly, like cycling, fishing, horseback riding, camping or driving a vehicle are not permitted under the CRoW Act.

229. See Sydenham, supra note 2, at 235. For a discussion of the legal issues surrounding lack of compensation, see id. at 235-36.
231. Countryside and Rights of Way Act, 2000, c. 37, § 2(1) (Eng.).
233. See Baker, supra note 6, at 28.
234. Countryside and Rights of Way Act, 2000, c. 37, sched. 2 (Eng.).
235. Id.
236. Id. at scheds. 1, 2.
237. Id.
238. Id. at sched. 2.
239. Id.
That said, if a landowner already permits such activities on the land, the CRoW Act will not prevent people from engaging in them. Landowners can require dogs to be kept on a short fixed lead of no more than two meters between 1 March and 31 July, and at any time when in the vicinity of livestock. Landowners also have powers to restrict people with dogs from small enclosures, such as for lambing, and across grouse moors. In addition, landowners will retain the right to close their land or otherwise restrict access for up to twenty-eight days a year for any reason, and they will be able to apply for further closures or restrictions to carry out tasks necessary for fire safety, public safety, or land management. Under the CRoW Act, access rights are managed primarily by the Department of Environment, Food, and Rural Affairs, which intends to do so primarily by voluntary agreement and through local access forums, including both public and landowner representation.

Section 1 of the CRoW Act sets forth the types of lands over which the public has a right of access and how those lands are identified. The section requires the Countryside Agency to create conclusive maps of all open country and registered common land. All land mapped as open country (mountain, moor, heath, down) and registered common land and appearing on the conclusive maps issued by the Countryside Agency is access land under the CRoW Act. In addition, land dedicated as open lands by their landowners becomes access lands under the statute.

240. Countryside and Rights of Way Act, 2000, c. 37, sched. 2 (Eng.).
241. Id.
245. Countryside and Rights of Way Act, 2000, c. 37, § 1 (Eng.) (stating that "access land" is any land that "(a) is shown as open country on a map in conclusive form issued by the appropriate countryside body for the purposes of this Part, (b) is shown on such a map as registered common land, (c) is registered common land in any area outside Inner London for which no such map relating to registered common land has been issued, (d) is situated more than 600 metres above sea level in any area for which no such map relating to open country has been issued, or (e) is dedicated for the purposes of this Part under section 16").
247. Countryside and Rights of Way Act, 2000, c. 37, § 1 (Eng.).
248. Id.
The maps are now available and viewable at the Natural England website, by place name, post code, and various other categories of place identification. By entering a form of place identifier, along with the dates for which access is sought, anyone can get maps of all access areas for that particular place and date. For example, if you wanted to walk on access lands in Oxfordshire because you were going to be in the area tomorrow, you would enter the name Oxfordshire and tomorrow’s date. The website would then provide you with a specific list of maps from which you could choose. You can print the maps and use them to navigate your walk.

The Act includes exclusions for land specifically not to be included in access lands. The excepted lands are those covered by buildings, used as parks or gardens, used for a golf course, racecourse, or aerodrome, and those lands shown on the maps but accessible to the public under certain other pieces of legislation. The lands designated as access lands will be managed by local access authorities that are already responsible for public rights of way. These local access authorities can make by-laws, appoint wardens, and erect notices regarding access land boundaries. They may also negotiate with the owner of the access lands regarding means of access and may undertake the work to ensure access if an agreement cannot be reached with the landowner to provide it. The local access authorities are responsible for making information available concerning access lands in their locales, for example, by making it available on their websites and including links to the maps at Natural England’s website.

Land might be included within the access lands because the landowner or long-term occupier decides to make it so. The CRoW Act allows landowners and those with at least ninety years to run on a lease to dedicate their land voluntarily for public access, regardless of whether the land is shown on the conclusive
map as open country or registered common land.\footnote{Id. § 17.} In such cases, the land will fall within the statutorily protected open land under the CRoW Act and is preserved for public access even when sold to another owner. Lands that become access lands through the dedication process may also include more expanded access rights—that is, to members of the public engaging in activities other than the low-impact walking and birding, and similar activities.\footnote{See Defra Guidance Note, supra note 251.} Access might even extend to horse riders or bikers.\footnote{See Defra Circular, supra note 251, at 2.} The British Government has set up local agencies to oversee the distribution of mapping information to the public and to ensure that access land is accessible.\footnote{See PART 1 OF THE COUNTRYSIDE AND RIGHTS OF WAY ACT 2000—FUNCTIONS OF ACCESS AUTHORITIES, supra note 254; see also Defra Circular, supra note 251, at 3.} These authorities, located near the lands in question, are to exercise the practical management of providing public access to the identified lands, working cooperatively with the owners or occupiers of the lands.\footnote{Defra Circular, supra note 251, at 3.}

The Government has written that greater access to these lands will provide substantially increased opportunities for open air recreation, which will lead to improved health and well being of the citizens, as well as an increased understanding of the countryside.\footnote{See Access to the Countryside and Coast, DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS, http://www2.defra.gov.uk/rural/countryside/access (last visited Mar. 30, 2011).} Greater access should also increase revenues in rural areas as people come to those areas to visit access lands. The local access authorities oversee and encourage these actions and benefits.\footnote{Id.} Local authorities must, according to the statute, make maps available to the public as they become available from Natural England, which is the agency responsible for creating the maps of identified access lands and for distributing them to the local authorities in reduced scale.\footnote{Countryside and Rights of Way Act, 2000, c. 37, § 4 (Eng.); see also Defra Circular, supra note 251, at 4.} This process takes place in both a provisional and conclusive form.\footnote{Id.} The local authorities take the provisional and/or conclusive maps from the Countryside Agency and maintain them for use by the public.\footnote{Id.}

In addition, the local authorities lead the process of providing on-site signage on access lands.\footnote{Id. at 5.} Signage might refer to boundaries of access land, and any restrictions on use or local exclusions.\footnote{Id.} Signs might also be used to put visitors on notice of their rights and responsibilities pertaining to use of the land, and any special rules arising due to the nature of the land, for example, potential hazards
or care due in nature conservation areas.\textsuperscript{269} The local access authorities must work with landowners or occupiers to determine the content and location of signs and may contribute towards the cost of them.\textsuperscript{270}

B. WHAT ARE THE RULES? ENVIRONMENTAL AND INDIVIDUAL RESPONSIBILITY UNDER ENGLAND'S CROW ACT

Similar to the rules or guidelines of environmental and individual responsibility that support public access to private land in Scandinavia, the CROW Act allows members of the public to enter onto designated access land and to remain there for the purpose of "open air recreation," provided they do so in a way that is respectful to the land, to the landowner, and to other users of the land. In particular, visitors must abide by the general restrictions set forth in the Act, and by any other legal restrictions imposed by the land owner or local council.\textsuperscript{271} General restrictions applicable to all designated access land include:

- Driving a motor vehicle
- Bringing an animal other than a dog
- Committing a crime
- Lighting a fire
- Taking, killing, injuring, or disturbing any animal, bird, or fish
- Feeding livestock
- Bathing in non-tidal water
- Hunting
- Removing, damaging or destroying plants, trees, shrubs, roots
- Interfering with a fence or barrier intended to prevent accidents or enclose livestock
- Neglecting to shut a gate or fence
- Affixing an advertisement or notice
- Disturbing others
- Engaging in organized games
- Engaging in activities for commercial purposes\textsuperscript{272}

Additional restrictions apply with respect to dogs.\textsuperscript{273} During the spring and summer months, dogs must be kept on a short lead (not longer than two meters).\textsuperscript{274} They must also be kept on a short lead, any time of year, when in the vicinity of livestock.\textsuperscript{275} They may be excluded from the land by the landowner for specified periods, for reasons such as the lambing season or grouse moor

\begin{itemize}
\item \textsuperscript{269} Id.
\item \textsuperscript{270} Id.
\item \textsuperscript{271} Countryside and Rights of Way Act, 2000, c. 37, § 2(1), sched. 2 (Eng.).
\item \textsuperscript{272} Id. § 1, sched. 2.
\item \textsuperscript{273} Id. sched. 2, § 4.
\item \textsuperscript{274} Id.
\item \textsuperscript{275} Id. § 5.
\end{itemize}
management. 276

The CRoW Act is explicit about the public’s right of access being dependent or conditioned upon following certain restrictions on use. Failure to observe the restrictions turns a citizen with a lawful right of entry into a trespasser and strips the visitor of his right of access to the land for seventy-two hours. 277

These rules, like those that exist through custom and culture in Sweden, and by statute in Norway, provide a supporting rationale for expanding the right of public access by statute in England. As in the other countries, where public access is embedded in the culture, these rules give English landowners some assurance that their privacy will not be infringed upon and their land will not be damaged by the presence of non-owners on their land.

C. ACCESS IN THE REST OF THE BRITISH ISLES

1. Scotland

According to some, the freedom to roam in Scotland was a traditional privilege far longer than it has been a legal right. 278 That traditional privilege included unhindered access to open countryside, public or private, provided that care was taken not to cause damage or interfere with activities including farming and game stalking. 279 The historic, deeply held nature of the privilege to roam in Scotland has existed perhaps for thousands of years. 280 In this, and other ways, it closely resembles the rights that are deeply held in parts of northern Europe, in particular, in Scandinavia. 281 That said, any privilege Scots had to roam on land they did not own existed largely due to custom and de facto access granted by landowner permission. 282 Still, Scots have long felt “free by custom and tradition to use some kinds of land for enjoyment . . . almost as if a right existed.” 283 Despite this feeling, there was no actual right to roam, merely a system of implied consent to access, in the form of revocable and informal licenses. 284 The courts, when faced

276. Id. § 23(1)-(2).
277. Countryside and Rights of Way Act, 2000, c. 37, § 4 (Eng.).
278. Council of Europe Report, supra note 176, at 34.
279. See id.
281. Rights of access in Scotland have been compared mostly with those of Sweden and Finland, as opposed to Norway, because it is based more on customary and common law than it is on statute. That said, Scottish traditional law was modified by statute, then codified, like Norway. This makes Scottish law, quite similar in practice to Sweden and Finland, but less similar to those countries in theory. See Council of Europe Report, supra note 176, at 34.
282. See MARION SHOARD, A RIGHT TO ROAM 9 (1999).
283. See Council of Europe Report, supra note 176, at 34.
284. According to Professor John Lovett, who studied on a Fulbright grant in Scotland, the notion that Scots had some kind of right to roam prior to the Land Reform Act (Scotland) is a myth, and that all the Scots had was
with the question, favored the rights of the landowner. In 1991, the Countryside Committee for Scotland commissioned a Review of Access in the Scottish Countryside to assist in the legislative process. In 1999, the Scottish Executive commented on then-proposed legislation that would “create a right of responsible access to all land in Scotland.” What Scotland created in the Land Reform (Scotland) Act (2003) (Scottish Act) was a newly created right based on the traditional privilege to roam. Unlike in England and Wales, where the CRoW Act created new rights of access, the Scottish Act essentially created rights to replace the longstanding system of implied consent to access. Some describe it as “a de facto resumption of an historic arrangement interrupted by the sheep farming estates of the eighteenth and nineteenth centuries.” In particular, the Scottish Act created a right to be on land for responsible recreational, educational, and certain other purposes, and a right to cross land. Prior to the Act, such actions could be taken only by implied consent of the landowner.

The Scottish Act creates a right of responsible access to land for recreation and passage, subject to certain exclusions. According to Angus MacKay, former Deputy Minister for Justice, “[t]he legislation is about a responsible right of access. It is about codifying what happens currently. It makes it clear to landowners and those who want to walk and have sensible recreation in the countryside what they are fairly allowed to do and what is expected of them.” The new legislation provides a framework of responsible conduct for both those exercising rights of access and for landowners. Guidance regarding what constitutes “responsible conduct” is set forth in the Scottish Outdoor Access Code, which was approved by the Scottish Parliament in 2004.


285. See Council of Europe Report, supra note 176, at 34.

286. See PETER SCOTT PLANNING SERVICES, supra note 108, at 1.

287. See Scottish Parliament Research Paper, supra note 280, at 3. Note that efforts to codify access to the mountains had been proposed and seriously considered as early as 1884 when Scottish MP James Bryce introduced a bill to Parliament. It was derailed by the state of World War II. See Shoard, supra note 282, at 6.


289. See id. at 3.

290. Id. (stating that the legislation is about codifying what happens currently).

291. See Flegg, supra note 70, at 24-25.

292. Id.

293. See Council of Europe Report, supra note 176, at 34.


The Scottish Outdoor Access Code, although it has been approved by Scottish Ministers and the Scottish Parliament, is more like a guidance document than a law. Violation of the code provides evidence of violation of the “responsible access” requirement in the Land Reform Act, but is not, itself, a violation of law. The Scottish Outdoor Access Code suggests that users of land follow a set of principles. First, users should take responsibility for their own actions. This means, for example, that they must be cautious of natural hazards and that parents, teachers, and guides must be responsible for their charges. Second, the code suggests that land users respect people’s privacy by using paths when they exist, and, when not, keeping a respectful distance from people’s homes and gardens, and choosing routes and times of travel that would not surprise or disrupt others. Third, land users should help land managers and others to work safely and effectively. They can accomplish this by closing gates, not feeding animals, and not disrupting on-going operations on farms or in cultivated land. Fourth, land users must care for the environment by, for example, not recklessly or intentionally disturbing plants, animals, or geological features, and not leaving litter behind. Fifth, land users must keep their dogs under control by not letting the dogs disturb other animals or livestock, keeping them out of fields where there are lambs or calves, keeping them controlled in the vicinity of livestock, keeping them on a short leash during bird breeding seasons, especially in areas where many are breeding, and by picking up and removing their feces. Finally, land users must take extra care if organizing an event or business by communicating with land managers and obtaining all necessary permissions.

Like some other countries, Scotland felt the need to create a right rather than rely on an informal system of implied consent and license for several reasons. The law, before the Land Reform Act, was viewed as complex and difficult to interpret. According to Scottish legal scholars, “[i]n reality . . . there is an uneasy balance between the public not having very many clear legal rights and the landowner . . . having few workable remedies against . . . irresponsible behaviour.” More specifically, Scotland’s push to create rights derived in part from a discontent with the nature and extent of those rights at their origin. A public

gov.uk/docs/A309336.pdf.

298. Id. at 2.
299. Id.
300. Id. at 17.
301. Id.
302. Id.
304. Id.
305. Id. at 18–19.
306. Id. at 19.
308. Id.
309. Id.
right of access to land, in particular a right that gives access to the countryside, is sometimes called de jure access. It can arise under common law, for example, as a right of way. It arises as an historic right in some places, such as Scotland’s historic rights to access to the shorelines for recreational purposes. Rights of access can also arise as a right to be in a “public place.” Although what constitutes a public place is not well-defined in law, in Scotland it may include open spaces within towns. Rights of access can arise by agreement between the government and landowners. In Scotland, this arises through the Countryside (Scotland) Act of 1967, which gives local planning agencies permission to create public rights of access in this way. People may also claim a de facto right of access to land; this is a right that arises effectively by implied consent of the landowner. This is a precarious right; however, because by nature, implied consent can be withdrawn. That said, where no other right of access exists in law, de facto access may be accepted as the only option. Access can be created by express permission, often in the form of a formal agreement between landowner and land user, such as in cases of walking groups or fishing clubs. Prescriptive rights can arise out of non-owner use of land, and because they create a legally enforceable interest in the land at issue, are more secure for the user than implied rights.

In Scotland, the de facto rights arise out of the historic tradition of allowing responsible access to the countryside. According to that historic tradition, a person who is on land with the express or implied consent, or even the tolerance, of the owner or occupier of that land is not a trespasser. The problem, according to reports submitted to the Scottish Parliament, was that these cases of implied consent, and the activities covered by it, were unpredictable to both landowner and land user, thus requiring creation of a legal right through legislation.

Interestingly, like in Sweden, these historical, deeply held, implied rights of access, now codified, exist when they are exercised responsibly. Although the

310. Id.
311. See id. at 10.
312. Id.
313. Id.
314. Id.
315. Id.
316. Id.
318. Id.
319. Id.
320. Id.
321. Id.
322. Id. at 11.
324. Id.
right of access is not codified in Sweden, the concept there, that rights of access are inextricably connected to responsible use of the land, is the same in Scotland. Scotland also requires responsible interaction with the environment and with other people using the land.

2. Ireland

Ireland has not moved the way of England, Scotland, and Wales, in terms of legislatively expanding access rights to private land for the public for recreational purposes. In fact, the law in Ireland is quite clear. One may not cross the land of another without permission. In this regard, Ireland's approach to property rights is more like that of the United States than what we now see in England. Most land in Ireland is privately owned farm land, so access to it for walking has become a contentious issue. Like Americans, Irish landowners must feel that their property rights have been compromised if non-owners may walk across their land without permission. In addition, like Americans, they fear that to allow non-owners access would lead to their loss of a right to use—the creation of an easement, or to liability for walkers' injuries suffered on their lands. In fact, even marked paths, called “waymarked ways” in Ireland, if they go across private land, must be with the permission of the landowner. State and municipal land is not generally open for public access, with the exception of parks. If one does traverse private land, it is presumed to be a “permissive path,” which could be revoked at any time by the landowner. This often occurs because it can be difficult to trace the ownership of all parts of a path in order to gain permission. Therefore, permission may be presumed and rights are subject to revocation by the landowner.

Ireland has an active walking community, part of which is almost militant in its efforts to establish greater access to private lands for walking. One group, Keep Ireland Open (KIO), has been pushing the Irish government to use its legislative powers to enact a freedom to roam law. In reaction to the efforts of groups like KIO, the Irish government created Comhairte an Tuaithe, the Countryside Recreation Council, to address access to land issues. This is a representative council and includes representation from many citizen groups and public interest groups, including KIO, as well as representatives from government.

325. See Flegg, supra note 70, at 24.
326. Id.
327. Id.
328. Id.
330. See Flegg, supra note 70, at 24.
331. Id. at 25.
332. Id.
333. Id.
primary goal is to help negotiate issues related to footpaths (waymarked ways) and access to land.\footnote{33\textsuperscript{4}}

Even in areas that are open for public access, there is no common law or statutory right to gather berries, or to camp or stay overnight outdoors.\footnote{33\textsuperscript{5}} Driving motor vehicles on private roads or private land is prohibited unless a right of way has been established or permission of the landowner obtained.\footnote{33\textsuperscript{6}}

IV. THE EUROPEAN CONTINENT

The countries of the European continent present several points of view regarding rights of access. This section explores their policies and seeks to find a pattern that may be partially explained by each country's culture and relationship to the environment. In addition, this section considers the value each country places on individual responsibility and environmental responsibility as it applies to access to the land.

A. DENMARK

Denmark is uniquely situated as both a Scandinavian country and a nation of continental Europe. Centuries ago, Denmark held public access for recreation in a regard similar to that of Sweden, and its citizens still hold access to the countryside and outdoor recreation in high regard.\footnote{33\textsuperscript{7}} In the nineteenth century, however, Denmark substantially reduced public access to privately owned land, drifting towards the policies of its European neighbors and away from those of its Scandinavian cousins. The Danes enacted a statute in 1873 that gave landowners a right to exclude that had not previously existed in Denmark.\footnote{33\textsuperscript{8}} Although landowners still have the right to exclude non-owners, Denmark had, in the twentieth century, taken steps retain and protect limited access to the countryside in keeping with its Scandinavian history and tradition.\footnote{33\textsuperscript{9}}

That Denmark's modern practices are different from Sweden's is not entirely surprising. Despite their common Scandinavian heritage, Denmark is smaller, and as a result, has less countryside land potentially available for public access.\footnote{33\textsuperscript{0}} Most of the land is owned by either a private person or the state.\footnote{33\textsuperscript{1}} Although there is little left in Denmark of the historic allemansrätt, Denmark has codified some rights associated with public access to land. In particular, Den-
mark’s Protection of Nature Act is the main piece of legislation preserving public access to land. 342

Danish legislation enacted in the twentieth century provides for access to public forests and to all beaches. 343 In particular, each piece of land between the low-water mark and twenty meters above the high-water mark is state-owned and, therefore, open to the public. 344 So, because this land is owned by the state, non-landowners may fish and hunt along the coasts without gaining permission from the adjacent landowner. Public access is also available, on a limited basis, in privately owned forests, to roads and gravel paths. 345 The Danish Protection of Nature Act provides access for walking and short visits to uncultivated and unfenced areas and roads in private forests. 346 According to that act, beaches and other coastal land must be open for passage on foot, occupancy for a short period of time, and bathing if there is no residential building within fifty meters. 347 Publicly owned forests are open for passage on foot and bicycle if there is a legal means of access to them. 348 Even in privately owned forests, visitors may travel on paths and established roads from 7 a.m. until sunset, except within 150 meters from residential and other active buildings.

According to Professor K. Højming, who investigated the effect that some changes in Danish law had on improving public access to private land for recreation, progress towards greater access has not been forthcoming in Denmark. 350 Professor Højming’s studies illustrate that what seem like improvements in regulation do not lead to corresponding improvements in access opportunities. 351 In particular, as discussed above, Danish legislation grants public access to “field roads” and to uncultivated areas, if they are unfenced. 352 Højming found, however, that during the later twentieth century, the number of field roads in the study areas had been reduced severely. 353 Højming also found that bogs, meadows, and moors, which are the landscape elements typically

343. Id. §§ 22-23; see also Peter Scott Planning Services, supra note 108, at 84-87.
345. Id. § 23.
346. Countryside and Rights of Way Act, 2000, c. 37 (Eng.).
347. Naturbeskyttelsesloven [Protection of Nature Act] § 22 (Den.); see also Peter Scott Planning Services, supra note 108, at 86.
351. Id.
352. Countryside and Rights of Way Act, 2000, c. 37 (Eng.).
353. See Hejring supra note 350, at 32.
covered by the law, were also substantially reduced in size. 354 As a result, there has been fragmentation of what used to be a dense road grid, thereby reducing the legal access of the public to hike through the countryside and lawfully reach uncultivated areas under the legislation. 355 Denmark holds the rights of private ownership in high esteem and seems overall to limit, rather than expand, the public interest in access to privately owned countryside. 356

In addition to Højming’s work, others also have argued that Denmark’s attempts to codify the remains of allemansrätt has resulted, instead, in decreased access. 357 The current state of affairs in Denmark, with respect to state owned land, is that everyone may walk there and collect berries, mushrooms, or whatever they would like. But one is not allowed to make camps, light fires, take firewood, or engage in other activities that may be viewed as damaging or disruptive. In Denmark, the right to exploit fish and wildlife resources goes with ownership of the land, and the owner may sell these rights to a third person, so these activities are not allowed freely under the limited Danish version of allemansrätt.

Despite Denmark’s Scandinavian background, there is far less public access remaining there today as compared with its Scandinavian brethren. Although Denmark has narrow, legislated access to private land, it is limited to uncultivated land not situated between fences or hedges. Roads and paths in the countryside, as opposed to forests, are open to the public, but, when a road or path to which access should be granted runs over private land, the private landowners may expel a visitor. 358 Even where public access is permissible, visitors may not camp or stay overnight except on public land. 359 So, although rooted in the Nordic tradition, Denmark has limited the public access it had in the past, likely due to the influences of density of development, land cultivation, and population. Denmark is smaller than the other Scandinavian countries and more developed throughout. 360 Still, what little remains of its public access-friendly past is supported by the rules tied to individual and environmental responsibility—no overnight camping, no fires, no access to cultivated land, no entry disrespectfully near to homes and buildings. The Danish government publishes, via its tourism office, an English language list of dos and don’ts in the Danish forests. 361

354. Id.
355. Id. at 37.
356. Id. at 39.
357. See EKNER, supra note 349, at 9.
358. NATURBESKYTLÆSLOVEN [PROTECTION OF NATURE ACT] § 26 (Den.).
360. See id.
To the extent that public access is allowed, rules of respect and responsibility for the environment and landowners do apply. For example, the rule that prevents camping outside of campsites without landowners' permission, although more restrictive than the Swedish rules, strikes a middle ground by both allowing some camping, and providing landowners with a bit more control over their land. Local agencies in Denmark provide information campaigns to teach the public about appropriate behavior in the countryside. For example, one of the primary responsibilities of the Danish Ranger service is to inform people about how to behave in the countryside.

B. SWITZERLAND

Further south in Europe, there is generally less public access than in the north. That said, there may be a discernable pattern through which countries or regions with strong outdoor traditions have found ways to expand rights of access in keeping with those values. For example, in Switzerland, which has a strong tradition of hiking and skiing in the mountains, there are federally codified rules of free access to certain types of lands, including forest and grazing land, much of which is found on mountainsides. In particular, there is a "betretungsrecht" (right of access) mainly over uncultivated land, and there are ancient rights of access to forests and woodlands. However, access may also be restricted if the land is being cultivated. Basically, forest and pasture land is open for general public access, and municipal and state owned land is open for public access. This right is guaranteed in the Swiss civil code (Zivilgesetzbuch) section 699, though several of the cantons have explicit rules for its implementation. Under this code section, landowners may not fence forest land to exclude people from land that should be open but may require permission when access would cause damage or disruption to the land. Where it exists, access includes not only walking, but also picking flowers, gathering mushrooms and berries, and staying overnight and camping outdoors, but not driving motorized vehicles on private

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362. See Peter Scott Planning Services, supra note 108, at 84.
363. Id.
365. See, Council of Europe Report, supra note 176, at 37; see also Sawers, supra note 364.
366. See Countryside and Rights of Way Act, 2000, c. 37 (Eng.).
367. See id.
368. See Council of Europe Report, supra note 176, at 37.
369. See Schweizerisches Zivilgesetzbuch [ZGB], Code civil [CC], Codice civile [CC] [Civil Code] Dec. 10, 1907, SR 210, RS 210, art. 699 (Switz.), available at http://www.admin.ch/ch/e/rs/2/210.en.pdf ("Any person has the right to enter woodlands and meadows and to gather wild berries, fungi and the like to the extent permitted by local custom except where the competent authority enacts specific limited prohibitions in the interests of conservation.").
370. See id.
371. Id.
roads or terrain. Cantons may also restrict access rights in efforts to preserve nature.

Switzerland, an alpine country with few flat areas that are easy to cultivate, has evolved a rigorous way of life suited to its geography. The country’s alpine nature may have contributed to its policies on access to the countryside. In addition, prior to World War II, Switzerland was a mainly rural population, which used the countryside mainly for food production and secondarily for recreation. The alpine way of life, though, even in its food production, was focused on the outdoors, for example, with families taking their cattle to summer pastures and spending several months there themselves. The Swiss later found their mountains an additional source of income through tourism, and have sought to protect them.

The Swiss have a fairly sophisticated system of footpaths (‘nationale wanderrouten’ or National Walking Paths) that includes marked walking routes. These paths make up a system of trails that cross Switzerland and provide access to scenic parts of the country.

Despite the Swiss' connection to the outdoors, they have not enjoyed the same freedom to roam that is seen farther north. The Swiss seem to have a more highly developed sense of private property ownership, and privacy in general. Still the Swiss’ attitude with respect to the country has remained strong. They appreciate the countryside, and have been supportive in protecting it for its own sake, in addition to its monetary advantages.

C. AUSTRIA

Like Switzerland, Austria is located in the Alps. It also has a history of citizens enjoying outdoor activities, such as walking, cycling, skiing, and hiking. Because much of the Austrian population, until the post World War II period, lived in rural areas, the countryside and countryside recreation was integral to their lifestyle. Austria has a traditional, though codified, system of access called “Wegefreiheit” (freedom way) that allows the public to go on foot

373. Id.
374. See PETER SCOTT PLANNING SERVICES, supra note 108, at 51.
375. Id.
376. See id. at 52.
377. See id.
378. See id.
379. See id. at 54.
380. See PETER SCOTT PLANNING SERVICES, supra note 108, at 54.
381. See id. at 53.
382. See id. at 43.
383. See id. at 44.
384. See id.
through forests they do not own, but forbids activities that would damage the land, such as riding horses, cycling, and camping overnight without express permission of the landowner. Like Switzerland, where the federal law on access can be modified by the cantons, Austrian federal law sets a base for access, but these rights vary by “bundesländer,” or state. Again, similar to Switzerland, some bundesländer (states) have made both public and private forests generally open for public access, granting tourists free access to alpine forests and pastures. These rights apply in most forests for general recreational purposes.

Similar to the Scandinavian countries, Austrian landowners have no right to prohibit access to land made accessible by federal law, which means, primarily forests. This is true to such an extent that countryside users sometimes have difficulty ascertaining the areas in which they are not permitted to roam. Also similar is the culture of using common sense and respect for the land and the landowner when exercising rights of access. Like Swedes, Austrians know that they should not cross cultivated fields or damage the land.

The rules for mountain areas differ by state with some of the Austrian states allowing free access to alpine regions for tourist purposes. Other states are more restrictive, giving landowners the right to deny access to their land. In general, visitors must gain permission to enter cultivated land, though some states have special laws granting free access for tourism purposes to the alpine pasture land or other alpine regions. When access is permitted, visitors may gather berries but generally may not pick flowers or camp outside special sites. The landowner’s permission is required for most activities other than walking, such as, for example, setting a campfire, and picking mushrooms in limited quantities. Horseback riding is generally prohibited probably because it is damaging to the landscape.

Certain restrictions do exist with regard to the activities that one can engage in on land that is otherwise open under the Forest Law. Notably, these restrictions

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385. Forstgesetz [Forest Act] 1975, § 33 (Austria); see also Countryside and Rights of Way Act, 2000, c. 37 (Eng.); see Peter Scott Planning Services, supra note 108, at 47.
387. See Council of Europe Report, supra note 176, at 22.
388. Id.
389. Id.
390. See Peter Scott Planning Services, supra note 108, at 44.
391. See id.
392. See id.
393. See Council of Europe Report, supra note 176, at 22.
394. Id.
395. See id.
396. Id.
397. Id.
relate to the rules of individual and environmental responsibility. For example, one may not camp overnight or use vehicles or horses without the permission of the landowner.\textsuperscript{399} Downhill skiing is not permitted except on marked tracks or routes,\textsuperscript{400} probably to protect both the environment and the tourism industry.\textsuperscript{401} Cross country skiing, similarly, may not be done off of marked paths except by permission of the landowner and fruit collection is limited to two kilograms per person.\textsuperscript{402} These restrictions are protective of the environment and the rights of landowners.

D. SLOVAKIA

Slovakia has legislated access to its landscape through its Legal Codes on Nature and Landscape Protection.\textsuperscript{403} Its "access to landscape" provision states that everyone has the right to pass freely through land owned by the state, by villages, or by other persons during recreation.\textsuperscript{404} It further states that when exercising this right, the lawful rights and interests of the landowner must be protected.\textsuperscript{405} Like Sweden and Finland, areas around homes are excepted from public access, as are gardens, backyards, and orchards.\textsuperscript{406} Also like Sweden and Finland, Slovakia allows public access to cultivated fields, provided that the entry does not damage the crops in any way.\textsuperscript{407} Understandably, it does not allow access to pastures when cattle are grazing there.\textsuperscript{408} Like Sweden and elsewhere in Scandinavia, although one may put up fences, the landowner must provide access to land that is not excluded by law. Slovakia, then, has a legislated right to public access, and relies on rules of responsible use of land to protect the land and the rights of the landowner.

E. THE NETHERLANDS

In the Netherlands, there is no discernable cultural right of access to private land, possibly because, like in Denmark, there is a shortage of land.\textsuperscript{409} In addition, the Netherlands has a history of needing to protect land from the encroaching seas.\textsuperscript{410} The Dutch consciously created spaces and opportunities for

\begin{footnotes}
\footnote{399. \textit{Id.; see also Peter Scott Planning Services, supra note 108, at 47.}}
\footnote{400. \textit{See Peter Scott Planning Services, supra note 108, at 47.}}
\footnote{401. \textit{See id.}}
\footnote{402. \textit{See id.}}
\footnote{404. \textit{Id.}}
\footnote{405. \textit{Id.}}
\footnote{406. \textit{Id.; see also Council of Europe Report supra note 176, at 35.}}
\footnote{407. \textit{Slovak Environmental Agency, supra note 403, at 57.}}
\footnote{408. \textit{See Council of Europe Report, supra note 176, at 16.}}
\footnote{409. \textit{See Peter Scott Planning Services, supra note 108, at 61.}}
\footnote{410. \textit{See id.}}
\end{footnotes}
outdoor recreation in the vicinities of major cities, and manage their forests and
other public areas as recreation areas.\footnote{See id. at 62.} That said, private lands are also often
accessible to the public, largely made possible by agreements with or consent of
landowners.\footnote{See Council of Europe Report; supra note 176, at 31.} Access to private land is sometimes arranged on a voluntary basis,
in exchange for grants or tax relief.\footnote{Id.} In some circumstances, landowners may
charge a fee for providing access.\footnote{Id.}

Access to public land is regulated under the Protection of Nature Act, which
regulates access to natural areas.\footnote{See id.} Even in public areas, activities are limited
and described by law.\footnote{Id.} For example, picking flowers and gathering berries are
allowed, but not gathering mushrooms, camping, or driving a motorized vehicle
on terrain.\footnote{Id.}

F. SOUTHERN EUROPE

France, Italy, and Spain have no discernable cultural or legal right of public
access to private land. Like the Netherlands, they do allow private landowners to
charge fees for access. In France, for example, much of the land is privately
owned, and has been for hundreds of years.\footnote{See Peter Scott Planning Services, supra note 108, at 19.} Physical activity for recreation
was not encouraged until more recently, where school children are encouraged to
go on vacations that include outdoor recreation.\footnote{See id. at 19-20.} Prior to feudal times, the
French were allowed to roam over the land, but as in much of Europe, the princes
and lords that came with feudalism took control of their lands and the French
Revolution did little to change it.\footnote{See id. at 20.} The French now ardently defend their right
to private property, and all the rights that go with it, including the right to
exclude.\footnote{See id.} Still, it appears that in the alpine regions of France, access is a bit
more open, especially above the treeline.\footnote{See id.}

Similarly, in Italy, there is virtually no public access to privately owned land,
even when that land is uncultivated and far removed from the landowners’ home
or developed areas.\footnote{See Council of Europe Report, supra note 176, at 16, 36; see also Sawers, supra note 364, at 37.} Rather, Italy fervently protects the rights of the land-
owner.\footnote{See Council of Europe Report, supra note 176, at 30; see also Valguarena, supra note 55, at 251.} Still, even in Italy, land that is not fenced or posted, may be open for
access unless the landowner prohibits it, and the landowner may choose to charge fees for access. For example, Italians regularly cross private land on ski slopes, and the Italian courts have required landowners to permit this passage without compensation, provided no damage is caused. To the extent that access is allowed, it does not come with many of the rights associated with access in other countries. Visitors would not be permitted to pick flowers or collect berries or mushrooms, and they would certainly not be permitted to camp overnight.

Similarly, Spain allows no right of public access, and allows landowners to charge fees in exchange for access to privately owned land for recreation. Interestingly, these countries do not have a strong historical or cultural love of nature, hiking, or the outdoors.

V. CONCLUSIONS

There are several general conceptions of the legal frameworks surrounding rights of access, even within Scandinavia. In one, held by Sweden and Finland, the right of access is deeply rooted in culture, appears in the Constitution and is defined, not by positive laws, but rather by what is not criminalized or otherwise restricted or prohibited in the national laws. So, in Sweden and Finland, the public right of access is the default position. A non-owner can assume that, if visitors are not doing something specifically prohibited by law, access is permitted.

A second Scandinavian conception of the legal framework surrounding rights of access is that of Norway, which has a right that is, in practical effect, quite similar to Sweden and Finland. It is, however, created differently and is quite different, operationally. In Norway, the specific codification of rights of access means that the rights that exist are positively identified and delineated in the code. This means that, unlike in Sweden and Finland, the default position in Norway slightly favors the landowner. Rights of access are not assumed unless prohibited, instead, they are specifically enumerated. This approach, of choosing and specifically enumerating access rights, even if more limited than those in Norway, is more prevalent in much of Europe, and Iceland.

A third conception of public access in not Scandinavian at all. This most restrictive conception is that held by much of Europe, especially Southern Europe, and, of course, the United States. Under this last legal framework, the default position favors the landowner absolutely, allowing only very precisely enumerated opportunities for access. In Italy, in particular, the right of the

425. Id.
426. See Valguarnera, supra note 55, at 251.
427. Id.
428. See, e.g., Council of Europe Report, supra note 176, at 36.
429. See id. at 15.
430. See id.
landowner is always protected by law and areas where free access is permissible are very few, with the exception of public parks, public shore land, and other public land. There, use of public land is almost entirely under the control of the landowner, so the default position supports property rights.

Scandinavia has had various degrees of public access to privately owned land: greater access through custom in Sweden and Finland, and by statute in Norway and Iceland. Some argue that Norway’s right is somewhat more limited than Sweden and Finland due to its codification. There is more limited public access in Denmark, which has drifted towards the ways of its continental neighbors.

Other European countries, such as the alpine countries of Austria and Switzerland, give some protection to the public’s right to roam, with approaches varying according to history and traditions of land use and relationship to the outdoors. There appears to be no completely reliable norm in Europe concerning these issues, however. In fact, Europe seems divided in approach by its legal and cultural history. Nordic countries, with a strong culture and tradition of environmental and individual responsibility, embrace concepts of public access. Alpine countries also have a strong tradition of access to forests and alpine pastures for hiking and outdoor recreation. These countries value access, but have codified rules regarding responsible use of that access in terms of privacy and right of the landowner, and protection of the land and environment. These countries also have a background in the Germanic legislative legal tradition. The countries in Southern Europe, without a strong tradition of mountain hiking or outdoor recreation, seem committed to strong legislative and cultural support of private property rights.

England has been inching towards providing increased public access to privately owned land for recreation for many years and it made a great leap in expanding those rights when it enacted the Countryside and Rights of Way Act of 2000. It was able to increase public access, in part, because it enacted strict and specific rules of behavior for those members of the public using private land. The rules, rooted in individual and environmental responsibility, created a legislative circumstance in England, similar to the cultural circumstance in Sweden, where landowners will know that both they and their land will be respected by visitors. The English will follow the rules of environmental and individual responsibility because they are legislated, whereas in Sweden and elsewhere, visitors will follow the rules because they are engrained in the culture.

Because United States law, in particular, United States property law, is rooted in English law, the question arises as to why the English were able to move toward greater access, which seems diametrically opposed to the direction the United States has taken in generally supporting private property rights over

431. See id. at 30.
432. See Flegg, supra note 70, at 25.
433. Id.
public access. This article takes the first step towards suggesting that the idea of
d public access to private land for recreation is rooted both in the physical nature of
the land—the amount of space and pressure on that space—and the political
culture and history of the region. Scandinavians have played an influential role
wherever they have been. Some of them visited and colonized parts of Britain as
Vikings. Although most Vikings took what they had pillaged and returned to
Scandinavia, many remained behind, bringing their skills and ideas with them.
The Scandinavian ideas regarding rights of access, long held in Scandinavia, may
well have travelled with them and remained at least somewhat with them in
Britain. Perhaps, at least in part, because of this, the idea that the public should
have increased rights to use land owned by others took root in England and
slowly grew to where it is today under the CRoW Act.

The historic legal tradition of a country also appears to predict the level of
modern rights of access it provides. It appears that countries with lesser rights of
access are those whose systems of law derive from the Roman law tradition, such
as Italy. Those with somewhat greater rights of access have systems of law
derived from the Germanic legislative tradition, such as Switzerland and Austria.
Countries with the broadest, or highest, levels of rights of access are the Nordic
countries of Sweden, Finland, Iceland, and Norway, which is only a bit more
limited, though some employ a law of access via custom, and others rely on
legislation. Some countries, even those with Roman law backgrounds, have been
able to expand rights of access by creating a countervailing system of responsibil­
ity and respect for land, and landowner. The countervailing principle seems to
balance the loss of property rights that accompany increased rights of access.

In a later article, I will look into the potential for increasing rights of access for
walking in the United States, perhaps, as I suggest above, by imposing a
balancing factor of explicit rules of environmental and individual responsibility.
These rules, which can be imposed by statute when not already a deeply held part
of culture, can help landowners and the public feel secure in the protection of
their land and privacy and seem to be required for countries to open privately
owned land for recreational use by non-owners.