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Stalemate: The Practical Impossibilities of Public Land Access in Wyoming

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STALEMATE: THE PRACTICAL IMPOSSIBILITIES OF PUBLIC LAND ACCESS IN WYOMING

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*“The land shall not be sold in perpetuity, for the land is mine. For you are strangers and sojourners with me.”*¹

On April 29, 2022, four hunters from Missouri sat in a Carbon County, Wyoming courtroom anxiously waiting for a jury to deliver their fate in the form of a verdict. The four men were charged with violating Wyoming’s criminal trespass law, despite technically never having stepped foot on private land.² The prosecution’s theory of the case—grounded in a long-standing tradition of American common law property rights—was that the hunters had violated the airspace above a privately-owned ranch where two corners of the ranch’s parcels came together with two opposing corners of public land.³ After hearing the evidence, the judge decided to include verbiage about traversing the airspace of privately-owned property in the jury instructions.⁴ This decision greatly impacted the prosecution’s case, mainly because there had not been a shred of evidence that the hunters had ever physically touched the privately-owned property.⁵

To help visualize the problem, imagine squares on a checkerboard, where alternating squares of black and red join at four corners to meet at a center point. The red squares represent public land, and the black squares are privately-owned land. In the case of the four hunters, the black squares are parcels of land that are part of the privately-owned Elk Mountain Ranch. Elk Mountain Ranch is a property that includes 22,000 acres of deeded land interspersed with approximately 11,000 acres of public land, overseen by the Bureau of Land Management and the State of Wyoming.⁶ Interestingly, on the real estate listing for Elk Mountain

1. *Leviticus* 25:23.

2. Kristen A. Schmitt, *Charges dismissed in Wyoming corner crossing case*, GO-HUNT (May 2, 2022), <https://www.gohunt.com/content/news/charges-dismissed-in-wyoming-corner-crossing-case>.

3. Ben Ryder Howe, *It’s Public Land. But the Public Can’t Reach It*, N.Y. TIMES (Nov. 26, 2022), <https://www.nytimes.com/2022/11/26/business/hunting-wyoming-elk-mountain-access.html>.

4. Angus M. Thuermer, Jr., *Corner-crossing judge wants ‘airspace’ language in jury instructions*, WYOFIL (Apr. 29, 2022), <https://wyofile.com/corner-crossing-judge-wants-air-space-language-in-jury-instructions/>.

5. *Id.*

6. See *Elk Mountain Ranch*, THE CHICKERING COMPANY, INC., <https://chickeringco.com/portfolio-item/elk-mountain/> (last visited Nov. 30, 2022).

Ranch, the property is described as having deeded property “blocked up together” with leased land.⁷

In the case described above, the Missouri hunters creatively tried to avoid physically trespassing on the privately-owned land. They built a stepladder, positioning it in such a way that two of its legs were grounded on the parcel of publicly-owned land they wanted to access, while the other two legs were planted on the publicly-owned land they were already standing on.⁸ To traverse the stepladder, the hunters had to pass through the airspace of the adjacent two squares of Elk Mountain Ranch’s privately-owned land—never physically stepping onto the property.⁹ This act of crossing at the corner where public and privately-owned parcels meet is commonly referred to as “cornercrossing.”¹⁰ To Fred Eschelmen, owner of Elk Mountain Ranch, these hunters trespassed, despite the legal ambiguity of cornercrossing, and this was a crime.¹¹

7. *Id.* The listing also mentions the following: “Two lawsuits protect the ranch from public access: When a group demanding access to the trophy hunting on the mountain sued, the Federal District Court ruled the road accessing the mountain must remain closed to the public. The other was a U.S. Supreme Court decision on a ranch nearby which ruled it is trespass if you step over public section corners when private sections complete the corner.”

8. Kamila Kudelska, *Missouri hunters get a not guilty verdict for corner crossing, moving the issue of whether it’s illegal or not forward*, WYOMING PUBLIC MEDIA (May 6, 2022, 4:31 PM), <https://www.wyomingpublicmedia.org/open-spaces/2022-05-06/missouri-hunters-get-a-not-guilty-verdict-for-corner-crossing-moving-the-issue-of-whether-its-illegal-or-not-forward>.

9. Angus M. Thuermer, Jr., *Ranch owner: Corner-crossing damages could exceed \$7M*, OIL CITY NEWS (Sept. 5, 2022), <https://oilcity.news/community/wyoming-community-2/2022/09/05/ranch-owner-corner-crossing-damages-could-exceed-7m/> [hereinafter Thuermer, *Ranch Owner*].

10. *WY BHA Carbon County Corner Crossing Issue Statement*, BHA (Jan. 26, 2022), https://www.backcountryhunters.org/wycorner_crossing#:~:text=The%20term%20%E2%80%9Ccorner%20crossing%E2%80%9D%20refers%20to%20the%20act,%E2%80%93%20land%20to%20another%20parcel%20of%20public%20land.

11. Thuermer, *Ranch Owner*, *supra* note 9. There are three trespassing crimes with which one can be charged criminally in Wyoming: criminal trespass, trespass to hunt, and trespass to collect resource data. Margaret O’Hara, *Judiciary Committee Undertakes Wyoming Trespass Statutes in First Interim Meeting*, THE SHERIDAN PRESS (May 24, 2022), https://www.thesheridanpress.com/news/local/judiciary-committee-undertakes-wyoming-trespass-statutes-in-first-interim-meeting/article_e90d7a1e-db6a-11ec-abc2-df807ace4a2a.html.

The jury who heard the case, however, disagreed with the landowner and the prosecution's theory of the case.¹² After deliberating, the jury returned a verdict of not guilty on all charges.¹³

But the story of these Missouri hunters is still far from over. Today, the hunters face a federal civil case where their fate could have wide-reaching consequences for the American public's access to over 8.3 million acres of similarly inaccessible public land across eleven different states.¹⁴

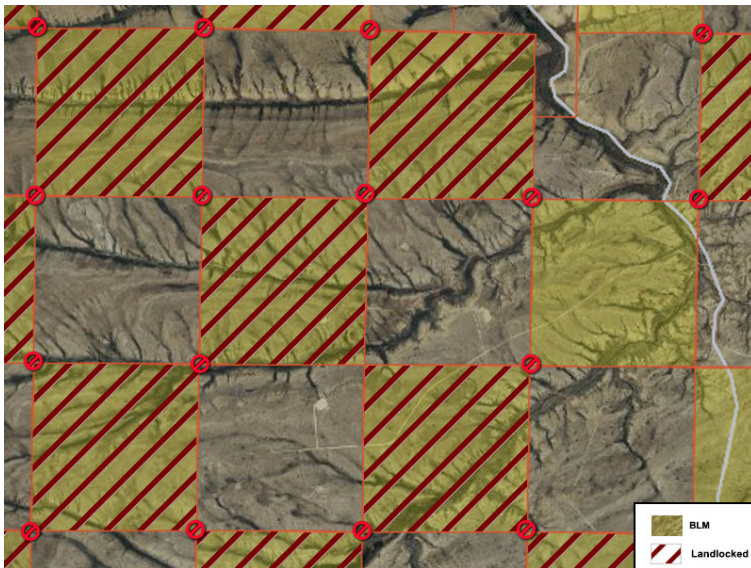
This Comment briefly introduces the reader to the history and concepts of both checkerboarding and cornercrossing in Part I. Also within Part I, Section C discusses Wyoming's methodology for dealing with the lack of accessibility and the implications of a pending federal civil case involving the four Missouri hunters. Part II discusses the legal issues and the jurisprudence implicated by cornercrossing. Part III calls for any and all changes to the existing law. This Comment concludes by positing a pragmatic solution of making immediate changes to criminal trespass statutes in Wyoming and elsewhere to explicitly bring cornercrossing out of the realm of illegality. It also argues, in a more aspirational manner, for a fundamental reordering of the rights that traditionally accompany property ownership to include a right to roam.

12. Alex Robinson, *Hunters Who Challenged Wyoming Corner Crossing Rules Found "Not Guilty" of Criminal Trespassing*, OUTDOOR LIFE (Apr. 29, 2022, 7:37 PM), <https://www.outdoorlife.com/hunting/wyoming-corner-crossing-case-verdict/>.

13. *Id.*

14. Angus M. Thuermer, Jr., *Corner crossing report: inaccessible public acres now 8.3M*, WYOFILE (Apr. 26, 2022), <https://wyofile.com/corner-crossing-report-expands-inaccessible-public-acres-to-8-3m/> [hereinafter Thuermer, *Corner Crossing Report*].

I. CORNERCROSSING – AN INTRODUCTION AND BRIEF HISTORY



*A checkerboard pattern of land ownership makes accessing millions of acres of public land in Wyoming and other western states practically impossible.*¹⁵

Vast swaths of several western states are home to a complex checkerboard pattern of property ownership.¹⁶ The checkerboard itself has an equally complex origin story and carries with it an enduring legacy of poor planning that has led to today's problems with inaccessibility. This quilted pattern of property ownership has created an estimated eight million acres of inaccessible public land.¹⁷ This means public lands as large as four Yellowstone National Parks are currently inaccessible to the public.¹⁸ To understand how so much public land became inaccessible in the

15. *The Corner-Locked Report: The Impact and Ethics of Corner Crossing*, ONX, <https://www.onxmaps.com/onx-access-initiatives/corner-crossing-report> (last visited Jan. 22, 2023) (photograph of checkerboard pattern of land ownership in Wyoming) [hereinafter *Corner-Locked Report*].

16. *Id.*

17. Alex Robinson & Dac Collins, *Why Not Legalize All Corner Crossing in the West?*, *OUTDOOR LIFE* (May 25, 2022, 4:29 PM), <https://www.outdoorlife.com/conservation/why-not-legalize-all-corner-crossing-in-the-west/>.

18. Keegan Sentner, *More Than 8 Million Acres of Public Land in the West Is "Corner Locked" and Inaccessible to Hunters*, *OUTDOOR LIFE* (Apr. 19, 2022, 5:57

first place, it is necessary to look at the history of American land purchases.

A. *A Brief History of Cornercrossing*

In the mid-1800s, as the United States sought to connect its new west coast states of California, Oregon, and Washington with existing states east of the Mississippi via the great transcontinental railroad, the idea that westward expansion could best be accomplished by land grants came into being.¹⁹ However, the United States quickly discovered that selling distant, desolate plots of individual land to homesteaders and farmers would be practically impossible.²⁰ Instead, Congress came up with what was believed to be a mutually beneficial plan: the federal government would simply give railroad companies alternating parcels of land along the planned railway, while the government would retain ownership of the remaining parcels.²¹ Then, railroad companies would sell off their parcels to privately finance construction of the railways.²² As podcaster and avid hunter Randy Newburg put it, “[t]he thinking was that the railroads would make a lot of money from the land they owned in the checkerboard, as towns developed . . . correspondingly, these public land sections would increase in value, too.”²³

Ostensibly, the federal government hoped that by giving the railroad company alternating parcels of land along the railway, settlements and towns would spring up alongside them, and property values would increase accordingly.²⁴ Indeed, the government would recoup its money

PM), <https://www.outdoorlife.com/conservation/millions-acres-corner-locked-public-land/>.

19. George E. Powers, Jr., *Gamesmanship on the Checkerboard: The Recurring Problem of Access to Interlocked Public and Private Lands Located within the Pacific Railroad Land Grants*, 17 LAND & WATER L. REV. 429, 429–31 (1982).

20. See Gregory Nickerson, *Industry, Politics and Power: the Union Pacific in Wyoming*, WYOHISTORY.ORG (Nov. 8, 2014), <https://www.wyohistory.org/encyclopedia/industry-politics-and-power-union-pacific-wyoming>.

21. Powers, *supra* note 19.

22. *Id.*

23. Randy Newburg, *Corner Crossing – Legal Experts Chime In (Part 2)*, YOUTUBE, at 22:33 (Mar. 10, 2022), <https://www.youtube.com/watch?v=oGkJUpkktdc> [hereinafter Newburg Podcast Part 2].

24. See Jillian Jurica, *Easement Data Unlocks Public Land*, ONX (Oct. 14, 2021), <https://www.onxmaps.com/blog/easement-data-unlocks-public-land>; *Land Grants*, LI-

by freely granting sections to the railroad companies, and would subsequently sell the sections it retained to incoming homesteaders as nearby towns expanded.²⁵

But, as in many cases, the best-laid plans often fail, and this plan failed spectacularly. By the mid-to-late 1970s, the federal government shifted its policy toward federal ownership and problems in managing the public lands mounted.²⁶ Those parcels reverted back to government ownership, creating the patchwork of privately and publicly-owned parcels seen today.²⁷ Very little, if any, attention was paid by the government or remaining landowners regarding how to access the remaining publicly-owned parcels.²⁸ As privately-owned parcels were subsequently sold and resold over the years, the United States retained control over alternating parcels.²⁹ However, little forethought was given to providing access to the millions of acres of interspersed publicly-owned parcels.³⁰ The Supreme Court further muddied the issue in the *Leo Sheep Co. v. United States* decision.³¹ In *Leo Sheep*, the Court found that the federal government had not retained any access, by way of easement or otherwise, to the landlocked parcels.³²

Within the past few decades, the federal government has since made securing easements and rights-of-way through privately-owned lands a priority, but many of these publicly-owned parcels remain landlocked behind thousands of acres of privately-owned land.³³

As a result, the United States is left with a strange checkerboard pattern of land ownership and the fallout of a lack of foresight in maintaining access to landlocked parcels. There are currently over 15.8 million acres

BRARY OF CONGRESS, <https://www.loc.gov/collections/railroad-maps-1828-to-1900/articles-and-essays/history-of-railroads-and-maps/land-grants/> (last visited Jan. 22, 2023) [hereinafter *Land Grants*].

25. Newburg Podcast Part 2, *supra* note 23, at 22:45–23:05.

26. Powers, *supra* note 19.

27. Jurica, *supra* note 24; *Land Grants*, *supra* note 24.

28. Powers, *supra* note 19.

29. Jerrold A. Long, *Railroad Land Grants and Public Access*, 37 NAT. RES. & ENV'T 57 (2022) [hereinafter Long, *Railroad Land Grants*].

30. Newburg Podcast Part 2, *supra* note 23, at 23:05–23:11; John W. Sheridan, *The Legal Landscape of America's Landlocked Property*, 37 UCLA J. ENV'T L. & POL'Y 229, 234 (2019).

31. Long, *Railroad Land Grants*, *supra* note 29.

32. *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979).

33. Jurica, *supra* note 24.

of federal land that are landlocked.³⁴ According to the most comprehensive mapping report to detail this issue, there are two types of landlocked public land—land that is isolated and land that is corner-locked.³⁵ Corner-locked land is land that can be accessed at the corners because it shares a corner with other publicly-owned land.³⁶

B. *The Cornercrossing Quandary*

As previously described, the maneuver that the four Missouri hunters attempted by crossing from one corner of public land to another that is bordered by privately-owned parcels is known as “cornercrossing.”³⁷ It has been given the name “cornercrossing” because one can only access a parcel of public land by crossing from the diagonally adjacent parcel of public land where the two corners meet.³⁸ Cornercrossing is not explicitly illegal in Wyoming as the law is currently written,³⁹ “and the law [surrounding cornercrossing] has been a legal gray [area] in Western states ever since their settlement.”⁴⁰ In fact, not a single law exists in any state that specifically criminalizes stepping from one corner of public land onto another corner of public land.⁴¹ This legal ambiguity has led to confusion and uncertainty with respect to the application of the law, “with some counties prosecuting corner crossers as trespassers and others choosing to turn a blind eye in most cases.”⁴²

Hunters and outdoorspeople have been capitalizing on this legal gray area for years—in the same way the Missouri hunters did—to access land

34. *Corner-Locked Report*, *supra* note 15.

35. *Id.*

36. *Id.*

37. Clara Geoghegan, *Corner Crossing is a Legal Gray Area in Colorado and Many Western States*, LAW WEEK COLO. (June 23, 2022), <https://www.lawweek.colorado.com/article/corner-crossing-is-a-legal-gray-area-in-colorado-and-many-western-states/>.

38. Sam Lungren, *Inside the Wyoming Corner Crossing Case Everyone is Watching*, MEATEATER (Dec. 15, 2021), <https://www.themeateater.com/conservation/public-lands-and-waters/inside-the-wyoming-corner-crossing-case-everyone-is-watching>.

39. Rachele Schrote, *‘Private Air’ Worth \$7.75 Million? WY Corner Crossing Lawsuit Continues*, GEARJUNKIE (Sept. 13, 2022), <https://gearjunkie.com/outdoor/hunt-fish/wyoming-corner-crossing-lawsuit-damages>.

40. Robinson & Collins, *supra* note 17.

41. *Corner-Locked Report*, *supra* note 15.

42. Robinson & Collins, *supra* note 17.

that has been designated as public land but is corner-locked and surrounded on all sides by private land.⁴³ Typically, these public lands are owned or operated by the United States Forest Service (“USFS”) or the Bureau of Land Management (“BLM”).⁴⁴ The issue of public land being landlocked behind private land is most egregious in the state of Wyoming. Currently, there are approximately 2.5 million acres of land designated as “public land” in Wyoming that are corner-locked.⁴⁵

Until recently, cornercrossing was simply a murky legal issue that was rarely prosecuted because few hunters had either the time or inclination to scour county recorders’ offices to determine where easements on landlocked public land existed.⁴⁶ If hunters and outdoorsmen wanted legal access to landlocked public land, but were uncertain of where the exact boundaries lay, they would simply knock on an owner’s door and ask permission to cross.⁴⁷ Within the last decade, however, the concept of cornercrossing has become both more conspicuous and more prevalent as global positioning and mapping companies are more adept at identifying (down to the foot in most cases) where private land ends and public land begins.⁴⁸

In 2019, after mapping company onX’s team of access advocates painstakingly scoured decades’ worth of land transactions, onX published a report that detailed precisely how egregious the inaccessibility issue is.⁴⁹ onX identified *millions* of acres of public land that are currently landlocked behind private land, and, therefore, unreachable without the express permission of the neighboring landowners.⁵⁰ Maps of the western United States, such as the one included in this Comment, detail the pervasiveness and complexity of this issue. There are millions of acres of

43. See generally *Corner-Locked Report*, *supra* note 15. Corner-locked land is public land that is inaccessible to the general public because there is no public road and no recorded easement.

44. See generally *The Federal Land Management Agencies*, CONG. RSCH. SERV. (Feb. 16, 2021), <https://sgp.fas.org/crs/misc/IF10585.pdf>.

45. Thuermer, *Corner Crossing Report*, *supra* note 14.

46. Howe, *supra* note 3.

47. Randy Newburg, *Corner Crossing – History and Trends (Part 1)*, YOUTUBE, at 18:19–19:38 (Mar. 9, 2022), <https://www.youtube.com/watch?v=hlzpWb5HXFw> [hereinafter Newburg Podcast Part 1].

48. Howe, *supra* note 3.

49. *Corner-Locked Report*, *supra* note 15.

50. Jurica, *supra* note 24; *Land Grants*, *supra* note 24.

public land that American citizens should have access to that are “diced up” between government agencies and private owners.⁵¹

The difficulties in accessing landlocked public land abound for numerous reasons. Historically, outdoor enthusiasts were relegated to only those lands whose access points were recorded in public records or on printed maps.⁵² Accessibility has recently become a priority for legislatures, especially after private companies like onX and constituents alike saw a need to modernize access records.⁵³ Not only is public access a priority, but wildlife management benefits from better mapping.⁵⁴ Accordingly, this has led to government agencies taking the initiative to dust off and digitize their records.⁵⁵

Furthermore, BLM has recently digitized access easements, and USFS has likewise begun digitizing easements and rights-of-way.⁵⁶ The White House recently signed H.R. 3113 into law (ironically on April 29, 2022, the very same day the Missouri hunters were acquitted in their criminal trespass case).⁵⁷ H.R. 3113 “digitizes and makes publicly available geographic information system mapping data relating to public access to federal land and waters for outdoor recreation.”⁵⁸

Outdoor enthusiasts and hunters began using handheld GPS technology more frequently with the advent of smartphones and as mapping companies developed applications that would give precise boundary lines and ownership records.⁵⁹ As GPS technology has become increasingly accurate with technological advances, applications like onX give

51. Ben Long, *Opinion: Hiking public lands shouldn't require a ladder or a lawsuit*, THE DENVER POST (Oct. 4, 2022, 12:58 PM), <https://www.denverpost.com/2022/10/04/public-land-access-private-land-easements-wyoming-lawsuit/> [hereinafter Long, *Opinion*].

52. Press Release, James E. Risch, U.S. Senator for Idaho, Risch, King Bill to Modernize Public Land Mapping Heads to President's Desk (Apr. 7, 2022), <https://www.risch.senate.gov/public/index.cfm/2022/4/risch-king-bill-to-modernize-public-land-mapping-heads-to-president-s-desk> [hereinafter Risch Press Release].

53. Howe, *supra* note 3.

54. Risch Press Release, *supra* note 52.

55. *Id.*

56. Jurica, *supra* note 24.

57. Press Release, The White House, Bill Signed: H.R. 3113 (Apr. 29, 2022), <https://www.whitehouse.gov/briefing-room/legislation/2022/04/29/bill-signed-h-r-3113/>.

58. *Id.*

59. Howe, *supra* note 3.

users the ability to know precisely where they are when traveling outdoors.⁶⁰ This not only helps prevent users from getting lost, but also allows users to identify who owns the private lands around them, and whether there are any recorded easements on the privately-owned property that would allow them an avenue of access to landlocked islands of public land.⁶¹ Seeing a need for a service like theirs, onX and other mapping companies now have entire crews of people who are tasked with combing through assessors' offices and updating ownership status of privately-owned land and any corresponding easements.⁶² These up-to-date records make their mapping products vitally important, not only to their subscribers and purchasers, but to the American public at large.⁶³

C. *How States Currently Deal with Corner-Locked Public Land*

Different states have dealt with their landlocked public land in different ways and with varying degrees of success. “[R]ecreational easements, as well as public access programs like Montana’s Block Management Program and Idaho’s Access Yes, . . . for hunting, fishing, or other recreational purposes” have successfully opened up much of the landlocked areas in those two states.⁶⁴ By prioritizing the creation of ingress and egress into these landlocked areas, “groups like the Trust for Public Land and the Montana Department of Fish, Wildlife & Parks worked with willing landowners and elected officials to secure public access.”⁶⁵

There are also efforts at the state and federal levels to incentivize private landowners to give the public access to these landlocked parcels.⁶⁶ For instance, “every major timber company in Montana has a conservation easement allowing the public to enter at least part of their domain,” which has “helped secure access to public lands around fast-growing resort towns

60. Jess McGlothlin, *Watch This Bill: The Modernizing Access to Our Public Land Act*, ONX (Mar. 10, 2020), <https://www.onxmaps.com/hunt/blog/watch-this-bill-the-modernizing-access-to-our-public-land-act>.

61. *The #1 Hunting GPS App*, ONX HUNT, <https://www.onxmaps.com/hunt/app?ref=home-page-cta-02> (last visited Feb. 24, 2023).

62. Howe, *supra* note 3.

63. Thuermer, *Corner Crossing Report*, *supra* note 14.

64. Robinson & Collins, *supra* note 17.

65. Long, *Opinion*, *supra* note 51.

66. *Public Access to Private Lands*, CONG. SPORTSMEN’S FOUND. <https://congressional sportsmen.org/policies/state/public-access-to-private-lands> (last visited Jan. 22, 2023).

like Whitefish and Columbia Falls.”⁶⁷ In 1964, Congress passed the Land and Water Conservation Fund (“LWCF”), an initiative dedicated to purchasing and preserving Americans’ access to wild and natural spaces.⁶⁸ In August 2020, Congress authorized funding permanently, allotting the LWCF a \$900 million annual budget⁶⁹ at virtually no cost to taxpayers.⁷⁰ Some states’ legislatures who have begun to prioritize conservation are now using LWCF funds to purchase land or easements in an effort to ensure the public has shared access to wilderness.⁷¹

Wyoming, on the other hand, seems to be plodding steadily along in the opposite direction. The Wyoming Wildlife Taskforce has been exploring a variety of ways to improve access to public land,⁷² including implementing a program called “Access Yes.” Access Yes, established in 1998, has had limited success, and suffers from a dubious definition of what constitutes improvements in accessibility.⁷³ The task force has also been discussing tying landowner tags to access.

The reasons for Wyoming’s reticence to provide better access are myriad. The Cowboy State is home to long-time “legacy” ranches that are hundreds or thousands of acres in size. Many of these ranches have been in families for generations,⁷⁴ and a large percentage of these ranches are home to this checkerboard pattern of public and private ownership. Until recently, many landowners allowed the public to cross their private parcels to access landlocked public acreage with the understanding that

67. Long, *Opinion, supra* note 51.

68. *About LWCF, LWCF COAL.*, <https://lwcfcoalition.org/about-lwcf> (last visited Jan. 23, 2023).

69. *Id.*

70. *Land and Water Conservation Fund*, U.S. DEP’T. OF THE INTERIOR, <https://www.doi.gov/lwcf> (last visited Jan. 22, 2023). The LWCF is funded by investing royalties from oil and gas leases already owned by the United States government.

71. Long, *Opinion, supra* note 51. Former Montana Senator Max Baucus “brokered a huge deal where the federal government bought thousands of acres in the Swan River Valley, making the land either state forest or national forest. Thankfully, there are sources of money through the Land & Water Conservation Fund that can pay for such solutions.” Long, *Opinion, supra* note 51.

72. Alex Hargrave, *Wildlife Taskforce looks at improving access to land*, THE SHERIDAN PRESS (Feb. 10, 2022), https://www.thesheridanpress.com/news/regional-news/wildlife-taskforce-looks-at-improving-access-to-land/article_b4583ee2-8a95-11ec-ba48-47562c410f8a.html.

73. *Id.*

74. Newburg Podcast Part 1, *supra* note 47, at 22:19–22:50.

the public would respect their private land.⁷⁵ Over the last few decades, however, many of these working ranches have been sold to wealthy, out-of-state business people who have no interest in maintaining a dying way of life. The consolidation of the meat industry into only four conglomerates who dominate and control eighty-five percent of the market is further hindering the tradition of legacy ranches.⁷⁶ These conglomerates are edging out or buying up smaller, individually-owned cattle ranches resulting in the saga of the small-town cattle rancher going the way of the dinosaur.

Instead, these properties are marketed and sold to amenity buyers looking for a great piece of property with wildlife, beautiful vistas, lots of space, and few neighbors.⁷⁷ These amenity buyers, most of whom are independently wealthy, do not purchase these ranches intending to maintain the ranching way of life, and they certainly do not depend on cattle ranching or farming for income. A perusal of current real estate listings for large legacy ranches in western states demonstrates that the marketing of these properties is often geared towards buying thousands of acres but “controlling access” to many more acres of contiguous public land.⁷⁸ Once they become owners of these legacy ranches, landowners are often less willing than their predecessors to allow access through their private land (perhaps because of a land ethos that does not include granting access to strangers).⁷⁹ It also may be due to the way the properties have been marketed, or it may be that these out-of-state owners bring a different mentality with them when it comes to the right to exclude. More than likely, both factors are at play in different ways. Formerly-working ranch owners had no trouble granting access to neighbors and hunters. But out-of-state purchasers have bought properties that are marketed in such a way to control access not only to their land, but to the public land that lies behind their property boundaries. And “[i]f you’re a buyer who doesn’t know any better . . . this sounds like a really good deal.”⁸⁰

75. *Id.* at 22:48–22:60.

76. Peter S. Goodman, *Record Beef Prices, but Ranchers Aren’t Cashing In*, N.Y. TIMES (Dec. 27, 2021), <https://www.nytimes.com/2021/12/27/business/beef-prices-cattle-ranchers.html>.

77. Newburg Podcast Part 1, *supra* note 47, at 24:09–24:50.

78. *Id.* at 27:40–28:23.

79. Newburg Podcast Part 1, *supra* note 47, at 25:15; Newburg Podcast Part 2, *supra* note 23, at 18:50–19:45.

80. Newburg Podcast Part 1, *supra* note 47, at 28:10.

II. LEGAL ISSUES IMPLICATED BY CORNER-LOCKED LAND

A. *Traditional Property Interests – Right to Exclude*

The cornercrossing issue puts the intersection of American property jurisprudence and public necessity squarely in the crosshairs at the most basic tenets of property law.⁸¹ At the heart of common law property rights in the United States is the ubiquitous “bundle of sticks,” which represents the many valuable rights held by American property owners.⁸² Presently sitting atop this bundle is the right to exclude, a right the Supreme Court has called “the most essential.”⁸³ Property theorists remain divided over whether the definition of private property should focus on the right to exclude.⁸⁴ In the instant case, the right to exclude stick has been wielded as a cudgel, preventing the public from accessing lands designated by the government as belonging to everyone.

However, it was not always that way. Before industrialization took hold in the latter half of the nineteenth and early twentieth centuries, it was uncommon for private land to be enclosed.⁸⁵ Indeed, until the early to mid-1900s, fenced land was more so the exception than the rule.⁸⁶ Unrestricted subsistence hunting was also commonplace on lands that remained open and unenclosed.⁸⁷ As homesteaders and ranchers were incentivized to settle west of the Mississippi River, enclosure and the right to exclude became more common. Because the American landowner class was becoming larger and less exclusive, the need for the common use of vast swaths of land was becoming less prevalent, and by extension, the right to exclude from one’s own lands was gradually becoming baked into the American concept of property ownership.⁸⁸

81. *Id.* at 0:01–2:20.

82. *See, e.g.*, Jerry L. Anderson, *Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks*, 19 GEO. INT’L ENVTL. L. REV. 375 (2007).

83. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

84. Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 UNIV. PA. L. REV. 917, 935 (2017) [hereinafter Klick & Parchomovsky, *Value of the Right to Exclude*].

85. Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 TEMP. L. REV. 665, 674 (2011) [hereinafter Sawers, *Right to Exclude*].

86. *Id.* at 676.

87. *Id.* at 678.

88. Anderson, *supra* note 82, at 377.

This method of asserting control and dominion over a vast, uncharted wilderness is largely reflected in American fables and popular culture. The concept of manifest destiny and the idea that the west was something to be won and owned are entrenched in American history.⁸⁹ This is noticeable in cultural touchstones American children learn about in grade school, such as Paul Bunyan, Davey Crockett, Johnny Appleseed, as well as modern television series like *Yellowstone*.

The idea of enclosure,⁹⁰ and, thus, the right to exclude, slowly made its way through the various states in fits and starts.⁹¹ The right to exclude gives a property owner power and control over who can and cannot come onto their land and how the property is used and enjoyed.⁹² With the right to exclude from the land, so too came the right to exclude from the airspace above the land. “A landowner’s property interest in land extends to the airspace directly over the property, to the extent that the airspace can be used to benefit the underlying land. A property owner, therefore, owns only so much of the air space as such owner can practicably use.”⁹³ Under common law, landowners “enjoyed property rights *de infernus ad coelum*, or ‘from heaven (to hell).’”⁹⁴ The concept of *ad coelum* ownership of the airspace above one’s land dates back to Justinian law, but has only been limited relatively recently.⁹⁵ With the invention of the airplane, the concept of “navigable airspace” belonging to the public made its way into American property jurisprudence.⁹⁶ With the advent of drone technology, the Federal Aviation Administration is attempting to assert even more control over the airspace above private property.⁹⁷

89. *America’s Manifest Destiny*, SMITHSONIAN AM. ART MUSEUM, <https://americanexperience.si.edu/historical-eras/expansion/pair-westward-apotheosis/> (last visited Feb. 24, 2023).

90. See *infra* Part III.A.3.

91. Sawers, *Right to Exclude*, *supra* note 85, at 667.

92. Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1 (2014).

93. Karen L. Schultz, 8A AM. JUR. 2d *Aviation* § 2 (2022).

94. Danaya Wright & Ethan Moore, *DARC Matters: Repurposing Nineteenth-Century Property Law for the Twenty-First Century*, 107 IOWA L. REV. 2247 (2022).

95. See generally Laura K. Donohue, *Who Owns the Skies? Ad Coelum, Property Rights, and State Sovereignty*, GEO. UNIV. L. CTR. (2021).

96. Air Commerce Act of 1926, Pub. L. No. 69254, 44 Stat. 568.

97. See generally Donohue, *supra* note 95.

Each state regulates airspace above private land up to five hundred feet.⁹⁸ Further, in *United States v. Causby*, the Supreme Court effectively limited the definition of “airspace” as that area “within the ‘immediate reaches’ of the surface” of the land.⁹⁹ Under 49 United States Code section 40103(1), the United States government has exclusive control of the airspace of the United States, and subsection two recognizes public use only of navigable airspace.¹⁰⁰ However, the law is not without precedent in carving out exceptions for trespass of the airspace above property. “A temporary invasion of the air space by aircraft is a privilege. So long as it ‘does not interfere unreasonably with the possessor’s enjoyment . . . it is privileged.’”¹⁰¹ This aggravating factor (of whether there was injury to the property or interference with the owner’s possession) seems to play a role in many decisions as to whether or not a trespass has actually occurred.¹⁰²

In the case of the four Missouri hunters, the owner of Elk Mountain Ranch is using his ownership rights—specifically the right to exclude from the airspace above his property—to penalize the hunters for encroaching on his property boundaries, despite the fact that no harm was done to his property. The case against the Missouri hunters could be viewed as a case of illegitimate leverage, where “an owner’s decision to use or to enforce her property rights is based solely on the harm to others, and so the leverage, that will result.”¹⁰³ This is the legal context through which the Missouri hunters must navigate and make their case. Unfortunately, the law as it currently stands is precedentially void of support for their position. “[A] landowner has virtually absolute proper-

98. Kylie Mohr, *5 questions you asked about trespassing through airspace*, HIGH COUNTRY NEWS (Feb. 18, 2022), <https://www.hcn.org/articles/north-public-lands-5-questions-you-asked-about-trespassing-through-airspace>.

99. *Pueblo of Sandia ex rel. Chaves v. Smith*, 497 F.2d 1043, 1045 (10th Cir. 1974) (citation omitted).

100. See generally Martin A. Schwartz, *It’s Up in the Air: Air Rights in Modern Development*, 89 FLA. BAR J. 4 (2015).

101. *La Com v. Pacific Gas & Elec. Co.*, 132 Cal.App.2d 114, 116 (1955) (quoting Restatement of Torts § 159).

102. See, e.g., *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962) (“[T]he use of land presupposes the use of some of the airspace above it.”).

103. Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property*, 122 YALE L. J. 1444, 1463 (2013).

ty rights in the space above [or near] his or her land,”¹⁰⁴ and the most important of these property rights is the right to exclude. Without permission, these hunters are illegally trespassing—albeit momentarily. Unless there is a sea-change in how Americans view their property and their property rights, or a fundamental shift in how trespass laws are currently drafted, this type of invasion of airspace will continue to be a crime, a liability, or both.

The potential plight of private property owners, if they cede access to the public at large, is not a wholly unsympathetic one. There are claims that “allowing corner crossing would devalue . . . property,” and “more access could mean more people,” and therefore, “more potential problems like trespassers, litterers, or poachers.”¹⁰⁵ These potentialities are arguably mundane as compared to the current injustice of millions of acres of public land that remain inaccessible to the public. Specifically, in the case of the Missouri hunters, the cries of outrage from an absentee landowner who filed a civil case for damages when the criminal case resulted in an acquittal on all charges appear to be nothing more than a temper tantrum. The landowner claims that “by merely crossing his land at the corner, the hunters had decreased the value of his property.”¹⁰⁶ The invasion of his “airspace,” however *de minimus*, is alleged to have caused a “loss of exclusive access to [his] land,” and “millions of dollars in damages.”¹⁰⁷

B. Criminal Trespass

1. The Law as it Currently Stands

When the Missouri hunters stepped over one parcel of public land to another, thereby crossing through two corners of adjacent private land owned by Elk Mountain Ranch,¹⁰⁸ the Carbon County prosecuting attorney charged them with a violation of Wyoming’s criminal trespass statute.¹⁰⁹ This statute provides that a “person is guilty of criminal trespass

104. 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY (MB) § 18A.05 (Mar. 2023).

105. Robinson & Collins, *supra* note 17.

106. Long, *Opinion*, *supra* note 51.

107. *Id.*

108. Robinson & Collins, *supra* note 17.

109. *Id.*

if he enters or remains on or in the land or premises of another person, knowing he is not authorized to do so, or after being notified to depart or to not trespass.”¹¹⁰ “Notice” is further delineated within the statute as being given by “[p]ersonal communication to the person by the owner or occupant, or his agent, or by a peace officer,” or through the “[p]osting of signs reasonably likely to come to the attention of intruders.”¹¹¹ Charging these hunters with violations of the criminal trespass statute was entirely discretionary,¹¹² which itself is a problem, as it has the potential to lead to inequity in enforcing the law.

Criminal trespass statutes like Wyoming’s exist to protect the sanctity of a property owner’s right to exclude. Historically, trespass was not a criminal offense, but was “in many respects the basis of the whole law of torts.”¹¹³ Some theorize that the criminalization of trespassing was brought about because of systemic racism.¹¹⁴ After the American Civil War, southern states began criminalizing trespass as a way to control former slaves’ movements.¹¹⁵ And certainly, criminal trespass statutes that were adopted in the years after the American Civil War were honed and used to criminalize forms of peaceful protest (such as sit-ins) during the Civil Rights era.¹¹⁶

In modern situations, such laws have been or could be used to criminalize and further stigmatize marginalized groups. For instance, despite

110. WYO. STAT ANN. § 6-3-303(a) (2022). This is a separate and distinct criminal statute than what is commonly referred to as the “hunter trespass” statute, found at section 23-3-305(b), which says that “[n]o person shall enter upon the private property of another person to hunt, fish, collect antlers or horns, or trap without the permission of the owner or person in charge of the property.” The distinction is important because in deciding to prosecute the hunters under the criminal trespass statute, Carbon County’s prosecutor was effectively attempting to criminalize corner-crossing from one parcel of public land to another parcel of public land.

111. WYO. STAT ANN. § 6-3-303(a)(i)–(ii).

112. Newburg Podcast Part 2, *supra* note 23, at 35:35–38:43.

113. Anthony Lewis, *Legal History Backs British on Trespass*, N.Y. TIMES (July 22, 1982), <https://www.nytimes.com/1982/07/22/world/legal-history-backs-british-on-trespass.html>.

114. Brian Sawers, *What Lies Behind That ‘No Trespass’ Sign*, THE ATLANTIC (July 2, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/the-true-meaning-of-no-trespass/661471/>.

115. *Id.*

116. See generally Hugh S. Johnston, *The Use of Trespass Laws to Enforce Private Policies of Discrimination*, 16 HASTINGS L.J. 445 (1965).

a resurgence in European right to roam laws,¹¹⁷ recently contemplated changes in criminal trespass laws in the United Kingdom could “have serious consequences for Gypsy, Roma, and Traveller communities.”¹¹⁸ It is not difficult to see how “[c]riminalising instances of non-violent and non-destructive trespass” can be “used as measures of social control, forcibly relocating” so-called “undesirable” populations to other jurisdictions.¹¹⁹

In the case of the Missouri hunters, these criminal trespass laws are being used by a wealthy landowner to intimidate, strong-arm, and exclude the public from accessing public land. On April 25, 2022, just four days before the four hunters were acquitted of the original criminal trespass charges filed by the Carbon County prosecutor, the prosecutor filed a new case against the hunters for similar conduct that had taken place a year prior.¹²⁰ The prosecutor moved to dismiss the new charges after a jury acquitted the four hunters, stating “[t]he essential facts in [the] matter were considered by the Jury.”¹²¹ The owner of Elk Mountain Ranch is essentially sending a strong message to anyone who dares to invade the airspace above his land: “Keep out, or I’ll see you in court.”

2. *Implications of Currently Contemplated Changes to Wyoming Trespass Laws*

Rather than eliminate the gray area of the current cornercrossing trespass law that favors giving the public better access to publicly-owned lands, Wyoming’s legislature is now considering adding verbiage to the current trespass laws that would explicitly ban cornercrossing. Earlier this year, the proposed changes would have added the verbiage “passing through” someone’s property to hunt, or antler-collecting, to the hunter

117. See *infra* Part III.A.3.

118. Tom Banbury, *The Ancient Roots of Trespass*, TRIBUNE MAGAZINE (Jan. 28, 2021), <https://tribunemag.co.uk/2021/01/trespass-a-landowners-coup> (providing that contemplated changes in the law include “proposals ‘to criminalise the act of trespassing when setting up an unauthorized encampment’”).

119. *Id.*

120. Angus M. Thuermer, Jr., *Hunters face new corner-crossing trespass charges in Carbon County*, OIL CITY NEWS (May 5, 2022), <https://oilcity.news/community/2022/05/05/hunters-face-new-corner-crossing-trespass-charges-in-carbon-county/>.

121. Angus M. Thuermer, Jr., *Prosecutor: Dismiss new corner-crossing charges*, WYOFILE (May 6, 2022), <https://wyofile.com/prosecutor-dismiss-new-corner-crossing-charges%EF%BF%BC/>.

trespass statute.¹²² In effect, this would criminalize the encroachment and intrusion into the airspace above private property. Among the contemplated changes to the trespass law, Wyoming Game and Fish Department officers are being given the power to cite those persons they deem to be trespassing as they “pass through” private property.¹²³ House Bill 103’s author and Wyoming State Representative Barry Crago has insisted publicly that his bill had nothing to do with cornercrossing and that he is “not into the whole corner-crossing controversy.”¹²⁴ Because the original draft of Crago’s bill was overly vague as to what constituted “passing through” a property, the bill went nowhere.¹²⁵

The most recent proposed change to the law, taken up in November 2022, stipulates “‘traveling through’ private property in relevant cases means actual ground contact.”¹²⁶ The proposed verbiage includes a definition that “‘travel through’ requires physically touching or driving on the surface of the private property.”¹²⁷ Again, this clarification only pertains to the hunter trespass statute, and not the criminal trespass statute. Only sheriff’s deputies can cite hunters and outdoorspeople for violations of the criminal trespass law.¹²⁸ The bill would still give game wardens the ability “to cite people illegally passing through private property to get to public land with the intent of hunting, fishing, trapping or shed collecting,” or passing through private property “if they were returning from those activities.”¹²⁹

122. Angus M. Thuermer, Jr., *Lawmakers tackle trespass definitions*, WYOFILE (Sept. 20, 2022), <https://wyofile.com/lawmakers-tackle-trespass-definitions/>.

123. *Id.*

124. Angus M. Thuermer, Jr., *Crago says trespass bill not ‘corner-crossing’ measure*, GILLETTE NEWS RECORD (Feb. 18, 2022), https://www.gillettenewsrecord.com/news/wyoming/article_32e088c3-8b6c-508a-a30c-3239802d6ef0.html.

125. Sabrina King, *An Update on Wyoming Hunting Trespass*, BACKCOUNTRY HUNTERS AND ANGLERS (Nov. 9, 2022), [https://www.backcountryhunters.org/an_update_on_wyoming_hunting_trespass#:~:text=23%2D3%2D305\(b,with%20the%20authority%20to%20enforce](https://www.backcountryhunters.org/an_update_on_wyoming_hunting_trespass#:~:text=23%2D3%2D305(b,with%20the%20authority%20to%20enforce).

126. Mark Heinz, *Bill Would Give Wyoming Game Wardens OK to Issue Hunting Trespass Tickets*, COWBOY STATE DAILY (Nov. 10, 2022), <https://cowboystate.com/2022/11/10/bill-would-give-wyoming-game-wardens-ok-to-issue-hunting-trespass-tickets/>.

127. STATE OF WYO., WORKING DRAFT OF H.B., J. JUDICIARY INTERIM COMM. (2023), <https://wyoleg.gov/InterimCommittee/2022/01-2022111023LSO-0108v0.6.pdf>.

128. Heinz, *supra* note 126.

129. *Id.*

Unfortunately, these contemplated changes do nothing to alter the criminal trespass statute. Whether cornercrossing can continue to be criminally prosecuted, or whether a trespasser can be civilly liable for damages, remains murky.

III. POTENTIAL RESOLUTIONS

Cornercrossing continues to be a thorny issue precisely because of the legacy of American property law and the sanctity of the right to exclude. Indeed, when the private landowner of Elk Mountain Ranch was unable to see the four Missouri hunters criminally prosecuted successfully, he sued in civil court. The civil suit, originally filed in a Wyoming state court, was removed in March 2022 and is currently pending in federal district court.¹³⁰ Once resolved, the federal decision will likely have far-reaching implications for public access in states where corner-locked land is prevalent.¹³¹ If the landowner prevails, the ramifications of this decision are an egregious lack of public access to designated wild spaces. The lack of public access is intentionally being frustrated by the incredibly wealthy at the expense of everyone else, at a precise moment in history when our wild spaces are diminishing, and the chasm of wealth disparity is ever-widening.

A. Model Solution(s)

Above all, what Americans value and hold dear when it comes to property rights requires a fundamental shift in ideology away from exclusion. However, “[t]he answer to the corner-crossing dilemma is more about finding compromise solutions than changing the law in one fell swoop.”¹³²

1. Statutory and Legislative Efforts to Improve Access

There are some legislative conservation and access efforts already underway in the United States. The Federal Land Transaction Facilitation Act (“FLTFA”), for example, serves as a potential blueprint and an

130. Iron Bar Holdings, LLC v. Cape, No. 22-CV-00067, (D. Wyo. filed Mar. 22, 2022).

131. Robinson & Collins, *supra* note 17.

132. *Id.*

“avenue for enhancing public access on a piece-by-piece basis.”¹³³ The FLTFA uses revenue from the sale of BLM-managed public lands to purchase land or easements that are identified as having “high conservation or recreation value,”¹³⁴ and such purchases are “meant to help [BLM] consolidate public land parcels.”¹³⁵ BLM is also prioritizing and purchasing specific parcels “on a piecemeal basis by targeting parcels [identified to be] ‘low-hanging fruit.’”¹³⁶

The Theodore Roosevelt Conservation Partnership (“TRCP”) “focuses on voluntary programs and financial incentives that make more land accessible.”¹³⁷ The TRCP’s initiatives include pushing legislation that requires land management agencies to digitize records.¹³⁸ Unfortunately, these programs are disappointingly underfunded compared to the number of acres of land that would need to be purchased in order to provide access to the millions of acres of public land that remain landlocked. While initiatives and programs, like the FLTFA and the TRCP, are a step in the right direction, they also depend on the willingness of private landowners to sell off parcels of land or to grant easements that would allow public access. Unwilling landowners are not likely to be swayed or bought when they already have the ability to control access to these public parcels because of the checkerboard pattern of ownership.

2. *Aggravated Trespass*

Accordingly, adding a requisite element of aggravation to criminal trespass laws would potentially have an immediate effect on how prosecutors bring actions against defendants charged with trespass. In Georgia, for example, there are multiple statutes regarding criminal trespass. Georgia’s misdemeanor criminal trespass statute states “charges can be brought against a defendant who intentionally causes less than \$500 in damages, or knowingly and maliciously interferes with the possession or use of property.”¹³⁹ First degree criminal damage to property, a felony,

133. *Id.*

134. *Id.*

135. *Id.*

136. Robinson & Collins, *supra* note 17.

137. Thuermer, *Corner Crossing Report*, *supra* note 14.

138. *Sportsmen’s Access*, THEODORE ROOSEVELT CONSERVATION PARTNERSHIP, <https://www.trcp.org/what/sportsmens-access/> (last visited Mar. 5, 2023).

139. GA. CODE ANN. § 16-7-21 (2022).

involves violence or threat to the wellbeing of another, and a defendant is guilty in the first degree if they “knowingly and without authority interfere with any property in a manner that endangers human life.”¹⁴⁰ Second degree trespass is trespass that causes property damage of more than \$500.¹⁴¹ Alternatively, in California, a prosecutor must prove that an alleged trespasser harbors the specific intent to interfere with an owner’s unenclosed property.¹⁴²

A graduated system of trespass laws, which includes an element of intent, especially in instances like cornercrossing, would make it more difficult to charge Americans with criminal trespass when they are only passing through the airspace of private property to get from one parcel of public land to another. Likewise, adding an element of aggravation would hold actual trespassers accountable for any property damage they cause, which should placate property owners.

3. *Rediscovering Our Right to Roam*

Americans did not always view property ownership as we do today. For many years, Americans’ ideology of private property included a concept known as the right to roam, inherited from British common law.

In the United Kingdom, beginning in the latter part of the fifteenth century and continuing on through the nineteenth century, wealthy aristocrats and royals enclosed land that had previously been used for common purposes.¹⁴³ After a series of coordinated mass trespassing excursions during the nineteenth and twentieth centuries, the United Kingdom finally regained the right to roam private properties.¹⁴⁴ Slowly but surely, Britain regained the right to roam: “Walkers became trespassers. Then trespassers became walkers.”¹⁴⁵

Americans similarly used to freely walk across common wild spaces and through private property. Indeed, throughout the 1860s, so long as property was unimproved, it was fair game for Americans to hunt, fish,

140. GA. CODE ANN. § 16-7-22 (2022).

141. GA. CODE ANN. § 16-7-23 (2022).

142. CAL. PENAL CODE § 602(k) (West 2022).

143. KEN ILGUNAS, THIS LAND IS OUR LAND: HOW WE LOST THE RIGHT TO ROAM AND HOW TO TAKE IT BACK 63 (2018).

144. *Id.*

145. *Id.* at 67.

or wander through.¹⁴⁶ “People thought of the land that was unimproved . . . and unenclosed . . . with a flexibility and nonchalance” that seems foreign in a day and age where “No Trespassing” signs are ubiquitous.¹⁴⁷

Property legal theorists have argued about reinstating or adopting a right to roam, as well as what role the right to exclude should continue to play in the conceptualization of property.¹⁴⁸ More progressive property law policies call for measures that “[maximize] the social value of property and the administration of property law,” and insist that “[a]n owner’s value of privacy and seclusion cannot easily be compared to another individual’s use value, which may be crucial for that non-owner’s flourishing as a human.”¹⁴⁹ Michael Heller’s thesis of the *Tragedy of the Anticommons* also decries the fact that “too much ownership has the opposite effect [of creating wealth] – it leads to resource underuse in an anticommons.”¹⁵⁰ Certainly, that appears to be the case here. Private owners are capitalizing on their ability to exclude other Americans from public land by seeking to enforce trespass laws, resulting in less access to the public and less enjoyment of shared resources as it pertains to corner-crossing.

While property ownership should include the right to exclude, in instances like the case of the Missouri hunters, courts should be wary of the cost an absolute right to exclude would have on the public’s ability to access land.¹⁵¹ A balance must be struck between a private property owner’s interest and the interests of the American public.¹⁵²

Reimagining the American concept of property law should include some aspect of a right to roam, but this right carries potential problems. For example, the right to roam presents tort liability for a property owner. If members of the public have a right to roam, then how would that

146. *Id.* at 101.

147. *Id.*

148. See generally ILGUNAS, *supra* note 143, at 101; Klick & Parchomovsky, *Value of the Right to Exclude*, *supra* note 84; Jonathan Klick & Gideon Parchomovsky, *Roam If You Want To?*, UNIV. PA. L. 18 (2017) [hereinafter Klick & Parchomovsky, *Roam If You Want To?*]; J.C. Lester, *Right to Roam or License to Trespass?*, ARGUMENTS FOR LIBERTY: A LIBERTARIAN MISCELLANY 77, 82 (2016).

149. Klick & Parchomovsky, *Roam If You Want To?*, *supra* note 148.

150. Michael Heller, *The Tragedy of the Anticommons: A Concise Introduction and Lexicon*, 76 THE MODERN L. REV. 6, 7 (2013).

151. Anderson, *supra* note 82, at 379.

152. *Id.*

affect the duties of property owners to those who roam on their property? Turning again to countries that have implemented and embraced a right to roam, “[I]andowners are exempt from tort liability for harm to hikers caused by natural features of the property or resulting from an improper use of gates, fences or walls.”¹⁵³ Limiting or exempting property owners from liability when roamers are injured on their property would go a long way in convincing owners that they have little to fear in allowing others onto their property.

Another concern is the value of property after a right to roam has been established. There is some indication that a right to roam diminishes private property values,¹⁵⁴ however, a modest reduction in private property values is infinitely preferable to allowing vast tracts of public land to simply go unused, or used only by the very wealthy and the very few.

One alternative to a free-for-all right to roam is footpaths. Footpaths are “public easements over private lands that are confined to a defined right of way.”¹⁵⁵ Where the right to roam gives a wanderer broader access to explore private or unimproved property, a footpath is only used for travel through a specific portion of private property.¹⁵⁶ This seems to be the perfect compromise for instances like cornercrossing where the public would only need to step over adjoining private property boundaries to access public land.

153. Klick & Parchomovsky, *Value of the Right to Exclude*, *supra* note 84, at 943.

154. *Id.* at 963.

155. Anderson, *supra* note 82, at 380.

156. *Id.* at 380–81.

4. Nuisance and the Unlawful Inclosures Act of 1884

Nuisance is another avenue that could be utilized against property owners who insist on preventing the public from accessing the public lands that lie beyond their private property. Generally, nuisance can be defined as obstructing the free use of property such that it interferes with the enjoyment of that property. Public nuisance is an act that obstructs the public in the exercise of rights common to all, or interfering with a right shared by the public, regardless of the property interest in the vicinity. Similarly, the Unlawful Inclosures Act of 1884¹⁵⁷ (“UIA”) sought “to preserve public access to federal property.”¹⁵⁸

There are several cases that would support using the UIA as a weapon against property owners who physically fence or enclose public land.¹⁵⁹ Because of the way the checkerboard pattern of property ownership persists, any owner whose private land is peppered with public acreage cannot enclose their own property.¹⁶⁰ In the case involving the four hunters, there was some indication that the owner of Elk Mountain Ranch attempted to fence his own parcels in the corner where public land met his private land.¹⁶¹ He may have violated the UIA by doing so, and in their answer, the four hunters alleged that he was the one in violation of federal law.¹⁶² Depending on the outcome of the federal civil case, the UIA could be turned into a weapon the public could wield against property owners who keep them from accessing public land.

157. 43 U.S.C. §§ 1061–1066.

158. Angus M. Thuermer, Jr., *U.S. attorney: Corner-crossing prosecution didn't violate hunters' rights*, WYOFILE (Sept. 15, 2022), <https://wyofile.com/u-s-attorney-corner-crossing-prosecution-didnt-violate-hunters-rights/>.

159. *Camfield v. United States*, 167 U.S. 518, 519 (1897) (upholding court order that compelled the “removal and abatement” of a fence on private land that enclosed 20,000 acres of public land in violation of the UIA); *United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502 (10th Cir. 1988) (upholding court order that required property owner to remove a fence from his land that had enclosed public land as a violation of the UIA).

160. George A. Gould, *Access to Public Lands Across Intervening Private Lands*, 8 LAND & WATER L. REV. 149, 154 (1973).

161. Angus M. Thuermer, Jr., *Corner crossers: Ranch owner broke federal access law*, WYOFILE (Aug. 23, 2022), <https://wyofile.com/corner-crossers-ranch-owner-broke-federal-access-law/>.

162. *Id.*; Def.’s Answer to Pl.’s Compl., *Iron Bar Holdings, LLC v. Cape*, No. 22-CV-00067, (D. Wyo. July 29, 2022), ECF No. 25.

B. More Ephemeral Solutions

1. Paper Streets

One possible avenue for creating access to public land is paper streets, also referred to as “paper roads.” Paper roads is a legal term of art for “those streets or alleyways that have been laid out on officially adopted plans or maps, but have never been improved or opened” by the local authorities.¹⁶³ As more land ownership records are digitized and become available to the public, recorded servitudes and easements are unearthed. A promising possibility is the idea that paper roads or paper streets may exist on some privately-owned land.

2. Light-and-Air Easements

There is minimal caselaw that would support this Comment’s thesis as it pertains to granting more access rather than less to the public to the perceived detriment of the private landowner. However, there is some precedent to support a “taking” that would not warrant compensation to the landowner. In one case out of Nevada, the district court determined that a right to compensation did not exist when a property owner’s “implied negative easement of light, air and view” was impacted by an overpass placed on a nearby street, and none of the owner’s property was taken.¹⁶⁴ While “[s]ecuring 16,102 [traditional] easements from 11,000 private landowners could provide certain access to the 8.3 million acres,”¹⁶⁵ the cost, time and feasibility difficulties of obtaining that many easements from so many property owners dwarfs the potential payoff. “At least 19% of the corners at issue are shared by oil, gas, energy, timber, or mining companies—not ranchers or farmers,”¹⁶⁶ which reduces the amount of potential expense and legwork, but leaves much of the public land still inaccessible.

163. Michael Thom, *There’s No Problem with “Paper Streets” that Time Can’t Solve*, JD SUPRA (Sept. 19, 2019), <https://www.jdsupra.com/legalnews/there-s-no-problem-with-paper-streets-13804/>.

164. *Probasco v. City of Reno*, 459 P.2d 772, 773 (Nev. 1969).

165. Thuermer, *Corner Crossing Report*, *supra* note 14.

166. *Id.*

IV. CONCLUSION

The legal predicament of how to provide access to landlocked parcels of public land while still respecting the rights of property owners is a unique one. Cornercrossing through the airspace of privately-owned land will remain a legal gray area, unless and until it is explicitly condoned or criminalized. Because the American conceptualization of property ownership includes, first and foremost, the absolute right to exclude, a right to roam has little chance of reasserting supremacy in the short run. Such a fundamental change in the ways Americans perceive ownership remains an aspirational solution, however, as European right to roam laws are now commonplace. A more immediate and concrete solution to the cornercrossing issue is to adopt into states' criminal trespass statutes a requisite element of aggravation. This aggravating factor will both adequately deter wrongdoers and bad actors, and support those hikers, hunters, and outdoorspeople who simply want to enjoy the freedom to explore America's designated wild spaces. Some combination of both a change in the way Americans think of property ownership and the pragmatic addition of an aggravating element of trespass would also go a long way in addressing the bad faith or ill will of both property owners and hunters. For hundreds of years, unimproved and unenclosed land was thought of as belonging to everyone. These landlocked public parcels should not remain under the dominion and control of a few to dictate access. They belong to all of us, and it's time we get them back.

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* J.D. Candidate, California Western School of Law, 2024; Associate Writer, *California Western Law Review*; B.A. California State University at San Marcos, 2008. I would like to thank Chelsey Barkley and her editing team for their incredible work on this Comment. Thanks also to faculty advisor Professor Emily Behzadi, PhD, for guiding me through the writing process with her usual wit and brilliance. Finally, I am deeply grateful to my husband, Jon Marshall, and my amazing children, for their constant love and support as I journey through law school. This Comment is dedicated to all hunters and outdoorspeople who are keeping the tradition of stewardship and conservation of our wild spaces alive. "When one tugs at a single thing in nature, he finds it attached to the rest of the world." – John Muir