Memorandum

To: National Conference of Commissioners on Uniform State Laws

From: Henry E. Smith, Fessenden Professor Law and Reporter for the American Law Institute's Restatement Fourth of the Law, Property

Date: June 20, 2019

Re: Comments on May 30, 2019 draft "Uniform Tort Law Relating to Drones Act"

This memorandum offers comments on the National Conference of Commissioners on Uniform State Laws' May 30, 2019 draft "Uniform Tort Law Relating to Drones Act" from the perspective of someone interested in the sound operation of the law of property, and the law of trespass and nuisance in particular. These subjects are of particular urgency in connection with the American Law Institute's project for a Fourth Restatement of Property, for which I am the Reporter. To be clear, I offer these comments in my personal capacity and not on behalf of the ALI.

While I agree wholeheartedly with the Drafters that not every "new" problem requires a new departure in the law and I agree that legislatures should be encouraged to enact sensible departures from the common law of property where new technologies call for such treatment, the May 30, 2019 draft Uniform Law Relating to Drones Act ("May 30 Draft" or "Draft") threatens to do damage to the integrity and substantive justice achievable under property law, both in the area of drones and more generally. Rather than modifying the law of trespass or even adopting familiar nuisance principles, the May 30 Draft substitutes wholesale a bespoke regime under which every intrusion no matter how close to the ground or severe in its effects is subject to an open-ended 13-factor test that will scare off potential plaintiffs and more generally threaten to destabilize the law of property in other areas.

The debate over the May 30 Draft is being conducted in terms of "property rights" versus "aerial trespass." Almost everything about that framing is misconceived. No one, even the most ardent drone proponent, can deny that landowners have "property rights" in their land, even against drone invasions. The question is what kind of protection their property rights should receive – a reasonable legislative modification of existing law or a root and branch replacement of owner's rights with an unprecedented watered-down regime that provides little guidance.

At the same time, this radical departure from existing law is being justified as applying, or at most extending, the "aerial trespass" doctrine to drones. While saying so provides soothing mood music, the May 30 Draft misconceives the import of aerial trespass. Under this problematic heading, the Draft winds up replacing trespass doctrine with a regime denominated "trespass" that bears no resemblance to any existing law and performs the impressive feat of outdoing nuisance law in its vagueness. It is time to step back and ask what protections

landowners and drone operators should have and why. Framed in this fashion, the needs of drone operators can be accommodated without cutting at the core of the law of property and tort.

1. Trespass or Nuisance

The law of trespass affords owners a broad swath of presumptive control over land. Liability for trespass, unlike that for nuisance, extends to any physical invasion of land without permission. Trespass requires no bad intent or knowledge that one is violating rights: all it requires is a voluntary act of being on someone else's land or being responsible for an object being on someone else's land. There is no de minimis exception for trespass: placing a toe on someone else's land or building one millimeter over the boundary line is a trespass. Trespass liability is in this sense exceptionally categorical and context-insensitive.

Though rigorous and strict, trespass is subject to exceptions – which themselves cast doubt on the May 30 Draft's sweeping approach. Trespass's exceptions and defenses include the common law defenses (e.g., necessity) and exceptions and modifications imposed by legislation or regulation. These include very important schemes of antidiscrimination laws governing public accommodations and the right of entry afforded to land surveyors. Such exceptions tend to govern certain kinds of land, or they are qualified by notice-giving and purpose restrictions.

Trespass couples breadth and strictness with well-defined exceptions for good reasons. Through these features, trespass affords presumptive control to landowners and gets others, including courts, out of the business of evaluating owners' choices. One cannot simply enter another's land and hope to avoid liability by convincing a court that, on balance, the considerations favoring entry outweigh those disfavoring it. And up until now, even compelling reasons to limit landowner's rights of control are tailored to such reasons and do not afford blank checks to be filled in later by courts.

Although filling in by courts is more of a feature in nuisance law, even nuisance does not go nearly as far as the May 30 Draft in inviting courts to balance away owners' rights. The Restatement Second of Torts bases its approach to intentional and unreasonable nuisances on a somewhat constrained set of five gravity-of-harm and three utility-of-conduct factors, Restatement Second of Torts §§ 827-828, rather than, as the May 30 Draft does, throw out a laundry list of non-exhaustive factors, the thirteenth (!) and final one of which – "[a]ny other factor relevant to the determination of substantial interference with the use and enjoyment of land." May 30 Draft § 5. Furthermore, tests for nuisance usually explicitly or implicitly include some notion of reciprocity or symmetry: the great value of my land use is not a reason I can simply locate next to you and tell you to put up with interferences it generates it in the name of the greater good.

The comparison with nuisance law is instructive and concerning. If the May 30 Draft had simply exempted drone overflights from trespass and subjected them to nuisance, it is hard to see how landowners would receive less protection. Nuisance is not mentioned once in the May 30 Draft. The Drafters seem to assume that because something labeled "trespass" would apply to drones, that nuisance would not apply. This would be only true in those jurisdictions that define nuisance as non-trespassory. In those jurisdictions in which nuisance can apply along with

trespass, the May 30 Draft is entirely nugatory. In a jurisdiction that adopted the May 30 Draft, landowners might as well sue in nuisance because "aerial trespass" would be weaker and more indeterminate than nuisance itself.

While much has been written about nuisance's protean character, it is more determinate than the May 30 Draft. The looseness and lack of content of the 13-factor test in Section 5 of the May 30 Draft makes the law of nuisance look like a paragon of determinateness and precision. And nuisance law has much more reason to be open-ended, given that it has to cover a much wider range of problems than the May 30 Draft. Like nuisance but more so, the May 30 Draft would present a daunting challenge for those seeking to vindicate their interests in the land they own. Without the presumption of violation for intrusions in traditional trespass, small landowners are expected under the May 30 Draft to challenge intrusions at low levels against large operators under a standard that will prove expensive to litigate. It is not even clear that the most egregious intrusions could be decided on summary judgment, and the discovery issues invited by the Draft's factors compared to traditional trespass would be significant.

In addition to forming the major part of tort law in the area of real property, trespass and nuisance carry a significance that goes well beyond their scope of operation. Trespass, nuisance, and the distinction between them also play an important systematic role in the law of property. While nuisance law has been vastly supplemented by law relating to land use regulation and the environment, principles of trespass and nuisance are still central in areas like takings law, where among other things, they determine the baseline of owners' entitlements and furnish a way of thinking about occupations that might automatically rise to the level of a taking. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419 (1982); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Whatever the merits of any application of trespass, nuisance, and the trespass-nuisance divide in such seemingly distant areas, the pervasiveness and persistence of this distinction in some form would indicate that a shift from a stricter and rougher approach to invasions to a more fine-grained reconciliation of conflicting uses is a functional imperative in property law. See, e.g., Henry E. Smith, Property as the Law of Things, 125 Harv. L. Rev. 1691, 1713-16 (2012); Henry E. Smith, Exclusion and Property Rules in the Law of Nuisance, 90 Va. L. Rev. 965, 990-1007 (2004). So central is this shift in modes of protecting owners to the law of torts and property that attempts in the past to conflate trespass and nuisance – notably, by extending trespass to cover nuisances, rather than vice versa – have invariably caused this distinction between access restrictions (exclusion) on the one hand and governance of uses on the other to reemerge. See Adams v. Cleveland Cliffs, 602 N.W.2d 215, 221 (Mich. App. 1999) ("This so-called "modern view of trespass" appears, with all its nuances and add-ons, merely to replicate traditional nuisance doctrine as recognized in Michigan."). The May 30 Draft obliterates this distinction in that it waters down a core swath of trespass law by essentially redefining it as a hyper-loose version of nuisance law.

2. Aerial Trespass and *Ad Coelum*

The May 30 Draft takes misplaced comfort in an analogy to, or more accurately, an extension of, "aerial trespass" law to drones. As the Drafters themselves point out, the problems presented by fixed-wing aircraft and typical unmanned aerial vehicles (drones) are quite different: drones fly at lower altitudes, more flexibly, more quietly, and they are often equipped

with cameras. How to accommodate this different problem is an important issue, but the May 30 Draft's invocation of the law of aerial trespass proves too much.

The Drafters' June 10, 2019 memo claims to be simply adopting the approach of the Supreme Court in *United States v. Causby*, 328 U.S. 256 (1946), and the similar Section 159(2) of the Restatement Second of Torts. This reliance is misleading and mistaken. The Drafters take overblown dictum in *Causby* and then extend it beyond the breaking point. It is true that a number of cases have required substantial harm in order for intrusions by aircraft to count as trespasses. See, e.g., Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936). In *United States v. Causby*, the Supreme Court held that an airplane overflight could constitute a taking, but disavowed the strictest kind of trespass based on an absolute version of the *ad coelum* principle (short for *cujus est solum, ejus est usque ad coelum et ad inferos, "*one who owns the soil owns also to the sky and to the depths"). Id. at 260-61. With respect to the *ad coelum* principle, *Causby* at most held that the principle could not be used to extend unqualified trespass liability indefinitely upwards. Instead, the degree of control afforded landowners has to peter out. Because the Court was faced in *Causby* with a landowner who was arguing for just such a literal and extreme interpretation of the *ad coelum* principle and perhaps because the Court was worried that that the *ad coelum* principle would have to be taken as literally reaching the edges of the universe or would have to be denied altogether, Justice Douglas laid it on thick in his famous dictum:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe – *Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

Id. at 260-61. That this pronouncement itself should not be taken literally is evidenced by the myriad ways that *ad coelum* has applied even after *Causby* – to underground excavation, to overhanging eaves and wires, and the like. And landowners are certainly free, within the limits of land use regulation, to build up without interference by planes.

In this light, the adoption of the *Causby* dictum in Section 159(2) of the Restatement Second of Torts is not to be taken literally either: that Restatement adopted the *Causby* formulation as blackletter for establishing trespass liability for airplane overflights, stating that "Flight by aircraft in the air space above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes substantially with the other's use and enjoyment of his land." Tellingly, the general case of trespass, to which Section 159(2) speaks, is couched in more sweeping terms: "Except as stated in Subsection (2), a trespass may be committed on, beneath, or above the *surface of the earth*." Restatement Second of Torts § 159(1) (emphasis added). That is, Section 159(1) makes intrusions above the surface of the earth (i.e. the soil, grasstops, etc.) a presumptive trespass. The "aerial trespass" exception of Section 159(2) does *not* apply to all intrusions above the

surface but only to those "into the immediate reaches of the airspace next to the land." This can and should be taken as narrower than if Section 159(2) had said "into the immediate reaches of the airspace above the surface of the land" or "immediately above the surface of the land" thereby using the same formulation as in Subsection (1). Furthermore, the Restatement Second makes clear that the term "immediate reaches" of the land "has not been defined yet, except to mean that 'the aircraft flights were at such altitudes as to interfere substantially with the landowner's possession and use of the airspace above the surface.' " In other words, the purposes of using the term "immediate reaches" was to specify how high up trespass rather than nuisance law would apply. Restatement Second of Torts § 159 cmt. m ("Even though the flight is not within the 'immediate reaches' of the air space, it may still unreasonably interfere with the use and enjoyment of the land. In such a case the liability will rest upon the basis of nuisance rather than trespass.").

Even more clearly, Section 159(2) by its terms does not apply to drones. Section 159(2) is immediately followed by a "Caveat," which states "The Institute expresses no opinion as to whether the rule stated in Subsection (2) is to be applied to the flight of space rockets, satellites, missiles, and similar objects." In other words, the Restatement was following existing caselaw and disavowing an automatic extension to new technologies. It is worth emphasizing that the technologies then known but as yet unlitigated – space rockets, satellites, and missiles – are far better candidates for treatment under Section 159(2) than are drones, which test the boundaries at the lower rather than the higher end of the airspace above land.

Moreover, the regime prescribed by *Causby* and Section 159(2) is more protective of landowners than is the May 30 Draft. Under the "aerial trespass" doctrine set out in *Causby* and the Restatement Second of Torts, if an aircraft enters the immediate reaches of land and "interferes substantially with the other's use and enjoyment of his land," § 159(2)(b), the aircraft operator is liable. Period. The test provides for no invocation of the value of the flight, its reasonableness, much less the open-ended inquiry called for by Section 5 the May 30 Draft. It is hard to exaggerate how far beyond "aerial trespass" the May 30 Draft goes in cutting into owners' rights and creating a steep hill for them to climb in litigation. The May 30 Draft tilts the scales wildly against owners at the same time as it stretches the doctrine to low-altitude, more stationary flights for which it wasn't suited in the first place.

There is an irony built into the May 30 Draft's reliance on *Causby* and Section 159(2). If *ad coelum* should not have been taken literally in its furthest reaching applications, by the same token, the dictum in *Causby* and the formulation in Section 159(2) should not be taken as literally applying down to the topsoil. The idea that one inch above the land would not count as part of the "land" rather than the "air space" and that a flight by any object would not count as a regular trespass at an altitude of one inch are absurdities one need not ascribe to the Drafters of the Restatement Second of Torts or to the Supreme Court in *Causby*. It is far from clear that either *Causby* or the Restatement meant for a silent balloon flight inches from the ground to be subject to a requirement of substantial interference rather than conventional trespass liability. (Indeed, the Illustrations to Section 159 reflect this understanding. § 159 Illus. 3 (defendant extending an arm over a fence into the space above the surface of plaintiff's land is a trespass); Id. Illus. 4 (defendant shooting at a bird so as to cause a bullet to cross plaintiff's land "close to the surface" without coming to rest on plaintiff's land is a trespass).)

Furthermore, it is striking how much of Justice Douglas's dictum and the Restatement Second of Torts depend on policy considerations that apply to high-flying aircraft – the need for a contiguous flight route, the conception of a certain part of airspace as a "highway," and the concentration of concern on upper reaches of airspace – and do not apply to low-flying aircraft like balloons, much less to drones. All in all, it is not clear that a sensitive reading of *Causby* and Restatement § 159(2) casts much doubt on the application of normal principles of trespass close to the ground – especially for the kinds of obvious intrusions by drones.

The May 30 Draft in effect extends the navigable airspace down to the grass tops of land across the entirety of any state that enacts it. In effect, it imposes a presumptive navigation servitude on every cubic centimeter of space above the surface of the land, subject only to the willingness and resources of a landowner to bring a loose nuisance-like "trespass" claim and litigate under the 13 nonexclusive factors.

3. Further Policy Considerations

Stepping further back, the May 30 Draft reflects a view of tort law that is both misconceived and troubling from a policy point of view. Tort law is not simply regulation by other means. Respect for labels like trespass is emphatically not a matter of antiquarianism. Instead, the most basic torts, trespass, nuisance, conversation, assault and battery, libel and the like correspond very closely to ordinary people's intuitions about wrongful conduct. Imagine a Draft Tort Law Relating to Medical Services Act, in which any touching by a doctor of a patient would be mandatorily evaluated under 13 non-exclusive factors. Or a Draft Tort Law Relating to Financial Services Act, where stealing a client's money would be similarly evaluated. While trespass to land is not always a hot button issue, the Draft's (correct) focus on the privacy issues involved reflects the seriousness of tort law's response to even seemingly trivial intrusions. Without the strong message sent by trespass law, people's legitimate expectations and moral intuitions would not be respected. The idea that the law is sending a message of "maybe, maybe not" or "it all depends" to very low-level aerial intrusions by drones will, I believe, not sit well with ordinary members of the public or with legislators who feel responsive to them.

And for what? Nothing prevents legislators from building the accommodation of drones into statutory law without upending the most basic notions and structures of tort and property law. And in the absence of legislation, courts could look to emerging social practice and norms of behavior, which, elusive thought they may be, would still be more determinate and more likely to be correct than the unguided and open-ended inquiry that would form part of the litigation fiesta that the May 30 Draft invites.

Equally troubling are the dynamic implications of the May 30 Draft for property law. Property regimes stated directly in terms of uses invite efforts at lobbying. Perhaps the most notorious of such regimes is copyright law, which affords a set of rights defined in terms of a list of uses. 17 U.S.C. §§ 106–106A. For over 100 years copyright law has been an arena of lobbying by industry for special use-based exceptions, leading to severe criticism from many quarters. See Jessica D. Litman, Copyright, Compromise, and Legislative History, 72 Cornell L. Rev. 857 (1987). Copyright is framed in terms of uses, and thus uses always appear to be up for grabs. The last place one would expect or desire that spirit to carry over is to trespass down to the level of

the grassroots, literally. Today the issue is drones, but the message for the future is that anyone with an important issue with a lot at stake is welcome to take a whack at the big public-choice piñata of tort and property law.

I do not presume to prescribe the particular solution to the problem of drones, although a number of solutions are fully consistent with the considerations I have laid out. At this point, my main concern is that the endorsement of the 13-factor standard not become the occasion for undermining the law of trespass more generally. In its extreme extensions of aerial trespass and its needless uprooting of existing tort and property law, the May 30 Draft does not advance the law in a positive direction.