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Food Law Gone Wild: The Law of Foraging

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FOOD LAW GONE WILD: THE LAW OF FORAGING

Baylen J. Linnekin*

I tend to believe that most laws limiting foraging manifest a conscious or unconscious racial or class bias, although not everyone agrees with me.

—Professor Karl Jacoby¹

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1. E-mail from Karl Jacoby, Professor, Columbia University, to author (Sept. 6, 2017) (on file with author). Professor Jacoby is a professor at Columbia University's Department of History and Center for the Study of Ethnicity and Race and is the author of CRIMES AGAINST NATURE: SQUATTERS, POACHERS, THIEVES, AND THE HIDDEN HISTORY OF AMERICAN CONSERVATION (2003); *see also infra* notes 98, 100–03 and accompanying text.

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INTRODUCTION

Foraging is the act of searching for and harvesting wild foods for sustenance.² Humans began and evolved as hunter-gatherers.³ For nearly all of our species’ history, foraging—the practices of the “gatherer” in “hunter-gatherer”—was a necessary activity that sustained mankind as we spread across the globe. With the rise of agriculture and, much later, commercial food production—particularly in developed countries such as the United States—the necessity of foraging has waned. Today’s humans subsist on a

2. See, e.g., *Forage*, OXFORD DICTIONARY OF ENG. 683 (3d ed. 2010) (defining the verb forage as “search[ing] widely for food or provisions”).

3. See, e.g., Carol R. Ember, *Hunter-Gatherers (Foragers)*, in EXPLAINING HUMAN CULTURE HUMAN RELATIONS AREA FILES 2 (C.R. Ember ed., 2014), <http://hrf.yale.edu/wp-content/uploads/2015/07/M.F.ExplainingHumanCulture-Foragers.pdf> [<https://perma.cc/7VZC-5XLC>] (“[F]or the vast stretch of human history, people lived by foraging for wild plants and animals.”).

startlingly small percentage of the edible plants available to them.⁴ And, save for a dwindling number of societies across the globe, mankind no longer subsists on hunting and gathering alone, or even chiefly.⁵

Yet it would be grossly inaccurate to suggest that foraging as a human practice ever left us. I have eaten blackberries and mushrooms I harvested in state and local parks; rose hips, pawpaws, and blueberries I gathered in national parks; and apples, figs, cherries, pears, and chives I picked while strolling city streets. As a forager, I'm an amateur. True foragers—those who regularly and actively seek out food to gather and eat, and who can recognize a broad variety of wild foods beyond those that resemble typical fruits and vegetables sold in a grocer's produce section—are legion. And those legions are growing, as scholarly and mainstream articles make clear.

Today, though, laws at all levels of government in America increasingly target foragers.⁶ In a few cases, these restrictions are smart policy. But many foraging rules at the federal, state, and local level are wrongheaded and draconian.⁷ In recent years, for example, an elderly Illinois man was fined for picking dandelion greens in a

4. See Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157, 208 n.325 (2000) (noting “that 30,000 plant species are known to have edible parts [but that only] 7,000 of these have [been] grown or collected for food at some point in human history”).

5. In general, research suggests foraging contributes very little to the overall caloric intake of most people in developed countries. See, e.g., Peter Rowley-Conwy & Robert Layton, *Foraging and Farming as Niche Construction: Stable and Unstable Adaptations*, 366 PHIL. TRANSACTIONS ROYAL SOC'Y. B. 849, 853–54 (2011) (“Gathering contributes little or nothing to farming societies It makes a progressively larger contribution to an ever smaller number of societies, so that very few depend on it for most of their livelihood.”). Detailed dietary data rarely take foraging into account, including a recent USDA study on Americans' food-acquisition habits that fails to discuss what, to what extent, or even whether foraging contributes to the American diet. See generally MICHELE VER PLOEG ET AL., U.S. DEP'T OF AGRIC., ECON. INFO. BULLETIN NO. 138, WHERE DO AMERICANS USUALLY SHOP FOR FOOD AND HOW DO THEY TRAVEL TO GET THERE? INITIAL FINDINGS FROM THE NATIONAL HOUSEHOLD FOOD ACQUISITION AND PURCHASE SURVEY (2015), https://www.ers.usda.gov/webdocs/publications/43953/eib138_errata.pdf?v=42636 [<https://perma.cc/V986-XMSH>].

6. See BAYLEN J. LINNEKIN, BITING THE HANDS THAT FEED US: HOW FEWER, SMARTER LAWS WOULD MAKE OUR FOOD SYSTEM MORE SUSTAINABLE 161 (2016).

7. See *infra* Part III. One of the main reasons I chose to write this Article—besides addressing the dearth of scholarship in this area—is that since writing *Biting the Hands that Feed Us* and immersing myself to a greater extent in both the literature and practice of foraging, I have concluded that I am far too deferential in the book to those who have restricted foraging based solely on claims that such restrictions are a necessary prophylactic measure to protect lands and species from overharvesting by foragers.

Chicago-area park. Another forager was fined for picking edible berries in a suburban Washington, D.C. park.

Laws pertaining to foraging reflect the ongoing tension between dueling policy goals. On the one hand, many people wish to protect and defend public and private ecosystems. On the other hand, many people long to spend time in nature and enjoy the fruits of those aforementioned ecosystems. Despite the growing number of regulatory issues pertaining to foraging, legal and other social science scholarship on this issue is virtually nonexistent.⁸ This lack of guidance is particularly problematic because foraging is increasingly popular and because federal, state, and local foraging rules vary wildly, and often conflict.

This Article seeks to address and eradicate this scholarly deficit. Part I provides a narrow definition of foraging, discusses American foraging demographics and the growing popularity of foraging, and describes the benefits of foraging and some potential risks. Part II provides a brief history of foraging traditions in the United States and discusses the factors behind the development of America's anti-foraging laws. Part III provides a detailed look at current federal, state, and local anti-foraging laws in the United States, with a special focus on select state and local rules, regulations at all fifty-nine National Park Service National Park units, and caselaw. Part IV assesses the impacts of foraging rules and proposes foraging rules that cities, states, and the federal government should adopt. The Article concludes that the ancient and valued practice of foraging deserves legal primacy that protects both foragers and the lands upon which they choose to forage.

8. See R.J. McLain et al., U.S. DEP'T OF AGRIC., GEN. TECH. REPORT PNW-GTR-849, GATHERING IN THE CITY: AN ANNOTATED BIBLIOGRAPHY AND REVIEW OF THE LITERATURE ABOUT HUMAN-PLANT INTERACTIONS IN URBAN ECOSYSTEMS 19 (2012) [hereinafter McLain et al., GATHERING IN THE CITY], https://www.fs.fed.us/pnw/pubs/pnw_gtr849.pdf [https://perma.cc/BQE2-DLNH] ("Scholars of contemporary gathering work in a variety of fields including anthropology, geography, sociology, rural sociology, social anthropology, cultural geography, environmental studies, and forestry. Most contemporary gathering research looks at gathering in rural areas; only a handful of studies examine [] gathering in urban or periurban settings."); Rebecca J. McLain et al., *Gathering "Wild" Food in the City: Rethinking the Role of Foraging in Urban Ecosystem Planning and Management*, 19 LOC. ENV'T 220, 221, 225 (2014) (noting that urban foraging "remains largely unexamined in the scholarly literature" and that "[s]tudies of urban foraging in the USA are rare") [hereinafter McLain et al., *Gathering "Wild" Food*]. See generally Charlie M. Shackleton et al., *Urban Foraging: A Ubiquitous Human Practice Overlooked by Urban Planners, Policy, and Research*, 9 SUSTAINABILITY 1884 (2017).

I. FORAGING IN AMERICA TODAY

A. What Is (and Isn't) Foraging?

Foraging is as old as—and has been essential to—human life itself. It is separate and distinct from all other pursuits for necessities. The eminent English jurist William Blackstone referred to foraging as the gathering of the “spontaneous product of the earth[.]”⁹ Other typical definitions of the term, a verb, describe it as the act of seeking or searching for food in the wild.¹⁰ More specifically, foraging is the practice of gathering vegetables, fruits, fungi, herbs, nuts, seaweed, and other edibles where they appear naturally in the wild.

That definition, while accurate, is incomplete. Foraging refers to the harvest of foods which are not cultivated by man but that grow spontaneously in the wild, regardless of whether the “wild” is an urban, suburban, rural, or wilderness area.¹¹ It is therefore distinct from farming and gardening and—both in scope and definition—from agriculture itself. Hence, when as a child I picked and ate crab apples that grew on two cultivated trees in my own suburban backyard, I was not foraging. But wandering by or through one’s own (or another’s) property in search of a wild apple tree or other food source is foraging.¹²

Foragers might harvest edibles from a bush or tree to eat on the spot, such as a handful of blackberries. Or they may harvest foods to cook, dry, smoke, pickle, or otherwise preserve or consume at some point in the future. Picking up foods that have fallen from a tree or bush in the wild—from apples to pawpaws to walnuts—is foraging. Foragers need not, but sometimes do, use some sort of tool or aid to locate or obtain wild foods. Such tools can include a rake, ladder, or a trained pig, in the case of truffles.

While foraging is distinct from agriculture, it also differs fundamentally from hunting, trapping, and fishing. Foraging involves no chase. Hence, gathering snails, mussels, clams, or seaweed is foraging, though snaring a squirrel or spearing a lobster is not.

9. 2 WILLIAM BLACKSTONE, COMMENTARIES *5.

10. *See Foraging*, *supra* note 2, at 683.

11. *See* Molly Watson, *What is Foraging?*, SPRUCE (Nov. 6, 2017), <https://www.thespruce.com/what-is-foraging-2216581> [<https://perma.cc/2ZHY-5RX5>] (“Foraging, at its most basic level, is the act of finding and harvesting wild foods.”).

12. In between these bright lines lie many grey areas. For example, the question of whether one is truly foraging is less certain when a person harvests an apple, say, from a tree growing on another person’s property along an urban street if it is unclear whether that tree is maintained and cultivated for the purpose of providing fruiting apples, rather than, say, for the purpose of providing a yard with shade.

Harvesting roadkill or dead animals in a forest, though outside the scope of this Article, is also foraging. Intentionally driving a vehicle into an animal for the purpose of killing that animal for food, however, is not.

Foraging is also distinct from so-called “dumpster diving.”¹³ Ergo, picking and eating wild foods that grow in an urban convenience store’s parking lot is foraging. Searching through a dumpster in that same urban convenience store’s parking lot and harvesting a discarded corn dog, banana, Slurpee, or bag of Doritos—none of these a “wild food”—is not foraging.

B. Foraging Is a Growing Trend in America

The 1962 novel *Stalking the Wild Asparagus*, written by foraging advocate Euell Gibbons, helped revive interest in the practice of foraging among everyday Americans.¹⁴ That interest has only grown in recent years. By any reasonable measure, foraging is increasingly common in the United States today. In fact, foraging displays several of the hallmarks of a burgeoning modern cultural phenomenon, including growing acceptance by the media, adoption by businesses (here, chefs), and embrace by Internet culture and technological developers.

Today’s mainstream media regularly highlights and discusses foraging.¹⁵ Highbrow publications like *Saveur* and the *New Yorker* have focused on foraging with increasing frequency.¹⁶ Both *Edible*

13. It is worth noting that at least one federal court has discussed laws that prohibit the urban homeless from seeking sustenance through food thrown out by restaurants and grocery stores: dumpster diving. *See Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994) (discussing “the wisdom of criminalizing the conduct of a hungry man trying to feed himself by foraging through abandoned property in hopes of finding food thrown out by a restaurant or grocery store at the end of the day’s business”).

14. *See generally* EUELL GIBBONS, *STALKING THE WILD ASPARAGUS* (1962). *See also* John McPhee, *Profiles: A Forager*, *NEW YORKER* (Apr. 6, 1968), <https://www.newyorker.com/magazine/1968/04/06/a-forager> [<https://perma.cc/MC6M-RJZV>] (“[Gibbons] is not trying to prove anything except that there is a marvellous [sic] variety of good food in the world & only a modest part can be found in markets.”).

15. *See, e.g.*, Addie Broyles, *Texas Pecan Crop Bouncing Back*, *AMERICAN-STATESMAN* (Nov. 7, 2012), <http://www.mystatesman.com/lifestyles/food—cooking/texas-pecan-crop-bouncing-back/VuJDNb9VFuCWvUCw2VqDIL/> [<https://perma.cc/UGZ6-57ZH>] (discussing pecan “hobby foragers” in Texas).

16. *See, e.g.*, Dana Goodyear, *Eat a Free Peach: Mapping ‘Public Fruit’*, *NEW YORKER* (Mar. 12, 2012), <https://www.newyorker.com/culture/culture-desk/eat-a-free-peach-mapping-public-fruit> [<https://perma.cc/ZA9K-RKZG>]; Alex Testere, *A*

Manhattan and the *New York Times* now boast foraging blogs.¹⁷ And national publications have run features on foraging, such as a 2012 *USA Today* piece on the best places to forage in the United States.¹⁸ Foraging has also been in the news recently for other reasons. Last year, an Alabama woman who became lost in the woods allegedly survived for nearly a month on foods she foraged there.¹⁹

Foraging and serving foraged ingredients is also a growing culinary fad.²⁰ Today, some of New York City's top restaurants serve foraged foods.²¹ Several employ "professional foragers" who obtain wild ingredients these restaurants serve to customers.²² Moreover, foraging wild foods for top restaurants has grown into a highly competitive—if not particularly glamorous—industry.²³

Ramp-Hunting Lesson in an Upstate New York Cemetery, SAVEUR (May 10, 2017), <https://www.saveur.com/ramp-foraging> [https://perma.cc/STA4-X2J3].

17. See Lisa W. Foderaro, *Enjoy Park Greenery, City Says, but Not as Salad*, N.Y. TIMES (July 29, 2011), <https://www.nytimes.com/2011/07/30/nyregion/new-york-moves-to-stop-foraging-in-citys-parks.html> [https://nyti.ms/2vK1yoP] ("The magazine Edible Manhattan has an 'Urban Forager' column (as does The New York Times's City Room blog).").

18. See Larry Bleiberg, *10 Great Places to Forage for Food*, USA TODAY (Sept. 19, 2012), <https://www.usatoday.com/story/travel/destinations/2012/09/19/10-great-places-food-forage-fall/1568861/> [http://perma.cc/Z84R-W7GQ].

19. See Josh Magness, *Remember the Woman Lost for a Month in the Woods? Police Think They Know Why—Meth*, SACRAMENTO BEE (Aug. 23, 2017), www.sacbee.com/news/nation-world/national/article168855082.html [https://perma.cc/9X4C-JSHU].

20. See, e.g., Sarah B. Schindler, *Unpermitted Urban Agriculture: Transgressive Actions, Changing Norms and the Local Food Movement*, 82 WIS. L. REV. 369, 382 (2014) ("[C]hefs often embrace the local food movement by foraging local ingredients—from mushrooms to ramps to periwinkles . . .").

21. See Sierra Tishgart, *Into the Wild: 8 New York Restaurants Where You Can Find Truly Foraged Foods*, GRUB STREET (Feb. 20, 2013, 12:35 PM), www.grubstreet.com/2013/02/new-york-restaurants-foraged-food.html [https://perma.cc/N2A5-7E6G].

22. See Melia Robinson, *Top Restaurants Are Going Crazy for These Secret Ingredients Found in the Wild*, BUS. INSIDER (July 14, 2014), www.businessinsider.com/field-to-table-food-movement-and-foraging-2014-6 [https://perma.cc/FMS8-2XXP].

23. See Edna Ishayik, *Inside the Intensely Secretive, Ultracompetitive World of Restaurant Foragers*, GRUB STREET (June 23, 2015, 8:35 AM), www.grubstreet.com/2015/06/secretcy-of-the-foraging-economy.html [https://perma.cc/ZG8R-7HUE] (describing "desperate meth addicts and poverty-stricken Laotian immigrants in the Pacific Northwest . . . who haul pounds of freshly foraged exotic mushrooms to buy-stations in the woods, some people packing guns for protection and never—never—revealing the source of their finds for fear that a competitor will do whatever it takes to gain access").

Finally, websites and mobile apps devoted to foraging are growing in number and popularity. In 2017, one of the world's top chefs, René Redzepi of Denmark's Noma, launched a foraging app, VILD MAP, which helps teach people how to forage.²⁴ Searchable websites like Falling Fruit map public and private sites in cities across the country and world where fruits, vegetables, nuts, and other food may be available for the picking.²⁵ Falling Fruit lists more than 150 fruit trees in the heart of Seattle's Wallingford neighborhood (where the author of this Article lives)²⁶ and dozens of fruit-bearing trees near Fordham University Law School.²⁷ And for those who wish to be educated about foraging using more traditional means, foraging classes are also increasingly common.²⁸

C. Who Forages in America?

Studies have found that foraging appeals broadly to the American public, across geographic, ethnic, racial, economic, and age demographics.²⁹ Government reports also indicate urban foraging in particular is on the uptick nationwide.³⁰

Despite reports indicating general increases in foraging, detailed national data are difficult to collect. These difficulties force researchers to rely on a combination of regionally and locally gathered data and unscientific polls. For example, one study found that "18% of residents in Massachusetts, Maine, New Hampshire, and Vermont forage regularly . . ."³¹ A randomized poll of residents in Northern Wisconsin found that nearly one in three foraged for food

24. See Mahita Gajanan, *Chef René Redzepi Wants You to Forage for Your Own Food*, TIME (June 28, 2017), www.time.com/4836748/forage-food-app-chef/ [<https://perma.cc/6879-ENTR>].

25. See FALLING FRUIT, <https://fallingfruit.org> [<https://perma.cc/DVB2-8BVE>].

26. See *id.*

27. See *id.*

28. See Marissa Harshman, *Class Teaches Do's and Don'ts of Eating Weeds*, COLUMBIAN HEALTH REP. (July 1, 2017), www.columbian.com/news/2017/jul/01/class-teaches-dos-and-donts-of-eating-weeds/ [<https://perma.cc/KT63-HFXL>] (discussing a recent foraging class in a Portland, Oregon suburb that drew more than three dozen eager participants).

29. See McLAIN ET AL., GATHERING IN THE CITY, *supra* note 8, at 1 ("[U]rban gathering is a geographically widespread practice in the contemporary United States [that appeals to] individuals of diverse ethnic and racial backgrounds, age groups, and income levels[.]").

30. See *id.* at Abstract ("The past decade has seen resurgence in interest in gathering wild plants and fungi in cities.").

31. McLain et al., *Gathering "Wild" Food*, *supra* note 8, at 227.

at some point.³² An unscientific Internet poll by PopSugar, a women's lifestyle website, found that more than half of respondents have foraged.³³

Data on the demographic characteristics of American foragers are much richer. Foragers tend to reflect the diversity of the American public.³⁴ In New York City, they tend to hail from a variety of disparate camps, including "downtown hipsters, recent immigrants, vegans[,] and people who do not believe in paying for food."³⁵

Data also show that cultural or ethnic background plays a role in determining what foods foragers seek out and select.³⁶ Simply put, what is foraged often depends on who is foraging.³⁷ Foragers in large,

32. See NORTHLAND COLL., CTR. FOR RURAL CMTYS., NORTHERN WISCONSIN LOCAL FOODS PUBLIC OPINION POLL FACT SHEET 2 (2017), <https://www.northland.edu/wp-content/uploads/2015/09/PublicOpinionPollLOCALFOODS.pdf> [https://perma.cc/5UZL-EGCL] (finding that 31.2% of area residents forage from forests in the region).

33. See *Have You Ever Foraged for Food?*, POPSUGAR (May 10, 2010), <https://www.popsugar.com/food/Have-You-Ever-Foraged-Food-8373745> [https://perma.cc/B7NZ-J6MQ] (finding that 51% of respondents have foraged at some point).

34. See McLain et al., *Gathering "Wild" Food*, *supra* note 8, at 227 (noting that limited studies of foragers find they "cross social identity boundaries, such as age, gender, and class").

35. Foderaro, *supra* note 17. While foraging may indeed appeal to hipsters, it should be noted that for many people, foraging is necessarily entangled with tragic and dire personal experiences with poverty and starvation. The severe drought that occurred during the Dust Bowl era of the 1930s, for example, forced many Americans to forage in order to survive. See TIMOTHY EGAN, *THE WORST HARD TIME* 101 (2006) ("American families were reduced to eating dandelions and foraging for blackberries in Arkansas, where the drought was going on two years."). The Great Depression (with which the Dust Bowl coincided in parts of the United States) and World War II were also periods that Americans were forced to rely on foraged starvation foods. See Rachel Belle, *Learn to Eat Weeds and Snails with Seattle's 'Front Yard Forager'*, MYNORTHWEST.COM (Aug. 22, 2013), www.mynorthwest.com/81749/learn-to-eat-weeds-and-snails-with-seattles-front-yard-forager/ [https://perma.cc/5LA2-AR43] (identifying these periods during which foraging was particularly popular). Recent news reports indicate many North Koreans, struggling to eat due to a family of maniacal despots that has ruled the country with an iron fist for generations, rely on foraging for subsistence purposes alone. See, e.g., *Starving North Koreans Forced to Survive on Diet of Grass and Tree Bark*, AMNESTY INT'L (July 15, 2010), <https://www.amnesty.org/en/latest/news/2010/07/starving-north-koreans-forced-survive-diet-grass-and-tree-bark/> [https://perma.cc/YG86-22A2].

36. See McLain et al., *Gathering "Wild" Food*, *supra* note 8, at 229 ("In some cases, foragers' ethnicity and/or place of origin appear to condition which products are foraged."); Foderaro, *supra* note 17 (noting that foraging choices "depend[] on the ethnic makeup of the surrounding neighborhood").

37. See Foderaro, *supra* note 17 ("Just what gets taken can vary from park to park, often depending on the ethnic makeup of the surrounding neighborhood 'There are groups going around and collecting things that they recognize from their

diverse urban environments, such as New York City, are known to target a variety of wild foods.³⁸ Some foraged foods are more popular across a variety of demographic groups than are others. Mushroom harvesting, for example, is a particularly popular type of foraging.³⁹ Other foods appeal to particular demographic groups. In Seattle, the city's large Southeast Asian community seeks out chestnuts every fall.⁴⁰

While virtually every mainstream media, legal, and social-science portrayal of foraging today focuses on its urban practitioners, as opposed to rural or wilderness populations, foraging in the latter environs is likely far more common on a per-capita basis than it is in cities and suburbs. Indeed, foraging in rural and wilderness areas is common. Scandinavian immigrants to the United States brought their own foraging traditions when they settled in Midwest communities, such as Michigan's Upper Peninsula, where foraging is popular.⁴¹ Native American populations continue their age-old foraging traditions. In Alaska, home to large Native American populations, harvesting is the norm, particularly in the majority of the state that consists of rural and wilderness areas.⁴²

Some people simply forage wherever wild foods lurk:

[Iso] Rabins forages in plenty of idyllic spots. He told me he dives for abalone and spearfishes in Sonoma. He gathers morel mushrooms in the same Sierra Nevada mountains where [journalist and professor Michael] Pollan foraged for chanterelles. Rabins

home countries The Chinese gather ginkgo, and I've talked to Koreans who are gathering white wood aster."') (internal citation omitted).

38. See *id.* (listing mushrooms, ginger, and elderberries).

39. See ELIZABETH S. BARRON & MARLA R. EMERY, DEP'T OF THE INTERIOR, NAT. RES. TECH. REPORT 2009/002, PROTECTING RESOURCES: ASSESSING HARVESTING OF WILD MOREL MUSHROOMS IN TWO NATIONAL CAPITAL REGION PARKS (2009), https://www.nrs.fs.fed.us/pubs/jrnl/2009/nrs_2009_barron_001.pdf [<https://perma.cc/4R2D-4A3L>] ("Thousands of people throughout the United States hunt for wild mushrooms and other [non-timber forest products ("NTFP")] U.S. Forest Service records show that approximately 770,000 pounds were harvested each year from national forests just in Oregon and Washington in 2004 and 2005.").

40. See Joshua McNichols, *Urban Food Foraging Goes Mainstream in Seattle*, KUOW (Aug. 1, 2013), www.kuow.org/post/urban-food-foraging-goes-mainstream-seattle [<https://perma.cc/EKN5-8LSP>].

41. See generally Jennifer Lind-Riehl et al., *Family Legacies and Community Networks Shape Private Forest Management in the Western Upper Peninsula of Michigan (USA)*, 45 LAND USE POL'Y 95 (2015).

42. See Sara Edmonds, Comment, *A Whale's Tale: Efforts to Save the Cook Inlet, Alaska Beluga Whale*, 7 OCEAN & COASTAL L.J. 131, 163 (2001) ("In Alaska, the subsistence lifestyle is a part of the culture and tradition of many families. The State of Alaska supports subsistence practices because it nurtures a major part of the state's rural culture.").

gathers edible flowers nearer the Bay Area. And he grabs seaweed anywhere it drifts along the coast. Some of his foraging spots are far less scenic. Rabins told me he's also foraged under bridges, along roadsides, and behind convenience stores.⁴³

In short, foragers represent a diverse demographic and are sure to be found nationwide: in cities and towns, in state and national parks, and along the coasts.

D. Why Americans Forage

Americans forage for a variety of reasons. Some Americans do not trust the integrity of today's food system and may turn to foraging in order to obtain food that grows without human intervention.⁴⁴ Others may forage because it is cheaper than buying food or because they have an interest in eating locally.⁴⁵ Additionally, some foragers identify health, flavor, and the benefits of harvesting their own food as key factors in why they forage.⁴⁶ The potential to subsist on foraged food is another factor. Foraging for subsistence purposes in America today, though uncommon, is not unheard of. Some city dwellers forage for subsistence purposes.⁴⁷ And some rural, low-income Americans have taken to foraging as a means of improving their food security and dietary choices.⁴⁸

43. See LINNEKIN, *supra* note 6, at 165–67 (profiling professional forager Iso Rabins of San Francisco).

44. See Erin Booke, *Are You Eating Your Weeds? Put These Wild Plants on Your Plate*, DALL. MORNING NEWS (Oct. 26, 2016), <https://www.dallasnews.com/life/gardening/2016/10/26/eating-weeds-put-wild-plants-plate> [<https://perma.cc/8JCV-DKGP>] (noting that many foragers “don’t trust the food that’s available now”).

45. See Foderaro, *supra* note 17 (“Maybe it is the spiraling cost of food in a tough economy or the logical next step in the movement to eat locally.”).

46. See McLain et al., *Gathering “Wild” Food*, *supra* note 8, at 230 (discussing interviews in which foragers identified “the flavours and what they believe are the healthful benefits of wild foods, as well as the satisfaction of eating something they have picked themselves”). One study of mushroom foragers cites a variety of factors that drive these foragers: “to earn income, to meet subsistence needs, to maintain lifeways and a sense of identity, and to strengthen intergenerational ties.” BARRON & EMERY, *supra* note 39, at 1.

47. See Rachel Belle, *Learn to Eat Weeds and Snails With Seattle’s ‘Front Yard Forager’*, MYNORTHWEST.COM (Aug. 22, 2013) (describing a Seattle “urban forager who gleans 90 percent of her family’s produce from her garden and from foraging what most people consider weeds and unrecognizable roadside plants”), <https://mynorthwest.com/81749/learn-to-eat-weeds-and-snails-with-seattles-front-yard-forager/> [<https://perma.cc/63YX-XSES>].

48. See Tracie McMillan, *The New Face of Hunger*, NAT’L GEOGRAPHIC (Aug. 2014), <https://www.nationalgeographic.com/foodfeatures/hunger/> [<https://perma.cc/FVG3-LUJS>] (noting one Iowa recipient of federal supplemental nutrition benefits

The benefits of foraging are widespread.⁴⁹ Research suggests that foraging “supports physical and emotional wellbeing”⁵⁰ and that the practice can benefit city dwellers of all income levels.⁵¹ A policy brief by the Berkeley Food Institute notes that foraged foods may have a higher nutrient density than commercial foods, are affordable and accessible to low-income consumers, can be of high quality, and can help supplement people’s nutritional needs.⁵² Foraging may also have broad urban ecological benefits. For example, it may make urban food systems more resilient through a combination of utilizing cost-free local food sources and reducing food waste.⁵³ Foraging may also help reduce a city’s carbon footprint by increasing local food sourcing and reducing food waste at the local level⁵⁴ and may help promote more a sustainable urban ecosystem.⁵⁵ Urban foraging can also help promote basic principles of sustainability and ecology by allowing urbanites to connect more closely with nature.⁵⁶

For all of its benefits, though, foraging is not without potential downsides. Rules pertaining to foraging exist on a razor’s edge between protecting the environment *qua* the environment and

“estimates her family could live for three months on the nutritious foods she’s saved up”).

49. See SABINE DABADY & PHILIP B. STARK, BERKELEY FOOD INST., URBAN FORAGING IN MUNICIPAL PARKS AND PUBLIC SCHOOLS: OPPORTUNITIES FOR POLICYMAKERS 1 (2017), https://food.berkeley.edu/wp-content/uploads/2017/08/BFI_UrbanForaging_Brief_8.1.17-FINAL-ELECTRONIC.pdf [<https://perma.cc/PC5C-6AHB>] (“By supplying accessible, nutritious food, foraging could provide a supplementary food source within the urban and peri-urban landscape as part of a multi-pronged strategy to help address socioeconomic inequities in access to nutritious foods.”).

50. Colleen M. Synk et al., *Gathering Baltimore’s Bounty: Characterizing Behaviors, Motivations, and Barriers of Foragers in an Urban Ecosystem*, 28 URB. FORESTRY & URB. GREENING 97, 97 (2017).

51. See McLain et al., *Gathering “Wild” Food*, *supra* note 8, at 237 (“Urban fruit harvesting and gleaning are already acquiring a degree of legitimacy as a food security strategy for low-income urban residents and as a local food production strategy for people of all income levels.”).

52. See *generally* DABADY & STARK, *supra* note 49.

53. See McNichols, *supra* note 40 (discussing how promoting “the resilience of their food supply [includes] things like encouraging more urban gardens and farms, allowing chickens and small livestock back into the city limits, and foraging”).

54. See *id.* (noting that foraging “helps lower [a] city’s carbon footprint”).

55. See McLAIN ET AL., *GATHERING IN THE CITY*, *supra* note 8, at 11 (finding that foraging “is a multifaceted, dynamic human practice that has much to contribute toward efforts to develop sustainable urban ecosystems”).

56. See McLain et al., *Gathering “Wild” Food*, *supra* note 8, at 221 (“Bringing nature back into cities and reconnecting urbanites with that nature are frequently cited in the urban green space planning literature as essential to fostering sustainable urban ecosystems.”).

protecting people's enjoyment of that same environment.⁵⁷ These dueling policy goals oftentimes create conflict.

Some commentators also question whether foraged foods are best consumed by the masses who sometimes cannot afford to feed themselves on store-bought agricultural products or by the so-called "one percent" who buy them in high-priced restaurants.⁵⁸ Opinions about whether a particular food is best suited for a particular class of people have existed for generations, and often change over time.⁵⁹

Urban foraging in particular is also not without its risks. In urban environments, questions about soil quality, pollutants, and pesticides can lead to other potential contradictions. While these foods are theoretically healthy and have traditionally provided human sustenance, contemporary intentional and unintentional human additives could potentially make foraged foods unhealthy or even dangerous to consume. Pesticides and other chemicals may have been sprayed—unbeknownst to the forager—on edible plants.⁶⁰ Elevated lead levels in urban soil could potentially leech into wild urban foods.⁶¹ However, the potential dangers that lead in urban soil

57. See, e.g., McNichols, *supra* note 40 ("[Seattle] had a situation where a newly restored area was stripped bare of its native plants by people foraging."); see also *infra* Part III (discussing modern rules pertaining to foraging).

58. See, e.g., Nathanael Johnson, *Can Urban Foraging Actually Feed Poor People?*, GRIST (Jan. 30, 2015), www.grist.org/food/can-urban-foraging-actually-feed-poor-people/ [https://perma.cc/3NMQ-NQVQ] ("We've reached a strange moment when foraging is firmly associated with upper class food—so much so that it's impossible to say you are serving, for example, *foraged sheep sorrel* or *wild fennel sprigs* without it sounding a bit pretentious. This is strange, because foraging was once a refuge for the desperately poor, and still is in many places.").

59. See, e.g., Josh Barrie, *From Lobster to Sushi: Foods of the Poor that Became Luxury Items*, TELEGRAPH (Mar. 18, 2016), www.telegraph.co.uk/food-and-drink/features/from-lobster-to-sushi-foods-of-the-poor-that-became-luxury-items/ [https://perma.cc/YZV5-GU2V] ("Lobster, like many other now fine elements of gastronomy, was once not deemed worthy for anything other than the 'lowest of the low.'").

60. See Cari Taylor-Carlson, *Backyard Weeds Can Be a Meal for Foragers*, MILWAUKEE J. SENTINEL (Apr. 29, 2014), archive.jsonline.com/features/food/backyard-weeds-can-be-a-meal-for-foragers-b99244355z1-257179551.html [https://perma.cc/J59K-S4NG] (noting potential dangers posed by "herbicides, pesticides and chemical-based fertilizers").

61. See Carl J. Rosen, *Lead in the Home Garden & Urban Soil Environment*, UNIV. OF MINN. EXTENSION (2002), <https://www.extension.umn.edu/garden/yard-garden/soils/lead-in-home-garden/> [https://perma.cc/9U45-EBS4] (warning of the "need to be concerned about elevated lead levels in the environment, particularly in metropolitan areas . . . in leafy vegetables (e.g., lettuce) and on the surface of root crops (e.g., carrots)").

poses to foragers may be overstated.⁶² Finally, some foraged foods, wherever they occur, may be inherently deadly to humans.⁶³

II. FORAGING IN PRE-MODERN AMERICA: FROM PRACTICE TO PROHIBITION

The long history of foraging necessarily predates the history of laws that govern the practice. Discussion of early foraging practices and the subsequent development of anti-foraging laws in the United States is a useful tool for contextualizing today's legal and policy debates over foraging.

A. Foraging from Pre-Colonial to Early-Modern America

As is the case elsewhere around the globe, humans foraged in what is now the United States for many thousands of years before agriculture took root. Prior to the arrival of European settlers, many Native American tribes across North America thrived by foraging. The Klamath tribe in the Pacific Northwest provides one such example.⁶⁴ Additionally, the Hohokam tribe, who lived in what is now Arizona,⁶⁵ and the Ute tribe, who ranged from present day New Mexico to Wyoming, subsisted largely by foraging.⁶⁶ Foraging traditions prior to and during the colonial period were also rich

62. See generally Sally L. Brown et al., *Lead in Urban Soils: A Real or Perceived Concern for Urban Agriculture?*, 45 J. ENVTL. QUALITY 26 (2016) (suggesting that the benefits of urban agriculture—and, by analogy, urban foraging—outweigh the potential risks of elevated lead levels in urban soil).

63. See PRIYA NAIR, INT'L FOOD PROT. TRAINING INST., NATIONAL SURVEY OF STATE REGULATION OF WILD MUSHROOM FORAGING FOR RETAIL SALE 3 (2016), <https://ifpti.org/wp-content/uploads/2016/11/PNair-Article.pdf> [<https://perma.cc/P6CR-A7AW>] (“Public health concerns related to food safety arise when commercial foragers of wild mushrooms pick toxic, ‘look-alikes’ of edible species and offer them at retail.”).

64. See Michael C. Blumm et al., *The Mirage of Indian Reserved Water Rights & Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled*, 36 ENVTL. L. 1157, 1162 (2006) (“For several thousand years before the first white settlers ever set foot in the region, the Klamath Tribes hunted, fished, and foraged for subsistence throughout the Klamath River Basin.”).

65. See Darla J. Mondou, *The American Indian Agricultural Resources Management Act: Does the Winters Water Bucket Have a Hole in It?*, 3 DRAKE J. AGRIC. L. 381, 397–98 (1998) (“Like those who came before them, the early Hohokam gathered acorns and pine nuts from the mountains in the fall, in addition to hunting small game.”).

66. See *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1093 (D. Utah 1981) (“The Ute economy [during the American colonial period] was based largely upon hunting and gathering of food A wide variety of smaller animals were . . . a part of their diet, as well as trout, berries, and a variety of seeds.”).

among other non-Europeans in what is now the United States.⁶⁷ In Hawaii, for example, the practice of harvesting wild foods was more widespread than was agriculture.⁶⁸

Up to and including Independence, American colonists enjoyed broad foraging rights not just in the commons but also on others' private lands.⁶⁹ At least two states offered constitutional protections of a person's right to enter private property for the purpose of hunting and fishing,⁷⁰ which are analogous to foraging. Other states offered similar protections.⁷¹ Foraging, oftentimes on others' property, was an important means for ensuring colonists had an adequate food supply.⁷² Over time, however, the need to forage for subsistence purposes waned.⁷³ Nevertheless, subsistence foraging remained necessary among many of the powerless and less powerful.⁷⁴ In the South, African American slaves subsisted in part

67. See, e.g., Gina M. Watumull, Note, *Pele Defense Fund v. Paty: Exacerbating the Inherent Conflict Between Hawaiian Native Tenant Access and Gathering Rights and Western Property Rights*, 16 U. HAW. L. REV. 207, 220 (1994) ("Ancient Hawaiian gathering rights primarily served to supplement the subsistence lifestyle of native tenants, and . . . during times of famine or drought . . . allowed foraging as a means of survival.").

68. See *id.* ("Early Hawaiians cultivated relatively small areas of the total acreage available on each island, but were able to utilize substantial uncultivated areas through gathering.").

69. See Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 673–74 (2011) ("At independence, the public had broad rights to use unimproved land, including the right to graze, fish, hunt, and forage. Since then, private landowners have acquired broader rights at the expense of the public.").

70. See *id.* at 678 ("In 1777, Vermont's new state constitution recognized the 'liberty to hunt and fowl, in seasonable times, on the lands they hold, and on other lands (not enclosed).'" (internal citation omitted). Pennsylvania's earlier constitution uses similar language. See PA. CONST. of 1776, ch. II, § 43 ("The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not [e]nclosed").

71. See Sawers, *supra* note 69, at 678. ("Even where the practice was not protected by state constitution, unrestricted hunting on unenclosed land was common practice. American courts and legislatures had repudiated English law, opening 'unenclosed, undeveloped, unposted' land, unlike English law which 'drew an invisible fence around all private property, no matter the description.'" (internal citation omitted).

72. See *id.* at 679 ("Many households also relied on unenclosed land for gathering, which was more than mere hobby in the nineteenth century. Nuts, fruits, and berries were eaten in season and preserves were made, providing important variety to the winter diet. Ginseng, yellowroot, sassafras, and other herbs were gathered for their healing properties.") (internal citation omitted).

73. See *id.* at 681 ("[I]ncreasing prosperity meant that foraging and hunting were less important. Rising incomes allowed farmers to substitute forage and home production with higher prestige, store-bought food.").

74. See *id.*

by foraging on unoccupied lands,⁷⁵ a practice that would come under systematic attack after the Civil War.⁷⁶

Around Independence, American law embraced “the liberty of citizens generally to use the open countryside,”⁷⁷ signaling that the power to exclude hunters and gatherers from private property was relatively unknown.⁷⁸ Early American caselaw upheld this liberty.⁷⁹ When disputes arose between landowners and foragers (or hunters), courts often sided with the latter.⁸⁰ But foragers’ rights were not absolute. For example, although early American property laws allowed foragers to enter and forage upon unimproved lands, this right did not extend to improved lands, including cropland, vineyards, and orchards.⁸¹

Well into the 1800s, laws resembling those that existed in the colonial period protected foragers who would gather wild foods on private lands.⁸² Despite these protections, the practice slowly waned as Americans moved away from the countryside and into cities and suburbs.

B. Development and Spread of American Anti-Foraging Law

The history of early American anti-foraging laws reveals that supporters of restricting foraging rights typically grounded their

75. See Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 LAW & HIST. REV. 351, 357 (2015) (“Open land provided hunting, fishing, and foraging for slaves, both for consumption and sale. Slave narratives describe a wide range of wild foods.”) (internal citation omitted).

76. See *infra* Section II.B.2.

77. See Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 90 (2010).

78. See *id.* at 88 (“As for the landowner’s right to exclude—viewed today as a key to private land ownership—lawmakers 200 years ago saw nothing sacred about it when it clashed with important liberties of non-owners.”) (internal citation omitted).

79. See *id.* at 89 (describing how in 1818 a South Carolina state court “scoffed at the entire notion that a private landowner might hold such legal power” as to exclude members of the public from his land “unless and until the land was physically enclosed or cultivated at considerable landowner expense”).

80. See *id.* at 90 (“In the clash of competing claims of liberty, lawmakers often favored the claims of landless citizens who wanted to make free use of the unenclosed countryside over the competing claims of landowners who wanted to exclude.”).

81. See *id.* (“Public uses apparently included ordinary travel, collecting downed firewood, foraging for berries, nuts, and mushrooms, and, of greatest economic importance, grazing livestock.”).

82. See *id.* at 89 (“In the South on the eve of the Civil War, this legal arrangement gave to the public open access to over eighty percent of all lands. To be sure, American landowners could certainly control their lands. But their power of control extended only to the point where it collided with this public liberty.”) (internal citations omitted).

efforts in racism, classism, colonialism, imperialism, or some combination of these odious practices and beliefs.

1. *Anti-Foraging Laws Targeting Native Americans*

Native American tribes were probably the earliest victims of anti-foraging laws in the New World. Shortly after English settlers landed in the New World, they began pushing the Powhatan Native American tribe off their traditional hunting and foraging grounds.⁸³ These settlers defended their newly occupied “property” with arms.⁸⁴ As more and more white settlers arrived in America over generations, the foraging practices of many Native Americans—or, more specifically, their status as hunter-gatherers, as opposed to agricultural practitioners—was used to justify driving them from lands they had historically occupied.⁸⁵

2. *Anti-Foraging Laws Targeting African Americans*

After the Civil War, plantation owners in the American South moved forcefully and systematically to restrict the foraging rights and practices of newly freed African American slaves. Many slaves freed after the Civil War understandably sought to leave farm work—and the farmers who had enslaved them—behind.⁸⁶ As they had before the Civil War, freed slaves earned money by selling foods they foraged and hunted.⁸⁷ In addition to income, foraging provided African Americans with some degree of self-sufficiency and self-

83. See Laurelyn Whitt & Alan W. Clarke, *Bringing It Home: North American Genocides*, 20 J. GENDER RACE & JUST. 263, 312 (2017) (“By 1622, the English had forced the Powhatan to relocate to raise their crops and make do with far less fertile land, while the settlers ‘occupied the link between the two major Powhatan subsistence areas [including] the hunting and foraging territories inland and the food-producing and reed-gathering regions along the rivers.’”).

84. See *id.* at 312 (“Now these primary subsistence areas were claimed ‘by trigger-happy, aggressive, and land-hungry English settlers who were not always willing to allow Indians to pass between the rivers and uplands.’”) (internal citations omitted).

85. See Freyfogle, *supra* note 77, at 105 n.112 (“A common argument used against Indians was that they had inadequately ‘improved’ lands, and thus had no right to claim ownership of them. . . . [T]he same argument was used to challenge the property rights of owners who held more land than they could use and to justify the public’s rights to hunt and forage on unenclosed private land.”) (internal citations omitted).

86. See Sawers, *supra* note 75, at 357 (“As ‘A Farmer’ noted, the ‘poor black man fails to see necessity or the philosophy of it,’ referring to working in the fields year round.”).

87. See *id.* at 358 (“Although many freedmen ate what they caught, game and fish could also be sold. All sorts of wild food were sold, from woodcock to oysters.”).

determination.⁸⁸ But the Southern planters who had recently owned the region's African Americans sought to prohibit the freed slaves from continuing their subsistence foraging practices as a tool to chain freed men to plantation work.⁸⁹ In service of this goal, Southern states zeroed in on practices that would allow freed slaves to be truly free by restricting access to foraging⁹⁰ through the enactment of criminal trespass laws.⁹¹

Anti-foraging sentiment among the powerful classes continued to spread in the decades following the Civil War. Some Native American tribes also found their previous foraging practices were now illegal, sometimes due to treaties they signed with the United States government.⁹² The United States Supreme Court and other federal courts historically sided with expansionist federal government efforts to limit the land rights—including, specifically, foraging

88. *See id.* at 358–59 (“Although only some freedmen could or would withdraw entirely from the labor market, wild food provided all workers with some autonomy [One] planter complained that black neighbors lived by hunting, fishing, ‘gathering berries and sumac,’ and doing occasional work Even when employers were able to convince their workers to sign annual contracts, the prospect of wild food proved a distraction.”).

89. *See id.* at 357 (“[P]lanters led the effort to prevent blacks from feeding themselves. Wild food gave workers bargaining power. If wages were the only sustenance, all workers must work or starve. If workers could feed themselves with food they grew, gathered, or hunted, they had more leverage during negotiations over pay, hours, and working conditions.”).

90. *See id.* at 360 (“Wild food presented a clear threat to the re-establishment of plantation agriculture. Before the war, unfenced land was open to the public, and state law did not consider it ‘trespassing’ to enter unfenced land. In many states, the public could enter fenced land also.”) (internal citation omitted).

91. *See id.* at 362 (“When legislatures closed access to open land and criminalized trespass, those laws overturned centuries of law and custom. In addition to general trespass laws, several states restricted hunting on private land. Allowing landowners to monopolize the wildlife on their land was so foreign to American sensibilities that only five states proscribed hunting on private land without permission in 1871.”); *id.* at 360 (“The most direct (and transparent) way to limit people’s access to open land is criminalizing trespass. Six states criminalized trespass in the first legislative session during Presidential Reconstruction.”). The advent of these trespass laws was grounded in racism. *See* Sawers, *supra* note 69, at 684 (“To keep black people off white land, states enacted trespass laws with harsh penalties. Louisiana criminalized trespass in 1865.”); Sawers, *supra* note 75, at 360 (“Even if one constructs a race-neutral motivation for increasing the rights that landowners had over their land, the timing does not support any explanation other than racialized labor control.”).

92. *See Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1096 (D. Utah 1981) (“Even those Indians who had removed to the Uintah Valley Reservation in 1866 were compelled by conditions there to venture on raids into the Heber Valley in search of food needed for bare survival. Even after hostilities had largely ceased, the early farming efforts at the parsimoniously funded Uintah Agency were largely a failure, leaving the Utes to hunt and forage for food, or continue raiding on a sporadic basis.”).

rights—of Native Americans.⁹³ Property laws that allowed private landowners to bar foragers continued to spread until they were, by the mid-1900s, the norm nationwide.⁹⁴

3. *Anti-Foraging Laws Targeting Rural Americans*

African Americans and Native Americans were not the only victims of anti-foraging laws in the decades after the Civil War. Rural white farmers also felt the sting of these laws. For example, foraging for ginseng, berries, herbs, and other wild plants—along with hunting—helped form the basis of the economy and food stores of the mostly rural, white subsistence farmers living in the Adirondack region of New York in the nineteenth century.⁹⁵ But in the 1880s, New York State’s “conservation movement” began to upend the traditional practices of many foragers in the region.⁹⁶

The push to “protect” land in this region came not from these farmers but, rather, from outside elites who sought to protect the land from its residents.⁹⁷ A subsequent move to restrict hunting and

93. See Mondou, *supra* note 65, at 383–84 n.11–12 (finding that “the United States Supreme Court found that the federal government did not grant land and water rights to the tribes . . . the Native American Indians themselves [] *reserved* the land and water when they entered into treaties with the United States and relinquished their rights to roam, gather, and hunt except on the reserved land.”) (emphasis added). More recently, courts have resuscitated some Native American foraging rights. See *id.* at 386 (“The Klamath Reservation, which includes an amount of marshy land, was created by treaty in 1864 and congressionally terminated in 1954. However, the right to harvest from the marsh was found to continue after termination. A federal court held that the treaty of 1864 had two purposes: to encourage Native American Indians to become farmers, and to secure forever the right of the Klamath Indians to continue their lifestyle of hunting waterfowl, fishing, and gathering edible plants.”) (internal citations omitted).

94. See Luke Manget, *Nature’s Emporium: The Botanical Drug Trade and the Commons Tradition in Southern Appalachia, 1847–1917*, 21 ENVTL. HIST. 660, 678 (2016) (“By the mid-twentieth century, a plethora of laws were on the books that limited the removal of wild plants from private property. The common right to enter someone else’s property to gather herbs was no longer widely acknowledged.”).

95. See KARL JACOBY, *CRIMES AGAINST NATURE: SQUATTERS, POACHERS, THIEVES, AND THE HIDDEN HISTORY OF AMERICAN CONSERVATION* 14 (2014).

96. See PETER LINEBAUGH, *THE MAGNA CARTA MANIFESTO* 3 (2008) (describing “the transformation of previously acceptable practices into illegal acts: hunting or fishing redefined as poaching, foraging as trespassing,” and noting these foraging residents “were charged by state officials with looking upon the forests as ‘a piece of commons,’ or as ‘a public crib where all may feed who choose’”) (internal citations omitted).

97. See JACOBY, *supra* note 95, at 14; see also *Crimes Against Nature*, KARL JACOBY, <https://karljacoby.com/books/crimes-against-nature> [<https://perma.cc/F2XX-8LUM>] (“[N]ineteenth-century efforts to control nature became irretrievably entangled with attempts at controlling the behavior of rural Americans.”).

foraging in the region more broadly, embodied in the creation in the 1890s of the Adirondack Park, came about in large part from “a distrust of the inhabitants of the countryside, particularly the small-scale farmers who made up the bulk of the residents in places like the Adirondacks.”⁹⁸ Elitist outsiders viewed the region’s residents as primitives with “slovenly husbandry” skills who “lack[ed] the foresight and expertise necessary to be wise stewards of the natural world.”⁹⁹

Anti-foraging laws trace their origins to contempt for the rights of those deemed by those in power to be “other”: Native Americans, African Americans, and rural white farmers. Modern foraging regulations, intentionally or not, are built upon this foundation.

III. MODERN AMERICAN FORAGING REGULATIONS

Though foraging is growing in popularity, a complicated and oftentimes contradictory tangle of federal, state, and local laws and regulations in the United States poses real threats to its future.¹⁰⁰

98. See JACOBY, *supra* note 95, at 14.

99. See *id.* (internal citation omitted). Notably, some leading early twentieth-century conservationists, including J. Horace McFarland, an early and key advocate of the U.S. National Parks system, also share the early anti-foraging movement’s historical taint of racism. See *Union for Efficiency: An Announcement*, 94 INDEPENDENT 443, 443 (1918) (identifying American Civic Association head J. Horace McFarland as a board member of the Union for Efficiency, a group that listed “The Conservation Movement” and “General Hygiene and Eugenics”—the latter a racist movement that was popular at the time among progressives—as two of its key “manifestations” in a founding statement).

100. The modern push to restrict foraging is by no means uniquely American. Foraging restrictions are common in parts of Africa. Foraging was common in pre-colonial Africa, for example. See Debbie Collier, *Access to and Control over Plant Genetic Resources for Food and Agriculture in South and Southern Africa: How Many Wrongs Before a Right?*, 7 MINN. J.L. SCI. & TECH. 529, 533 (2006) (“African communities generally had access to an abundance of land and could gather the plants they needed for food and medicine by foraging.”). But the practice has dwindled as laws restrict the practice. Today in Namibia, for example, the government has discouraged the nomadic San people from foraging, instead encouraging them to abandon their 40,000-year practices in favor of agricultural production. See Stephen R. Munzer & Phyllis Chen Simon, *Territory, Plants, and Land-Use Rights Among the San of Southern Africa: A Case Study in Regional Biodiversity, Traditional Knowledge & Intellectual Property*, 17 WM. & MARY BILL RTS. J. 831, 876–77 (2009) (noting the government has “encouraged cultivation as both a supplement and an alternative to harvesting wild plants”). Restrictive foraging laws are also common in England, where a proposed ban on foraging mushrooms in a park in Southern England in 2016 drew vocal response from The Association of Foragers, an international foraging-advocacy group. Press Release, New Forest, Hampshire, Ass’n of Foragers, New Forest Fungi Picking Ban ‘Unscientific’ Say Fungi Experts (Sept. 1, 2016), <https://www.foragers-association.org.uk/media/press/Association-Of-Foragers-Response-To-New-Forest->

Consider that most foragers today often have no idea if the act of picking a single berry in a park makes them a lawbreaker.¹⁰¹ Rules can vary from park to park, and from jurisdiction to jurisdiction. Consequently, foragers who simply want to pick wild foods are often viewed as subversives. Even scholars sometimes paint foragers as counterculture rebels.¹⁰²

Section III.A looks first at municipal regulations, highlighting several examples in which people were fined for foraging in city parks. Section III.B then turns to state law. Finally, Section III.C details foraging regulations at our fifty-nine national parks.

A. Urban Foraging Laws

A New York City parks department ordinance prohibits destroying, cutting, or pruning trees, or severing or removing plant vegetation.¹⁰³ The common interpretation of the ordinance is that “foraging is against the law in all New York City parks, including Central Park.”¹⁰⁴ Notably, though, the language of the ordinance is both broad and vague enough that it does not expressly prohibit picking fruit from trees or plants.¹⁰⁵

Fungi-Picking-Press-Release.pdf [https://perma.cc/23UF-9BQQ]. The group argued the proposed ban was counterproductive and had no scientific basis. *Id.* Canada’s foraging laws also appear designed to deter foragers. See Laura Brehaut, *Forage a Fall Feast from Chanterelles to Porcini, a Beginner’s Guide to Foraging for Wild Mushrooms*, MONTREAL GAZETTE (Sept. 21, 2016), <http://www.montrealgazette.com/life/food/forage+fall+feast+from+chanterelles+porcini+beginner+guide+foraging/12206104/story.html> [https://perma.cc/KU62-CQMN] (“Harvesting wild mushrooms is prohibited in national, provincial and regional parks but permitted on Crown (public) land. Foraging on private property, leased Crown land, and traditional territory requires permission.”).

101. See McLAIN ET AL., GATHERING IN THE CITY, *supra* note 8, at 15 (noting foraging is “often neither fully legal nor illegal”).

102. See McLain et al., *Gathering “Wild” Food*, *supra* note 8, at 220 (“[F]oraging for ‘wild’ foods in cities [is] a subversive practice that challenges prevailing views about the roles of humans in urban green spaces . . .”).

103. See N.Y.C., RULES OF THE CITY OF NEW YORK tit. 56 § 1-04(b)(1)(i)–(ii) (2017), <https://www.nycgovparks.org/rules/section-1-04> [https://perma.cc/L2EF-Y6E8] (titled “Prohibited Uses: Destruction or Abuse of Trees, Plants, Flowers, Shrubs and Grass”); see also Alexandra S. Levine, *A Forest Floats on the Bronx River, with Free Produce*, N.Y. TIMES (July 7, 2017), <https://www.nytimes.com/2017/07/07/nyregion/a-forest-floats-on-the-bronx-river-with-free-produce.html> [https://nyti.ms/2tRN3z7] (“An ordinance from the New York City public park system, which includes 30,000 acres in nearly 2,000 parks, equates the cutting, removing or defacing of trees, plants and flowers with destruction of property.”).

104. *Red Mulberry*, CENT. PARK CONSERVANCY, <http://www.centralparknyc.org/tree-guide/red-mulberry.html> [https://perma.cc/KR2R-ZHED].

105. See N.Y.C., RULES OF THE CITY OF NEW YORK tit. 56 § 1-04(b)(1)(i)–(ii).

Unsurprisingly, given the ordinance and official interpretations of it, New York City parks officials have long taken a dim view of foragers in city parks.¹⁰⁶ A forager caught in New York City could face fines of up to \$250.¹⁰⁷ However, the city has, in most cases, opted in favor of education and discouraging foragers over issuing fines.¹⁰⁸

But there are exceptions, such as the 1986 arrest of Central Park forager Steve Brill. Brill, a New Yorker who goes by the moniker “Wildman,” was arrested in a sting operation carried out by city officials.¹⁰⁹ Brill was arrested for leading paid foraging tours in New York City’s Central Park.¹¹⁰ Brill’s “crime” was described as “snatching and eating dandelion greens from the meadows of Central Park.”¹¹¹ The city’s parks commissioner at the time, Henry Stern, said he “couldn’t stomach the idea of anyone ‘eating our parks[.]’”¹¹² Brill’s arrest and subsequent trial was “a public relations debacle for the parks department”¹¹³ and made news in more than a dozen national and international newspapers.¹¹⁴ Ultimately, the city dropped the charges against Brill after he agreed to lead his foraging tours as an employee of the city’s Parks Department, which he did for several years.¹¹⁵

106. See Foderaro, *supra* note 17 (“Now parks officials want them to stop. New York’s public lands are not a communal pantry, they say. In recent months, the city has stepped up training of park rangers and enforcement-patrol officers, directing them to keep an eye out for foragers and chase them off.”).

107. See *id.* (“[I]t has long been against the rules to collect or destroy plants in the city’s parks, with potential fines of \$250 . . .”). Foraging rules just outside New York City are, in many cases, dramatically different than those rules in the city. See *id.* (“Some natural areas outside New York City accommodate foragers. Sandy Hook in New Jersey, which is part of the federal Gateway National Recreation Area, limits the harvesting of beach plum fruit, berries and mushrooms to ‘one quart container per person, per day,’ said John Harlan Warren, a spokesman for the recreation area.”).

108. See *id.*

109. James Harney, *Don’t Eat the Dandelions, Arrested Ecologist Ordered*, N.Y. DAILY NEWS, Apr. 3, 1986, reprinted in COLLECTIONS: CENTRAL PARK, SUNSENTINEL, articles.sun-sentinel.com/1986-04-03/news/8601200363_1_dandelions-central-park-rangers [<https://perma.cc/UM2Z-WV7H>].

110. See *id.*

111. *Id.*

112. *Id.*

113. See Foderaro, *supra* note 17.

114. See *My Arrest and the Consequences*, “WILDMAN” STEVE BRILL, <https://www.wildmanstevebrill.com/my-arrest.html> [<https://perma.cc/K9EY-MQXA>].

115. See STEVE BRILL, *WILD VEGETARIAN COOKBOOK 2* (2002).

Brill's place within New York City government did little to soften the city's stance against foraging.¹¹⁶ And New York City's marginalization of foragers such as Brill is hardly unusual. In 2015, Greg Visscher, a Maryland man, was picking raspberries in a county park and was stopped by three police officers and fined \$50 for "destroying/interfering with plants to wit: berries. Without a permit on park property."¹¹⁷ Visscher subsequently appealed the case. A judge dismissed the case after a parks department official was unable to explain either (a) in what manner picking a berry destroys or interferes with a plant or (b) whether the permit referenced in the citation actually exists.¹¹⁸ In another example, an elderly Chicago man was ticketed \$75 for picking dandelion greens in a city park.¹¹⁹ He had picked the greens to use in a salad.¹²⁰

Examples like these are the absurd result of uncaring, intrusive, and arbitrary foraging restrictions. A recent study that reviewed foraging regulations in four major American cities—New York, Philadelphia, Seattle, and Baltimore—found each city's rules vary widely from each other, lean toward prohibition, and are often vague:

[In Philadelphia,] harvesting is prohibited outright in land trust preserves and some county parks, while other county parks, state parks, and Valley Forge National Park restrict harvesting to edible fruits, nuts, and berries for personal use. Section 18-129 of New York City's Parks and Recreation Department Code states that it is unlawful to "cut, remove or in any way destroy or cause to be destroyed, any tree or other form of vegetation on public property" under the park commissioner's jurisdiction. Seattle is an exception in that the Seattle Parks and Recreation Department has recently updated their policy to permit foraging as long as the quantities harvested are small. Baltimore's city parks do not explicitly prohibit the collection of fungi and plant material, although Section 52-2 of the city's Natural Resources Code states that persons are not permitted to "injure the grass, trees, or shrubbery" in Mount

116. See *On Second Thought, Don't Eat the Plants in the Park*, N.Y. TIMES: CITY ROOM (Mar. 29, 2010, 3:41 PM), <https://cityroom.blogs.nytimes.com/2010/03/29/on-second-thought-dont-eat-the-plants-in-the-park/> [<https://perma.cc/7LAQ-A868>] ("It is illegal to pick plants in city parks, for any purpose. . . . We did not know this when we published the post. We know it now."). In 2010, the *New York Times* was forced to do an about face after publishing a story encouraging people in the city to forage for day lily flower shoots in city parks.

117. LINNEKIN, *supra* note 6, at 161. As the book details, I had foraged for berries in a neighboring Maryland park the day before the man was fined.

118. See *id.* at 168.

119. See *id.* at 163.

120. See *id.*

Vernon Place Park. Section 30-2-201 of Baltimore County's Recreation and Parks Code states that persons may not "damage or destroy flora in a park" without permission of the Recreation and Parks Department, leaving open to interpretation whether some types of harvesting, such as the picking of fruit or berries, might be considered acceptable.¹²¹

Many urban foragers say these bans and fines are unnecessary and are based on little more than hysterical fears about overharvesting.¹²² Indeed, some cities are recognizing this fact and are beginning, slowly, to embrace foraging and foragers.¹²³ Seattle, for example, has established an urban "food forest" in a working-class neighborhood in the city, dubbed the Beacon Food Forest, that "feature[s] fruit-bearing perennials—apples, pears, plums, grapes, blueberries, raspberries and more."¹²⁴ The city also became the first in the country to formally acknowledge the role foraging plays in feeding its populace.¹²⁵

New York City has also embraced the idea of an urban food forest. A new "floating forest project" in the Bronx River, anchored just off the South Bronx, provides New York City residents with the opportunity to forage fruits, vegetables, and herbs free of charge or threat of fines.¹²⁶ The barge installation, Swale, established by a local

121. See McLain et al., *Gathering "Wild" Food*, *supra* note 8, at 232–33.

122. See LINNEKIN, *supra* note 6, at 166 ("These [prohibitions] are of course in place because the parks service imagines if they legalized [foraging] all the plants would be gone. I personally think this is ridiculous, and that open, legal, well-educated foraging only adds to the stewardship and use of our parks.") (quoting San Francisco-based forager Iso Rabins); see also Foderaro, *supra* note 17 (quoting Marie Viljoen, who writes a foraging column for the publication *Edible Manhattan* and "argued that parks officials were overstating the problem").

123. See, e.g., McNichols, *supra* note 40 ("Los Angeles recently affirmed the right to harvest fruit on public land.").

124. See *id.* ("Seattle's response to a few bad experiences like that has been to engage foragers, not crack down on them. City departments have all been asked to take a look at their policies—and to consider ways to allow food harvesting and even production on public land."); Kristofer Husted, *Seattle's First Urban Food Forest Will Be Open to Foragers*, NAT'L PUB. RADIO (Mar. 1, 2012), www.npr.org/sections/thesalt/2012/02/29/147668557/seattles-first-urban-food-forest-will-be-free-to-forage [<https://perma.cc/ZX3S-KKH7>] (discussing Seattle's Beacon Food Forest, which established a multi-acre site in the city for the purpose of foraging); see also BEACON FOOD FOREST, <http://beaconfoodforest.org> [<https://perma.cc/P4MS-MRTL>].

125. See Patrick T. Hurley & Marla R. Emery, *Locating Provisioning Ecosystem Service in Urban Forests: Forageable Woody Species in New York City, USA*, 170 LANDSCAPE & URB. PLAN. 266, 266 (2018) ("Seattle's urban forest management handbook lists human foraging amongst the functions and benefits of healthy urban forests Seattle is the first city we are aware of to acknowledge [foraging in this manner].").

126. See Levine, *supra* note 103.

artist, serves as “a public food forest with free edible and medicinal treasures.”¹²⁷ It is intended to address local food and health issues, including “food access, food security and food justice.”¹²⁸

But what about New York City’s foraging ban? The barge, which is “[b]acked by the city’s parks department,” only exists legally thanks to “a loophole [that] circumvents rules about foraging on public land because technically, it is on the water.”¹²⁹ New York City should not force residents who wish to forage to do so on a barge, particularly when plenty of opportunities to do so exist in city parks. Bran Gunther of New York City’s parks department suggested that the barge might help spur “potentially new ways of practice or policy [and] other possibilities for food within the city.”¹³⁰ If that is the case—and the barge is intended to be a trial balloon that opens up more of New York City to foragers—then Swale is a promising project. If, alternately, Swale is intended to serve as the sole place in New York City where foraging is legal—as a tiny concession intended by itself to address the growing demand for foraging in the city—then Swale is simply furthering (rather than solving) a problem.

B. State Foraging Laws

State laws pertaining to foraging vary wildly. For example, various agencies and municipalities in California, a state that is particularly rich in wild foods, make legal foraging nearly impossible.¹³¹ Penalties for violating these laws can be severe.¹³² Alaska’s so-called “Subsistence Statute,” which refers to “the noncommercial, customary and traditional uses of wild, renewable resources by a resident domiciled in a rural area of the state for direct personal or family consumption as food,” protects the rights of Alaska residents to forage in the state.¹³³

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See* DABADY & STARK, *supra* note 49, at 3 (“Although wild foods are abundant and ubiquitous, agencies responsible for most public lands, including California state, regional, and local parks, generally do not permit the disturbance or removal of plant parts without special permission.”).

132. *See id.* (“Penalties for removing plants include imprisonment and fines.”).

133. ALASKA STAT. § 16.05.940 (2000). Notably, at least one Alaska Supreme Court decision has centered in part on the right to harvest wild foods. *See* Alaska Fish & Wildlife Conservation Fund v. State of Alaska Dep’t of Fish & Game, 289 P.3d 903, 908 (Alaska 2012).

A sampling of state foraging laws in seven geographically diverse American states (Alaska, Arkansas, California, Colorado, Florida, Hawaii, and Maine) conducted as part of the research for this Article indicates that state foraging laws lack uniformity. Alaska allows “recreational harvesting” of “wild plants, mushrooms, berries, and other plant material for personal, noncommercial use[.]”¹³⁴ Arkansas has specific rules for harvesting ginseng,¹³⁵ but prohibits the destruction, disturbance, or removal of plants from state park land.¹³⁶ California has specific rules for harvesting seaweed,¹³⁷ and particular rules that prohibit foraging for “berries” or “fruit” in all state parks.¹³⁸ Colorado prohibits all foraging in its state parks.¹³⁹ Florida prohibits harvesting, collecting, destroying, or disturbing all plants within state parks,¹⁴⁰ except for “aquatic plants.”¹⁴¹ Hawaii prohibits “damag[ing], destroy[ing], dig[ging], remov[ing], or possess[ing] any tree, shrub, or other plant” in a state park,¹⁴² but allows “reasonable quantities of fruits and seeds [to] be gathered for personal use.”¹⁴³

Maine takes a rather different view of foraging. State customs protect the rights of those who venture onto *private* property in order to forage, though the custom is not enshrined in law:

We have a long tradition, in Maine, of free and easy access to unimproved and unposted private land. Some have called this custom “permissive trespass.” . . . We are not talking about a legal

134. ALASKA ADMIN. CODE tit. 11, § 96.020(a)(3)(B) (2008).

135. See 209-02-13 ARK. CODE R. (2018).

136. See ARK. DEP’T OF PARKS & TOURISM, PARK DIRECTIVE NO. 3150, STATE PROPERTY (1975), <http://www.adptfoi.com/Parks/Park%20Operations%20Manual/PD3150.pdf> [<https://perma.cc/F6QG-9KUE>].

137. See CAL. CODE REGS. tit 14, § 30.10 (2017); CAL. FISH & WILDLIFE DEP’T, RECREATIONAL HARVEST OF KELP AND OTHER MARINE ALGAE, <https://www.wildlife.ca.gov/Conservation/Marine/Kelp/Recreational-Harvest> [<https://perma.cc/UL2E-TVNB>] (allowing the “[r]ecreational harvest of marine algae for personal use”).

138. See CAL. CODE REGS. tit 14, § 4306 (2017).

139. See COLO. CODE REGS. § 405-1:100(B)(2) (2017) (making it illegal “[t]o remove, destroy, mutilate, modify or deface any structure, water control device, poster, notice, sign or marker, tree, shrub, or other plant or vegetation”).

140. See FLA. ADMIN. CODE ANN. r. 62D-2.013 (2017) (declaring all plant life in state parks to be property of the state).

141. *Id.* r. 68F-20.002.

142. HAW. CODE R. § 13-146-32(e) (2017).

143. *Id.* § 13-146-32(c); see *Administrative Rules*, DEP’T OF LAND & NAT’L RES., dlnr.hawaii.gov/dsp/administrative-rules [<https://perma.cc/WG69-VSEF>] (“Leave all plant life undisturbed. Where permitted, reasonable quantities of fruits and seeds may be gathered for personal use.”).

right[], but rather a custom in which people use private property with the informal permission of the owner.¹⁴⁴

Permissive trespass in Maine made news in 2017, when state lawmakers sought to pass legislation that would curtail the practice, arguing that property rights should trump the rights of foragers who gather wild foods on another person's property.¹⁴⁵ A bill, *An Act To Prohibit Foraging on Private Land without Permission*, was sponsored by State Senator Thomas Saviello.¹⁴⁶ As the title of the bill suggests, it was intended, in particular, to “require foragers—those looking to harvest blueberries, mushrooms, and other wild foods—to obtain permission from the property owner before collecting the food.”¹⁴⁷ Saviello says he sponsored the bill because a pair of angry constituents had had their property stripped of a delicacy, fiddlehead ferns,¹⁴⁸ and noted “[i]f you own the land, it's not my right to go onto your property and take something that belongs to you.”¹⁴⁹ Saviello's fellow lawmakers, though, saw it differently, defeating the bill soundly in committee.¹⁵⁰

State laws pertaining to the *sale* of foraged foods—particularly mushrooms—also vary. A fifty-state survey published in 2016 indicated that states use one of six different approaches to regulating the sale of foraged mushrooms.¹⁵¹ Notably, the FDA Food Code, a

144. ME. STATE LEGISLATURE, ACCESS TO COASTAL AND INLAND WATERS: THE PUBLIC USE OF PRIVATE LAND 3 (1988), ldc.mainelegislature.org/Open/Rpts/hcl07_m2u5_1988.pdf [<https://perma.cc/UF2Q-E26T>] (describing Maine's tradition of “permissive trespass”).

145. See Patrick Whittle, *Maine Bill Would Require Written Permission for Foraging on Private Property*, PORTLAND PRESS HERALD (Mar. 27, 2017), <https://www.pressherald.com/2017/03/26/maine-senator-proposes-law-requiring-landowners-to-approve-foraging-on-their-private-property> [<https://perma.cc/5566-B48D>].

146. See *id.*

147. Baylen Linnekin, *Maine Lawmaker Targets Foragers on Private Property*, REASON.COM (Apr. 8, 2017), <https://reason.com/archives/2017/04/08/maine-lawmaker-targets-foragers/singlepage> [<https://perma.cc/N8NL-7TA6>].

148. See Abigail Curtis, *Foragers, Landowners at Odds in Proposed Wild Picker Law*, BANGOR DAILY NEWS (Mar. 29, 2017), bangordailynews.com/2017/03/29/homestead/foragers-landowners-at-odds-in-proposed-wild-picker-law/ [<https://perma.cc/G75D-65MA>].

149. *Id.*

150. See generally State of Maine, History and Final Disposition of Legislative Documents of the 128th Legislature 5 (May 4, 2017), <http://legislature.maine.gov/doc/1989> [<https://perma.cc/NB6W-4R3E>].

151. See PRIYA NAIR, NATIONAL SURVEY OF STATE REGULATION OF WILD MUSHROOM FORAGING FOR RETAIL SALE 2 (2016) (“These approaches include not allowing sale; identification by the state of approved wild mushroom experts certified via training; licensing of wild mushroom sellers; consumer advisory in the retail food

model food-guidance document that many states have adopted as law, suggests no wild-harvested mushrooms should be sold unless each individual mushroom has been “found to be safe by an approved mushroom identification expert.”¹⁵² In 2009, New York State’s Department of Agriculture & Markets ordered Carl Whittaker, a longtime mushroom forager who had sold wild mushrooms to many restaurants in the state for more than two decades, to halt his sales until he obtained a certification.¹⁵³ The state did not have a certifying process in place at the time.¹⁵⁴

C. Federal Foraging Laws

1. Federal Foraging Regulations

When it comes to national parks and other federal lands, the general policy of Congress is to favor conservation.¹⁵⁵ However, Congress has another intertwined policy, which is to encourage the use and enjoyment of national parks and federal lands by the public. Both policies are reflected in the Organic Act of 1916, which established the National Park Service (“NPS”).¹⁵⁶ The mission of the NPS, housed within the Department of the Interior, is to:

promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.¹⁵⁷

establishment; identification of mushrooms by a wild mushroom expert with state verified credentials; or variance on a case-by-case basis.”).

152. U.S. DEP’T OF HEALTH & HUMAN SERVS., FOOD & DRUG ADMIN., FOOD CODE § 3-201-16 WILD MUSHROOMS (2001), <https://www.fda.gov/ohrms/dockets/98fr/FDAFoodCode2001.pdf> [<https://perma.cc/VBW9-UNX6>].

153. *See Local Mushroom Supplier Stopped by State Dept. of Health*, ITHACA.COM (Oct. 14, 2009), www.ithaca.com/news/local_news/local-mushroom-supplier-stopped-by-state-dept-of-health/article_93bd7cb5-1181-594f-8f16-1c4190f4d2b1.html [<https://perma.cc/M884-SQJJ>].

154. *See id.*

155. *See, e.g.*, Joris Naiman, *ANILCA Section 810: An Undervalued Protection for Alaskan Villagers’ Subsistence*, 7 FORDHAM ENVTL. L. REV. 211, 249 (1996) (noting “Congress[s] policy of conserving wildlife on federal lands”).

156. Organic Act of 1916, 39 Stat. 535 (originally codified at 16 U.S.C. § 1 (2012) and now codified as amended at 54 U.S.C.A. § 100101 (West 2017)).

157. *Id.*

The Organic Act has been criticized for generations for its “contradictory mandate.”¹⁵⁸ That contradiction lay in the law’s stated intents to (1) conserve scenery, nature, historical objects, and wildlife and (2) provide a space within which people may enjoy the same.¹⁵⁹ Any specific intent on the part of Congress to address the issue of foraging in adopting the Organic Act is unclear. For example, perhaps the most exhaustive look at the origins of the Organic Act makes no mention of Congress’s intent with respect to foraging in national parks.¹⁶⁰

Our national parks and forests are administered by two different cabinet-level agencies. In addition to the NPS, the U.S. Forest Service, which resides within the Department of Agriculture, administers National Forest units. Forest Service regulations pertaining to foraging in the National Forests it manages differ from those enforced by the NPS. While NPS rules typically do not require foragers to obtain a permit, a person interested in foraging within Mt. Hood National Forest, for example, would first have to read the Forest Service’s complex and detailed fee and permit schedule for “harvesting special forest products” in the park.¹⁶¹ The forest’s rules also include requirements for permitting, age, location, quantity, and other variables.¹⁶²

The NPS, Forest Service, and other federal agencies occupy and manage more than one-quarter of all land in the United States.¹⁶³ Federal ownership of land varies dramatically by state, from a low of 0.3% in Connecticut and Iowa to a high of nearly 80% in Nevada.¹⁶⁴ As of 2017, the U.S. Forest Service managed more than 150 designated National Forests in forty-three U.S. states and territories,

158. *See, e.g.*, Robin W. Winks, *The National Park Service Act of 1916: “A Contradictory Mandate”?*, 74 DENV. U. L. REV. 575, 575 (1997) (“Historians concerned with the National Park Service, managers in the Park Service, and critics and defenders of the Service frequently state that the Organic Act . . . draw[s] the Park Service in two quite opposite directions with respect to its primary mission[.]”).

159. *See id.*

160. *See id.*

161. *See generally* U.S. DEP’T OF AGRIC., GENERAL RULES AND GUIDELINES FOR GATHERING SPECIAL FOREST PRODUCTS (2016), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd497955.pdf [<https://perma.cc/6A48-736E>].

162. *See id.*

163. *See* CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2017), <https://fas.org/sgp/crs/misc/R42346.pdf> [<https://perma.cc/YDG8-2DBC>] (“The federal government owns roughly 640 million acres, about 28% of the 2.27 billion acres of land in the United States.”).

164. *See id.*

totaling nearly 200 million acres of land.¹⁶⁵ That's more total land acreage than is found in any one U.S. state, save for Alaska. The NPS manages nearly 80 million acres of land across the country.¹⁶⁶ That's more total land acreage than is found in all but four U.S. states: Alaska, California, Texas, and Montana.

This Article focuses chiefly on NPS regulations, rather than those promulgated by the Forest Service.¹⁶⁷ This decision is based on the large variation in visitor use of these public parks. While Forest Service visitors number approximately 160 million each year,¹⁶⁸ NPS visitors number more than 300 million annually.¹⁶⁹ Furthermore, though the NPS administers more than 400 park units in the United States and its territories and protectorates,¹⁷⁰ this Article focuses on the best-known and most visited of these units: the fifty-nine designated National Park units administered by the NPS.

165. *See id.*

166. *See id.*

167. As with this Article's discussion of National Park Service regulations pertaining to foraging, a deep look at Forest Service foraging regulations is long overdue. Interestingly, there is some indication the Forest Service takes state foraging laws into account when setting its own foraging limits within parks that cross state borders. *See* U.S. DEP'T OF AGRIC., 2017 MUSHROOM GUIDE: MALHEUR/UMATILLA/WALLOWA-WHITMAN NATIONAL FORESTS 1 (2017), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd538379.pdf [<https://perma.cc/8BR8-ZHZM>] ("The Blue Mountains National Forests do **not** require free-use permits for individuals harvesting 'incidental amounts' of mushrooms. To be consistent with State laws, 'incidental amounts' are defined as 'possessing or transporting one gallon or less in Oregon and five gallons or less in Washington.'"). The NPS does not appear to consider state law when determining foraging on lands it manages.

168. *See* Press Release, U.S. Dep't of Agric., U.S. Forest Service Reports Visitors, Local Communities Receive Health, Economic Benefits from Visiting National Forests and Grasslands (July 19, 2013), <https://www.usda.gov/media/press-releases/2013/07/19/us-forest-service-reports-visitors-local-communities-receive-health> [<https://perma.cc/BVW6-U2PN>].

169. *See* Jennifer Errick, *Visits to National Parks in 2015 Top 300 Million for the First Time*, NAT'L PARKS CONSERVATION ASS'N (Feb. 17, 2016), <https://www.npca.org/articles/1138-visits-to-national-parks-in-2015-top-300-million-for-the-first-time> [<https://perma.cc/JX5D-AKFE>].

170. *See generally* NAT'L PARK SERV., NATIONAL PARK SYSTEM (2017) <https://www.nps.gov/aboutus/upload/Site-Designations-01-13-17.pdf> [<https://perma.cc/GHY4-WBZK>] (listing 417 separate units within the National Park system). Though the term "National Parks" is used generally to refer to most NPS lands, the NPS manages a broad group of parks that feature a rich variety of names. *See* VINCENT ET AL., *supra* note 163, at 5 ("NPS units have diverse titles—national park, national monument, national preserve, national historic site, national recreation area, national battlefield, and many more.").

The history of NPS regulations pertaining to foraging in designated National Parks dates back to 1960.¹⁷¹ In 1966, the NPS expanded foraging opportunities to its recreation areas.¹⁷² In 1983, the NPS updated the rules again.¹⁷³ The rules have not been updated substantively since 1983.¹⁷⁴

The Park Service's default position on foraging on its lands, embodied in its regulations, is one of prohibition.¹⁷⁵ The relevant NPS regulations reside at 36 C.F.R. § 2.1 under a broad section heading, "Preservation of natural, cultural and archeological resources."¹⁷⁶ There, 36 C.F.R. § 2.1(a)(1)(ii) prohibits—in pertinent part and subject to one exception—possessing, destroying, removing, digging up, or disturbing "plants or the parts or products thereof."¹⁷⁷ Additionally, 36 C.F.R. § 2.1(c)(3) expressly bars NPS visitors from foraging for or possessing unenumerated wild foods; from gathering more than the permissible amount of a wild food; from removing wild foods without authorization; from foraging in areas forbidden by the superintendent; or from selling any wild foods. The fine for possessing, destroying, removing, or disturbing plants or plant products is \$100.¹⁷⁸ Under 36 C.F.R. § 2.1(c)(3), the penalty for gathering natural products without permission is \$50.¹⁷⁹

The exception to the general prohibition on foraging resides at 36 C.F.R. § 2.1(c)(1)–(2).¹⁸⁰ Under the exception, the superintendent

171. *See* Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 81 Fed. Reg. 45,024, 45,025 (July 12, 2016) (codified at 36 C.F.R. pt. 2) ("The NPS has allowed limited gathering by hand of certain renewable natural resources since at least 1960.") (citing 36 C.F.R. § 1.2(c) (1960), which authorized hand picking and eating of designated native fruits and berries).

172. *Id.* ("In 1966, the NPS expanded this authority for NPS-administered recreational areas, allowing the gathering or collecting for personal use of reasonable quantities of natural, renewable products (e.g., seashells, fruits, berries, driftwood, and marine deposits of natural origin).").

173. *Id.* ("Existing NPS regulations at 36 CFR 2.1(c), promulgated in 1983, allow for the personal use or consumption of 'fruits, berries, nuts, or unoccupied seashells' by the general public, subject to certain conditions.").

174. *See id.* at 45,028 n.3 ("The NPS promulgated the current authorization in 1983, when the NPS last comprehensively revised its public-use regulations.").

175. *See* VINCENT ET AL., *supra* note 163, at Summary ("Activities that harvest or remove resources from NPS lands generally are prohibited.").

176. *See* 36 C.F.R. § 2.1 (2017).

177. *See id.*

178. S. DIST. OF W. VA., PETTY OFFENSES COLLATERAL FORFEITURE SCHEDULE 46 (2011), <http://www.wvsc.uscourts.gov/pdfs/PettyOffensesCollateralForfeitureSchedule.pdf> [<https://perma.cc/CC3H-YJT4>].

179. *See id.*

180. *See* 36 C.F.R. § 2.1(c)(1)–(2).

of each NPS unit “may designate certain fruits, berries, [or] nuts...which may be gathered by hand for personal use or consumption upon a written determination that the gathering or consumption will not adversely affect park wildlife, the reproductive potential of a plant species, or otherwise adversely affect park resources.”¹⁸¹ The rule also authorizes the superintendent to restrict the size, quantity, or location where these wild foods may be foraged and to limit possession and consumption to NPS grounds.¹⁸²

The law provides significant discretion to the superintendent of each park, often resulting in adjacent parks featuring completely different foraging rules, with little or no rationale explaining the differences. For example, a 2009 NPS report highlighted the dramatic differences in mushroom foraging rules at nearby NPS-administered parks in the Washington, D.C. area.¹⁸³ Notably, the report also details how rules differ not just from park to park but even from year to year in the same park. As of 2006, the report states, the C&O Canal National Historic Park allowed any forager to harvest up to one half-gallon of mushrooms per day.¹⁸⁴ As of 2007, neighboring Rock Creek Park banned all harvesting of mushrooms (or, indeed, of any wild foods).¹⁸⁵ As of 2008, the report states, Catoctin Mountain Park allowed foragers to gather no more than one half-gallon of mushrooms per person per day.¹⁸⁶ The report determined that same park’s rules in 2007 permitted only “less than one gallon,” while the 2006 rules only allowed “small amounts.”¹⁸⁷

Caselaw on foraging violations under 36 C.F.R. § 2.1 is scant. In one foraging case, plaintiff Jeffery D. Burrell was convicted for “removing and possessing plant material [ginseng] in violation of 36 C.F.R. § 2.1(a)(1)(ii).”¹⁸⁸ In October 1991, NPS rangers in Great

181. *Id.*; accord NAT’L PARK SERV., SUPERINTENDENT’S COMPENDIUM: ISLE ROYALE NATIONAL PARK 1 (2017) [hereinafter ISLE ROYALE COMPENDIUM] (“This activity can occur, however, only if a written determination shows that the allowed activity does not adversely affect park wildlife, the reproductive potential of a plant species, or otherwise adversely affect park resources.”).

182. See Baylen J. Linnekin, *The Case for Legal Foraging in America’s National Parks*, NEW FOOD ECON. (Jan. 8, 2018), <https://newfoodeconomy.org/the-case-for-legalizing-foraging-in-national-parks/> [<https://perma.cc/WC8N-P7Q4>] (describing NPS foraging rules pertaining to size, type, location, use, and other factors).

183. See BARRON & EMERY, *supra* note 39, at iii.

184. See *id.* at 22.

185. See *id.*

186. See *id.*

187. See *id.*

188. *United States v. Burrell*, No. 92-5223, 1993 WL 73705, at *1 (4th Cir. Mar. 17, 1993).

Smoky Mountain National Park found human footprints near an area “that had been freshly dug for ginseng.”¹⁸⁹ The next day, a pair of rangers monitored the area and saw the defendants, Burrell and Shuler, carrying sticks of the sort that can be used to harvest ginseng.¹⁹⁰ After a chase, the rangers “found forty ginseng roots sticking out of Burrell’s vest pocket.”¹⁹¹ Burrell, who faced a fine of up to \$5000, claimed he had harvested the ginseng on private property outside the park.¹⁹²

A federal court convicted Burrell, holding that regardless of whether he had harvested the ginseng outside of the boundaries of the national park, the fact he “possessed ginseng within the boundaries of the Park” was sufficient to convict him under 36 C.F.R. § 2.1(a)(1)(ii).¹⁹³ The Fourth Circuit reversed, holding it is not a violation of 36 C.F.R. § 2.1(a)(1)(ii) merely to possess a natural product regulated by the NPS within a National Park.¹⁹⁴ The court determined that “mere possession of a natural feature does not violate the regulation; the natural feature must be removed from the Park (physically harvested from park land).”¹⁹⁵

Foragers such as Burrell may learn about specific park rules around foraging through a document published by every National Park in the United States. Individual park superintendents publish their respective decisions pertaining to foraging in the parks they manage in a document known as the “Superintendent’s Compendium of Designations, Closures, Permit Requirements and Other Restrictions Imposed Under Discretionary Authority” (“Superintendent’s Compendium”).¹⁹⁶ A Superintendent’s Compendium is a “summary of park specific rules . . . [that] serves as public notice . . . and elaborates on public use and resource protection

189. *Id.*

190. *See id.*

191. *Id.*

192. *See id.*

193. *See id.*

194. *See id.* at *3 (“[T]he evidence is insufficient to show that Burrell harvested ginseng from a national park and Burrell proffered a plausible explanation of how he obtained the ginseng found on his person.”).

195. *Id.*

196. *See, e.g., National Park Service’s Draft Management Policies: Hearing Before the Subcomm. on National Parks of the S. Comm. on Energy and Natural Resources*, 109th Cong. 63 (2005) (“[T]he Superintendent’s Compendium is a written compilation of decisions made under the Superintendent’s discretionary authority affecting operations at that park.”). The Superintendent’s Compendium is authorized and required under the Code of Federal Regulations. *See* 36 C.F.R. §§ 1.5, 1.7(b) (2017).

regulations pertaining specifically to the administration of the park.”¹⁹⁷ Each individual National Park and NPS unit—including, for example, a National Historic Park—publishes an annual Superintendent’s Compendium.¹⁹⁸

No article to date has discussed how the fifty-nine designated National Parks regulate foraging, or has assessed and compared the park-specific foraging rules found in each Superintendent’s Compendium. In fact, few if any commentators have noted, much less discussed in any specific detail, the particulars of foraging rules that apply in each NPS unit.¹⁹⁹

2. *Data on Foraging Rules in NPS National Parks*

Data on foraging regulations for each of the fifty-nine National Parks, gathered from the respective Superintendents’ Compendiums, appear in Appendix A: National Park Service Policies Pertaining to Foraging Edible Foods in Our Nation’s Fifty-Nine National Parks.²⁰⁰ Key data points in the appendix include park name; whether or not a park allows foraging; whether a park limits the method, quantity, location, or type of gathering; whether a park restricts the use(s) of wild foods; which, if any, wild foods are enumerated; and whether a particular compendium contains a determination explaining a superintendent’s rationale for his or her park’s particular foraging rules.

Key findings include:

- Thirteen National Parks prohibit all foraging;
- Forty-six National Parks allow some foraging;
- Seven National Parks allow general harvesting of fruits, nuts, and berries;

197. NAT’L PARK SERV., SUPERINTENDENT’S COMPENDIUM: ACADIA NATIONAL PARK AND ST. CROIX ISLAND INTERNATIONAL HISTORIC SITE 2 (2017) [hereinafter ACADIA COMPENDIUM].

198. Email from Jeffrey Olson, Public Affairs Officer, Nat’l Park Serv., to author (Dec. 21, 2018) (on file with author) (“Superintendents update their park compendium annually and make it available to the public.”).

199. *See generally, e.g.*, Jen Stegmann, *Savoring the Fruits of Fall in the National Parks*, NAT’L PARKS TRAVELER (Sept. 21, 2014), <https://www.nationalparks.traveler.org/2014/09/savoring-fruits-fall-national-parks25668> [<https://perma.cc/VBV8-ZJED>] (discussing the Superintendents’ Compendiums and suggesting, with little or no evidence, that one “common pattern[] worth noting” in the regulations is that a “visitor can harvest generally 1–2 quarts of berries from native species for personal consumption”).

200. *See infra* Appendix A.

- Thirty-nine National Parks specify wild foods in addition to or instead of fruits, nuts, and berries;
- Twenty-seven National Parks require all foraging to be conducted only by hand (without tools);
- Eleven National Parks impose additional harvesting requirements on foragers (e.g., prohibiting visitors from climbing trees to gather wild foods);
- Thirty-nine National Parks place limitations on the use of wild foods (e.g., for personal use or consumption only);
- Twenty-six National Parks issued a statement of determination explaining the specific basis of their foraging rules, while twenty-three did not;
- Twelve National Parks reference a particular location or locations within the park where foraging may or may not take place;
- Thirty-two National Parks place limitations on the quantity of one or more wild foods a person may harvest in the park (varying from “a handful” to “reasonable quantities” to, in some cases, “no limit”); and
- Ten National Parks prohibit specific wild foods from being harvested (including everything from lobsters to fiddleheads to mushrooms).

These data demonstrate dramatic differences in the respective foraging rules that exist within our National Parks.²⁰¹ The NPS argues that these differences simply reflect the differing wild foods and visitor frequency at these parks.²⁰²

Although enumerated in the fifty-nine respective Superintendents’ Compendiums,²⁰³ individual park rules pertaining to foraging are

201. NPS foraging rules apply equally across all NPS units—not just in the fifty-nine designated National Parks. *See* Email from Jeffrey Olson, *supra* note 198 (“The regulation that covers foraging applies uniformly across the National Park System.”). Analysis for this Article of approximately three-dozen NPS parks—in addition to the fifty-nine National Parks—finds that the superintendents who manage these parks appear to regulate foraging in these parks in a manner consistent with the National Parks. *See, e.g.,* NAT’L PARK SERV., SUPERINTENDENT’S COMPENDIUM: ASSATEAGUE ISLAND NATIONAL SEASHORE 6 (2017) [hereinafter ASSATEAGUE ISLAND COMPENDIUM] (allowing the harvesting of limited quantities of blueberries and other wild foods by hand, for personal use and consumption).

202. *See* Email from Jeffrey Olson, *supra* note 198 (“There is variation because all parks are unique and have different resources. There are, too, different circumstances like visitation that have an effect on what decisions park managers make to preserve resources and the values for which the park was created while providing opportunities for public enjoyment.”).

203. *See infra* Appendix A.

nevertheless sometimes still confusing. For example, the Wind Cave National Park Superintendent's Compendium states that gathering small quantities of fruits, berries, and nuts is permissible.²⁰⁴ But the compendium then states that chokecherries and wild/American plums "may be collected."²⁰⁵ It is unclear whether the superintendent's intent and the letter of the law allow visitors (1) to gather small amounts of any and all fruits, nuts, and berries, as the rules first suggest; or (2) to gather only chokecherries and wild/American plums, as the rules then suggest; or (3) to gather *both* small amounts of any and all fruits, nuts, and berries but unlimited amounts of chokecherries and wild/American plums, as the former and latter suggest when read as a whole.²⁰⁶ Given that any one of these three very different interpretations of the rules is reasonable, the need for more clarity in the regulations that apply to foragers in National Parks is evident.

Appendix B to this Article, titled "National Park Service's Enumerated List of Wild Foods Open to Foraging in Our Nation's Fifty-Nine National Parks," presents an alphabetical list of all of the wild foods that are enumerated in the fifty-nine National Parks' Superintendents' Compendiums. The vast list includes a staggering 108 separate and distinct wild foods—from acorns to yellow raspberries—along with a handful of general food types (e.g., nuts). It includes tropical fruits like avocados and coconuts and fruits common in cooler climates, such as apples and pears. It also features more than a handful of fruits, nuts, and berries that are virtually unknown outside of their regional areas, including calabaash, genips, Tanoak acorns, and Woods Rose fruits. If this list demonstrates nothing else, it reveals the fantastic variety of wild foods growing around this country that are available to foragers and the incredible diversity of this country's flora and natural lands.

IV. TOWARD AN IDEAL FORAGING LAW

Laws and regulations that prohibit foraging as a default position harm the majority of people who would otherwise engage in harmless—and even beneficial—foraging activities. Conflicting and confusing foraging laws and regulations have a similar impact. Rules that restrict foraging promote a host of negative unintended

204. See NAT'L PARK SERV., SUPERINTENDENT'S COMPENDIUM: WIND CAVE NATIONAL PARK 11 (2016).

205. See *id.*

206. See *id.*

consequences, including that they limit the use and enjoyment of parkland; ignore foraging's health, cultural, and nutritional benefits; and further marginalize vulnerable populations, particularly those in urban, rural, and wilderness areas. Treating foragers as scofflaws rather than as what they truly are—conservationists, park users, outdoor lovers, cultural preservationists, foodies, or some combination of these traits—is a misguided approach that fosters a modern American anti-foraging stance that finds its basis in the combination of racism, classism, and elitism that were the basis for America's earliest anti-foraging laws.

While the problems posed by anti-foraging laws are legion, changing federal, state, and local foraging laws and regulations so that they strike the right balance between embracing both foragers and conservation requires several systemic changes. Enacting five key changes would help ensure that the rights and practices of foragers are respected while also protecting the delicate ecology of our nation's federal, state, and local parks for the use and enjoyment of future generations of visitors.

A. Legalize All Foraging in All National Park Service Units

NPS National Park foraging regulations are problematic for a number of reasons. First, they are difficult to locate. A researcher can easily spend more than a dozen hours tracking down and reading the compendiums on the Internet. The NPS leaves it up to individual National Park units to post the compendiums online, rather than (or in addition to) collecting and posting them all on one web page, as the agency could and should do.²⁰⁷ To gain a comprehensive view of the foraging regulations across all National Parks is a tedious, confusing, and frustrating process. Even once obtained, the Superintendents' Compendiums lack uniformity in terms of contents and format generally. With regard to specific foraging regulations, the Superintendents' Compendiums frequently allow different foraging methods, uses, and quantities, and do not explain the rationale behind decisions to ban or limit the harvesting of some or all wild foods.²⁰⁸ Additionally, it is often unclear if a particular compendium is the

207. *Accord* Email from Jeffrey Olson, *supra* note 198.

208. *See id.* (noting that superintendents need not publish a justification—known as a “determination”—but that they must have such determination available upon request); *see also infra* Appendix A.

most recent version and if that version reflects current or outdated regulations.²⁰⁹

The default position of the rules in 36 C.F.R. § 2.1 is to ban all foraging in a park in the name of conservation unless the park superintendent permits it.²¹⁰ This absolutist notion of “conservation” indiscriminately protects the wild blackberry or blueberry, a pawpaw or a coconut fallen to the ground, or a wild crab apple or a walnut, none of which inherently requires any such protection.

Rather than the current prohibitive regulations, which serve as a default ban on all foraging, the rules under 36 C.F.R. § 2.1 should embrace both, equally important parts of the dual mission of the National Parks: conservation *and human enjoyment*.²¹¹ Consequently, the rules in 36 C.F.R. § 2.1 should be amended so that the default position for every National Park is permissive, allowing visitors to forage, subject to limits on method, location, quantity, type, or use as justified by each park’s superintendent.

Superintendents already have two tools at their disposal in the event a particular wild food is in danger of being overharvested. Both are found in the Superintendents’ Compendiums. In the first case, the compendium allows a superintendent the opportunity to exercise their discretion to allow foraging but to prohibit specific wild foods from being harvested altogether.²¹² As discussed in Section III.C, ten National Parks already prohibit specific wild foods from being harvested. At least some of those prohibitions have likely arisen as a result of overharvesting. The most recent Superintendent’s Compendium from the Great Smoky Mountains National Park notes that the park has “rescinded” an exception that had allowed the collection of ramps, a popular wild food.²¹³ This is exactly how the

209. *See generally infra* Appendix A. While most data on which this Article relies in Appendix A and elsewhere are recent, the data for Virgin Islands National Park come from a 2013 Superintendent’s Compendium. *See* NAT’L PARK SERV., SUPERINTENDENT’S COMPENDIUM: VIRGIN ISLANDS NATIONAL PARK 21 (2013) [hereinafter VIRGIN ISLANDS COMPENDIUM].

210. *See supra* notes 175–82 and accompanying text.

211. *See* discussion *supra* Introduction, Section I.D.

212. *See supra* Section III.C.2.

213. *See* NAT’L PARK SERV., SUPERINTENDENT’S COMPENDIUM: GREAT SMOKY MOUNTAINS NATIONAL PARK 8 (2014) [hereinafter GREAT SMOKY MOUNTAINS COMPENDIUM]. As this example suggests, park compendiums are evolving documents. For example, some compendiums address the use of very recent technological advances such as drones, selfie sticks, and Segway vehicles in parks. *See, e.g.*, NAT’L PARK SERV., SUPERINTENDENT’S COMPENDIUM: MAMMOTH CAVE NATIONAL PARK 2 (2017) [hereinafter MAMMOTH CAVE COMPENDIUM].

existing regulations should work, and how the regulations would continue to work under the revised regulations this Article proposes.

The second case pertains to the determination found within the respective park compendiums. Park superintendents currently use the determination to justify lifting the regulatory ban on foraging and to permit, for example, the harvesting of a quart of berries. Under the more permissive regulations proposed here in this Article, park superintendents would instead use the determination to justify, if necessary, why they chose to *prohibit or restrict* some or all foraging in their park. Therefore, if overharvesting becomes a problem within a specific park, the superintendent could utilize the determination to limit or suspend foraging for any specific wild food or foods deemed to be threatened. By shifting the determination from a tool superintendents may use to allow some or all foraging to one superintendents may use to prohibit some or all foraging, the revised regulations would benefit those subject to rules by enumerating practices that are not permissible under the rules; would provide proper notice, clarity, and certainty; and would inform the public of the basis and intent of the regulations.

The rules currently do not achieve this result. Given that fewer than half of park superintendents provide any determination at all in their compendiums,²¹⁴ the public in general and foragers specifically are more often than not uninformed about the reason why a park superintendent has chosen to prohibit or allow foraging in the park they oversee. For this reason, publication of a determination should be made mandatory in all cases where a superintendent chooses to prohibit or otherwise restrict foraging (e.g., by limiting collection to one handful per day) in the park they manage.

B. End the “Museumification” of City Parks

Cities often “welcome” visitors to urban parks in a way that prohibits the visitors from enjoying the fruits of those parks.²¹⁵ In truth, urban parks were designed with neither foragers nor foraging in

214. See generally *infra* Appendix A.

215. See McLain et al., *Gathering “Wild” Food*, *supra* note 8, at 221 (“Parks have become museumified landscapes which humans can look at, recreate in, and pass through, but where harvesting is strongly discouraged.”).

mind.²¹⁶ One reason for this is that activities like foraging were seen by early parks advocates as anathema to the urban environment.²¹⁷

Consequently, potential urban foragers frequently visit lush city parks filled with wild foods they cannot touch, much less eat. Critics charge that urban conservation efforts in parks tend to “museumify” nature and wall off the urban ecosystem as a source of human sustenance.²¹⁸ Cities should therefore reimagine their regulations both to recognize that foraging takes place in contravention of regulations and to acknowledge the many benefits urban foraging provides.²¹⁹

C. Eliminate Discouraging and Confusing Rules

Federal, state, and local rules pertaining to foraging are often callous, inane, and perplexing instruments. Local regulations provide some of the most absurd enforcement examples. Consider that both “Wildman” Brill in New York City and the aforementioned Chicago forager were both fined for picking dandelion greens, the leafy part of a weed that would likely have met its eventual doom in each case at the hands of a city-owned lawnmower.²²⁰ Some local laws characterize picking berries as, invariably, destroying or interfering with a plant.²²¹ It is neither.

State regulations can be impenetrable. Some state regulations declare they prohibit all foraging, but these regulations (or state rules found elsewhere) also describe certain types of foraging they allow.²²²

216. *See id.* at 222–23 (noting that “influential landscape architects of the nineteenth and early twentieth century . . . designed [parks] as aesthetic *backdrops* for activities such as sitting, walking, birdwatching, and playing”).

217. *See id.* at 223 (delineating the view of a clear divide between rural and urban activities, and “which human–nature interactions belonged in the city and which in the country”).

218. *See id.* at 221 (discussing the “museumification of nature, urban conservation programmes typically favour a discursive and regulatory construction of urban nature as a provider of ecological services and intangible values rather than a source of products for human use”) (internal citation omitted).

219. *See id.* (“[I]t may be desirable to thoughtfully (re)incorporate materially productive relationships between people and nature in urban green space planning [since] urban green spaces already serve as provisioning sites where people collect plants and fungi—often surreptitiously and in defiance of rules prohibiting such activities—for a variety of uses.”).

220. *See supra* Section III.A.

221. *See supra* notes 117–18 and accompanying text.

222. *See supra* notes 135–36 and accompanying text.

Other states reference foraging permits, but those permits can be difficult or impossible to locate.²²³

NPS rules serve both to confuse National Park visitors and to discourage potential visitors. Forager Iso Rabins has stated that “[t]he rules around harvesting . . . I’ve always found fairly confusing overall and [it] takes a ton of research to find out what you can and cannot harvest, and sometimes the information can’t even be easily found online.”²²⁴ Despite its recent denial,²²⁵ the NPS has long been aware of the fact its prohibitions and conflicting regulations discourage foragers specifically and park visitors more generally.²²⁶

Even NPS rules that allow foraging can be confusing. Some individual park rules contradict themselves, as the Wind Cave National Park example illustrates.²²⁷ Other times, park rules change from year to year.²²⁸ In still other cases, adjacent parks often have conflicting rules.²²⁹ Finally, park rules posted at the NPS website can be difficult to locate and, even when found, may be outdated.²³⁰

D. Recognize that Foragers Are Conservationists

Bureaucrats and lawmakers should acknowledge that foragers are conservationists and craft their regulations with that fact in mind. Conservationists are sometimes divided about whether or not cities should allow foraging.²³¹ Some critics of looser foraging regulations

223. See, e.g., *DEEP’s Native Plant Garden at 79 Elm Street*, CONN. DEP’T OF ENERGY & ENVTL. PROT. (Sept. 2011), www.ct.gov/deep/cwp/view.asp?a=2690&q=322452 [<https://perma.cc/43KG-PBGE>] (noting it is against the law “to collect any plants from state-owned lands without a permit” but failing to identify what sort of permit one would need and where or how to obtain such a permit).

224. See Email from Iso Rabins, Founder, ForageSF, to author (Dec. 29, 2017) (on file with author).

225. See Email from Jeffrey Olson, *supra* note 198 (stating NPS does not believe that conflicting foraging rules in National Parks discourage visitors).

226. See BARRON & EMERY, *supra* note 39, at iii (“Substantial confusion . . . generates resentment and causes some local residents to avoid the parks altogether.”).

227. See *supra* note 204 and accompanying text.

228. See *supra* notes 183–87 and accompanying text.

229. See *supra* notes 183–87 and accompanying text.

230. See *supra* notes 207–09 and accompanying text.

231. See, e.g., McLain et al., *Gathering “Wild” Food*, *supra* note 8, at 235 (“Some considered foraging to be destructive and a practice that should not be permitted, others felt that low levels of harvesting, particularly of invasive or non-native species, were acceptable, and a small minority stated that they were considering how foraging could be integrated into ecological restoration activities.”).

often point to the classic example of the “tragedy of the commons,” developed by Garrett Hardin, as support for stricter regulation.²³²

But a growing number of scholars are pushing back against the notion that foraging in a commons is an inherently unsustainable practice.²³³ Scholars have described, for example, the “distinct conservation ethic among modern ginseng harvesters, who see themselves as stewards of the forest.”²³⁴ Scholars have also noted that foraging is far more sustainable than alternative uses of land.²³⁵ Foragers regularly identify themselves as conservationists. One of those foragers, Iso Rabins, was dubbed an eco-friendly gourmet by Sierra Club.²³⁶ Mainstream media articles on foraging also tend to highlight ways to forage in an ecologically responsible manner.²³⁷

A growing body of literature demonstrates that foragers are conservationists.²³⁸ Additionally, bad policies arising from uneven

232. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968) (describing how the rational behavior of actors in a commons is to deplete or exhaust resources in that commons).

233. See, e.g., Manget, *supra* note 94, at 677 (“Since Hardin’s essay [*The Tragedy of the Commons*], numerous scholars, most notably Elinor Ostrom, have challenged his theory by pointing out myriad ways in which people around the world have mobilized culture on a local level to effectively manage commons resources. Scholars such as Mary Hufford, Brent Bailey, and Eric Edwards have documented instances of such cultural adaptations in Appalachia today, including a distinct conservation ethic among modern ginseng harvesters, who see themselves as stewards of the forest.”) (internal citations omitted).

234. *Id.*

235. See SARAH A. LAIRD ET AL., WILD PRODUCT GOVERNANCE: LAWS AND POLICIES FOR SUSTAINABLE AND EQUITABLE NON-TIMBER FOREST PRODUCT USE 5 (2009) (noting that “forest degradation and destruction resulting from agriculture, logging, mining and other land uses cause far more damage to NTFP populations than overharvesting”).

236. Krislyn Placide, *Q&A: Iso Rabins, Gourmet Hunter-Gatherer*, SIERRA CLUB (June 22, 2012), sierraclub.typepad.com/greenlife/2012/06/foraging-qa-iso-rabins-the-gourmet-hunter-gatherer.html [https://perma.cc/EA34-4SR4].

237. See, e.g., Cari Taylor-Carlson, *Backyard Weeds Can Be a Meal for Foragers*, MILWAUKEE J. SENT. (Apr. 29, 2014), archive.jsonline.com/features/food/backyard-weeds-can-be-a-meal-for-foragers-b99244355z1-257179551.html [https://perma.cc/NR H3-VBPV] (urging foragers to take only as much as they need and to avoid picking endangered species).

238. See generally, e.g., JENNIFER HAHN, PACIFIC FEAST: A COOK’ GUIDE TO WEST COAST FORAGING AND CUISINE (2010); LINNEKIN, *supra* note 6; Rebecca J. McLain et al., *Urban Non-Timber Forest Products Stewardship Practices Among Foragers in Seattle, Washington (USA)*, 28 URB. FORESTRY & URB. GREENING 36 (2017); Email from Iso Rabins, *supra* note 224 (“[M]ore open rules around foraging would actually help protect the environment more than the blanket prohibition we have now. Instead of letting the public get out into nature and see what it has to offer, we’re forced to keep it at arms length, which doesn’t lend itself to caring for the resource as much as we should.”).

power allocation can exacerbate inequalities like those seen historically in the United States.²³⁹ Given these factors, some scholars—including the authors of an NPS report—are adamant about the need both to allow foraging and to involve foragers in crafting foraging regulations.²⁴⁰

E. Lightly Regulate Foragers

Virtually everyone—from the NPS to urban lawmakers and foraging advocates—agrees that decisions about foraging are best made at the local level.²⁴¹ Where people differ, chiefly, concerns whether they believe the government’s default position toward foraging should be a permissive or prohibitive one.

The permissive approach appears to be gaining ground. In recent years, scholarly and policy arguments in favor of legalized foraging have grown more common.²⁴² For example, a 2009 United Nations (“UN”) report criticized foraging regulations, including those in the United States, as overly protective of resources and overly burdensome on users of those resources.²⁴³ The report argues that subsistence foraging should not be regulated *at all* until and unless “there are clear risks of overharvesting.”²⁴⁴ Even when a crisis arises due to overharvesting, for example, stricter regulations may not be

239. See *supra* Part II; see also LAIRD ET AL., *supra* note 235, at 6 (“It is vital that the power dynamics and political and economic inequalities between stakeholders be understood prior to policy formulation and implementation, otherwise measures will be ineffective and produce unintended consequences.”).

240. See BARRON & EMERY, *supra* note 39, at iii (“Involving harvesters in decision making and incorporating their local ecological knowledge would enhance the effectiveness of morel management, increase the perceived legitimacy of guidelines and regulations, decrease enforcement costs, and reinforce good park-community relations.”).

241. See, e.g., Sawers, *supra* note 69, at 688 (“The states are better positioned than federal courts to decide, say, where gathering berries is appropriate. Our national landscape is varied and our property law should be as well. Although legislatures are better placed to weigh the interests of landowners and the public, there is no legal impediment to a state court interpreting its common law to permit public access to unimproved land.”).

242. See McLain et al., *Gathering “Wild” Food*, *supra* note 8, at 222 (concluding that “foraging deserves to be considered a legitimate and potentially positive practice in urban ecosystems”).

243. See LAIRD ET AL., *supra* note 235, at 3 (“Laws tend to be inconsistent and confusing, with little resembling a policy ‘framework’ or strategy. Many are opportunistic or drafted in response to perceived threats, and rarely do regulations follow from consultations with stakeholders or careful analysis of the complex factors involved in the sustainability and equity of [non-timber forest product] management, use and trade.”).

244. See *id.* at 4.

the best response.²⁴⁵ One reason for caution, the UN report concludes, is that good intentions often lead to unintended, negative consequences.²⁴⁶ These conclusions dovetail with the findings of an earlier UN report on biological diversity.²⁴⁷ In that document, the 150 signatory nations determined that “the conservation of biological diversity [and] the sustainable use of its components” is vital to the “many indigenous and local communities embodying traditional lifestyles [that rely] on biological resources[.]”²⁴⁸ The Convention defined “sustainable use” as the utilization “of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.”²⁴⁹

Leading food-policy advocates have also urged policymakers to remove barriers to legal foraging.²⁵⁰ As these advocates note, the benefits of foraging may only be maximized if the practice is legal.²⁵¹ Ultimately, given this growing agreement between scholars and advocates, “[r]egulating lightly” may be the best approach.²⁵²

245. *Id.* at 7 (“In the absence of a crisis, and in some cases even when there is a perceived crisis, it is often best for governments to **maintain the status quo** until they have had a chance to fully comprehend the products and activities they seek to regulate. They should first consult, undertake research and invest in the early stages of policy design and formulation in order to create texts that will work and actually be implemented.”).

246. *Id.* at 12 (“Governments and others should be aware that unintended consequences often result both from policies regulating NTFPs [E]ven in cases when governments have the ‘best-laid plans’, crafted with the best of intentions, NTFP law and policy often have a way of not working out as planned.”).

247. *See* UNITED NATIONS, CONVENTION ON BIOLOGICAL DIVERSITY (1992), <https://www.cbd.int/doc/legal/cbd-en.pdf> [<https://perma.cc/TFM8-WWV2>].

248. *See id.* at 1.

249. *Id.* at 4.

250. *See* DABADY & STARK, *supra* note 49, at 3 (urging lawmakers and regulators to “further consider ways to address legal barriers to sustainable foraging”).

251. *See id.* at 1 (“The success of foraging in the urban ecosystems of California depends on enabling city dwellers to safely and freely harvest plants in their local environment.”).

252. LAIRD ET AL., *supra* note 235, at 13 (“Governments should be encouraged to approach NTFP regulation with a light hand, and in ways that reflect the financial, ecological and social costs and benefits of such actions, as well as implementation capacity and the likelihood of compliance. Regulating lightly will, in turn, reduce bureaucratic procedures and levels of red tape, lessen confusion among harvester communities, and eliminate opportunities for bribery and corruption.”).

CONCLUSION

The ancient and valued practice of foraging deserves laws and regulations which protect both foragers and the lands upon which they choose to forage. Federal, state, and local laws should embrace foragers and foraging. They can do so by enacting permissive laws that allow foraging by default and shift the burden—in cases where the government believes placing any restrictions on the practice to be necessary, for whatever reason or reasons—on the legislative body or government agency that wishes to restrict foraging. By adopting laws that no longer discourage or prohibit the practice of foraging, governments can continue to promote conservation while also better promoting the use and enjoyment of our nation's unique national, state, and local parklands by a greater and more diverse population of visitors.