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July 10, 2019

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Uniform Law Commission - All Commissioners
c/o Lucy Grelle

RE: Uniform Law Relating to Drones Act, Final Reading

Dear Commissioners:

I was a member of the study committee and am a member of the drafting committee for this Act. I oppose it as drafted and as I set out below, I am not the only objector. I think it turned into a lopsided protection of the drone industry at the sacrifice of those who own, rent, live on, work on and depend on their livings from property.

Here are my reasons for opposing the Act as drafted. These comments are directed chiefly at Section 5. I speak only for myself but the drafting committee was not unanimous in its support of the Act. And, there are objections from all of the following individuals or entities all of which may not have been seen by all Commissioners.

Objections from others in order from the latest to earliest:

1) The Heritage Foundation Letter of July 8, 2019, from Jason Sneed, addressed to President Ramasastry; forwarded to Drafting Committee Members, July 9, 2019; distributed to Drafting Committee Members and Observers and posted on Committee's webpage.

2) American College of Real Estate Lawyers July 3, 2019 email addressed to The Commissioners of the Uniform Law Commission, forwarded to Drafting Committee Members and Observers on July 3, 2019 and posted on the Committee's webpage.

3) Further comments from Henry E. Smith, Fessenden Professor of Law and Reporter for the American Law Institute's Restatement Fourth of the Law, Property, July 2, 2019 addressed to National Conference of Commissioners on Uniform State Law, forwarded to the Drafting Committee and posted on the Committee's webpage. Professor Smith made an earlier objection with more detail on June 20, 2019. See Paragraph 7 below.

4) Memo from Commissioner and Drafting Committee Member Joe Willis sent to Chair Kurtz, June 28, 2019 and forwarded by Chair Kurtz to Committee Members and Observers. I do not know if this was posted on the Committee's webpage as well.

5) Memo June 5, 2019 from Joint Editorial Board for Uniform Real Property Acts addressed to Commissioners of the Uniform Law Conference.

The members and liaisons of the JEB are co-chairs; William Breetz and Barry Nekritz, members; Ann M. Burkhart, Barry Hawkins, Christopher Odinet, James Wine, ACMA Liaison; Nancy R. Little, ALTA Liaison; Steve Gottheim, CAI liaison; David Ramsey, Emeritus Members; Carl H. Lisman, Dale A. Whitman, Executive Director; R. Wilson Freyermuth .

Forwarded to Committee Members and Observers on June 25, 2019 and posted on Committee's webpage.

6) Email June 28, 2019 and attached June 27, 2019 memo from Jo-Ann Marzullo, Section Chair-Elect, ABA Section of Real Property, Trust and Estate Law addressed to Commissioners, Uniform Law Commission. The email notes in part "...It is rare for RPTE to oppose acts under consideration by the ULC; in this instance, the sentiment against the act was so strong the Section felt compelled to let each Commissioner know of its opposition." The attachment notes; "Unless the Act is modified to the extent that RPTE may support it, RPTE is prepared to oppose the Act if and when it comes before the House of Delegates of the American Bar Association for a vote." . The ABA Section RPTE objection enclosed the earlier objection from the JEB and a memo from RPTE member Professor Steve Eagle dated June 6, 2019. I found the RPTE objection in my spam filter and pulled it out but do not know if it reached all commissioners.

7) Memo from Professor Henry E. Smith dated June 20, 2019 (see also Paragraph 3 above).Please take note of his exposition of the error of applying the *Causby*, Restatement of Torts, Second, adoption of a substantial interference standard to aerial trespass by drones at pp 3-6. I agree with him. Please read it and I will ask if you also agree.

I add to the long list of objections most of which have been covered and I concur with them but add my own objections to the Act as drafted.

1) As drafted a drone operator could fly a drone across your property, whether it is your home, farm, commercial or industrial development or any other designation of privately owned property, as often, and as low and hovering where, and as long, as the operator decided to do that AND continue to do that even though any or all of that would INTERFERE WITH THE USE AND ENJOYMENT OF YOUR PROPERTY. Still that would not constitute a trespass.

How low could drone operators fly a drone across your property? Clearly as low as possible so long as they do not touch down. Why? Because the draft has no basis for trespass relief for trespassing across your property unless the drone touches down. What if a drone operator did engage in the conduct described above and you found out who it was and told them clearly to not do that again but they continued. Would that constitute a trespass under the Act? NO it would not unless you sue and prove that it SUBSTANTIALLY INTERFERED WITH THE USE AND ENJOYMENT OF YOUR LAND.

2) To get any trespass relief from a drone operator doing any or all of what is set out in paragraph 1) the offended owner of the land must sue the drone operator and prove in court that the conduct complained of SUBSTANTIALLY INTERFERED WITH THE USE AND ENJOYMENT OF YOUR LAND. Drone operators are expressly allowed to INTERFERE with your use and enjoyment so long as they do not go so far as SUBSTANTIALLY INTERFERE.

I ask each of you, especially those who serve in the legislatures, to think of how you would explain to your constituents why you would support this Act. Drones are not the toys some may think of. They can be up to 55 pounds. I strongly suspect that Amazon will need something that large to deliver their package payloads. But, if one of the smaller ones operated by an obnoxious individual, they could continue as well until sued and you proved SUBSTANTIAL interference with your use and enjoyment of your land.

3) The importation of the SUBSTANTIALLY INTERFERES WITH THE USE AND ENJOYMENT standard came from the holding in *United States v Causby* as noted in the various objections I listed from others. That was an inverse condemnation case filed against the United States in the Claims Court. The United States Supreme Court did partially reject the ad coleum theory of land ownership but did no such thing as to the immediate reaches of the airspace over the land. I am confident in my assessment of that proposition. The Court held there was a taking of an easement in that immediate reach airspace and remanded to the Claims Court to fashion a proper decree describing what had been taken and to determine the amount of just compensation to be paid for what had been taken. The Fifth Amendment protects property. No airplane touched down. Airplanes flew through the immediate reaches. It was that property that was taken. It is that property that the Act now allows drones to fly though with impunity from trespass liability unless the operator is sued and the substantive standard for an inverse condemnation case is proven. Professor Smith in his June 5 memo noted above clearly explains the flawed logic of applying the standard in our Act.

4) What justification is there for importing a constitutional taking standard into a trespass law dealing with drone flights in the immediate reaches of the airspace above your land? I submit that there is no proper basis for this and by conflating a trespass concept with a taking concept creates huge confusion not clarity. I acknowledge that the Restatement of Torts did import this language and the majority of the drafting committee followed suit. But, I also submit it is not only an error to do so, but inconsistent with the Restatement's own work. The Restatement of Torts properly recognized and retains the trespass rule that one cannot fire a missile from one side of another's land across it to the other side. It retains the trespass rule that one could not build a structure such as a bridge across another's land even though never touching that land. Does anyone think a neighbor could cantilever a deck across and over your property without that being a trespass? Why do drone operators get a pass for flying one nano-meter above your grass immediately outside your door so long as you can't prove substantial interference with the use and enjoyment of your property? Seems clearly you could fail to do that under a myriad of circumstances.

Courts dealing with the difference between inverse condemnation cases have struggled to make clear distinctions between Tort liability for both Nuisance and Trespass and Takings liability. See *Penland v. Redwood Sanitary Sewer Service* 156 Ore. App. 311 (1998) for the opinion on remand in the Oregon Court of Appeals. That intermediate appellate Court reversed a trial court injunction in favor of the complaining landowners. The Oregon Supreme Court reversed the intermediate appellate court and the intermediate appellate court on remand finally affirmed an injunction against the operation of the nuisance.

The nuisance like approach and the list of considerations in the Act presents far more difficulty than the *Penland* case presented. See also *Worman v Columbia County* 223 Ore. App. 223 (2008) and its discussion of *Vokoun v City of Lake Oswego*, 335 Ore.19 (2002) dealing with differences between negligent or intentional spraying of herbicides onto plaintiffs property. If a governmental entity providing utility service used drones in its process over lands it failed to have an existing easement on, the proof of trespass under the Act would also constitute a constitutional taking not just a trespass. That is a public use for the utility. The local government has condemnation power. It flew there without permission intentionally. Under *Causby* and the Act, the standard is the same. Thus, prove the trespass and you have proved the taking. This could be extended to other municipal entities and even entities that have been delegated condemnation power such as railroads and pipeline companies.

What if there are several independent drone operators buzzing around your home a few feet off the ground with a 55 pound drone? Assume not one of them will admit to substantially interfering with the use and enjoyment of your property even if you could find their identity and tell them to stop it and they refuse. After all, they only did it a time or two and did not conspire with the others each of who tells the same tale. The owner under the Act as drafted would lose their case against each of them. The Act as worded would permit each to defend and short of proving a conspiracy or jointly aiding and abetting each other, the drone operators win. What right does a land owner retain to protect the right of exclusive possession to their property? Almost nothing and as a practical matter nothing. All those problems increase the probability of bringing an inverse condemnation case against the State. It is the State that expressly allows all the drone operators to do this with impunity.

The constitutional law of inverse condemnation under the Fifth Amendment has generally grown more protective of property protection over the last several decades. The most recent decision is *Knick v. Township of Scott, Pennsylvania* decided June 16, 2019 builds on that.

The drafting committee has not yet given any consideration to the impact of that holding to the Act which mirrors the *Causby* taking standard for aerial invasions of the immediate reaches of the air over land. The recent memorandum from the Chair and Vice Chair, with great respect, misses the mark badly when they dismiss *Knick* saying, "the procedural niceties of *Knick* may not affect the claims at all."

In *Knick,* the U S Supreme Court heard argument on the case just prior to the appointment of Justice Kavanaugh. Shortly after his appointment, the Court ordered limited re-argument and briefing on a limited issue detailed in the transcript of oral argument. The focus

was whether the Court should overrule *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City,* 473 US 172, which had held a person claiming Just Compensation had to first sue in state court, if state law provided a remedy of just compensation, before the case could be ripe and a claim for a Fifth Amendment taking without compensation arose and could be heard in Federal Court. It expressly overruled that part of Hamilton Bank. *Knick* outlined the development of law in inverse condemnation and in reaching its 5 to 4 decision made clear Mrs. Knick was entitled to bring her case in Federal Court under the Civil Rights Act 42 USCA 1983. Government that passes a law that amounts to a taking must pay and the owner of what is taken has a claim under the civil rights act for the Fifth Amendment Just Compensation. The taking occurs when the offending rule is passed unless there is provision made to pay compensation then. Even if it stayed enforcement of or repealed the offending law, the government must still pay for what is taken. It will owe just compensation for the interim taking and interest on the amount due and under 42 USC 1988, also reasonable attorney fees. The Court made clear that the owner's ability to claim just compensation in an action at law prohibited enjoining enforcement of the offending law.

How does that apply to the Act under consideration? Although highly unlikely a State who should pass this Act could be sued in Federal Court 42 USC 1983 based on the 11th Amendment, 1983 actions may be filed in state court too. We know that all courts are bound by holdings of the U. S. Supreme Court. Although Mrs. Knick has never had any court yet determine the Township Ordinance worked a taking when adopted (I believe she will win on the merits) we do know that the US Supreme Court has held that Substantial Interference with the Use and Enjoyment of land is a taking in immediate reaches overflight cases. That is *Causby.* It is that very standard the Act adopts in Section 5. So, a State that adopts the Act as written can be subjected to immediate suit in state courts for an inverse condemnation under 42 USC 1983 and that claim for Just Compensation must be given the same stature as a violation of the other amendments in the Bill of Rights including the First Amendment. If a drone operator was sued, I think the State could be joined in State court since it provides the drone operator the protection to fly until enjoined and after *Knick* there seems to be no way to enjoin the State but it must pay even if it repeals the Act. Whether one brings an as applied, or a facial attack against the State is not a big worry. Passage of the Act is final. There are no discretionary exemptions or conditions the owner must apply for prior to suffering the compelled intrusions. There is much more I can offer on that and if any of you have any questions or think there are pieces missing, I would be happy to fill you in. I would happily take such cases. What will the impact be if a legislator asks for the fiscal impact of passage of the Act?

No consideration of the *Knick* case occurred prior to the production of the Act that is before you. Not to be missed, what does the presumption the Act provides in favor of First Amendment activity square with the landowners property right to be treated on the same stature as the First Amendment? Set aside for the minute a blogger who wants to fly around your home with a drone. Say it is the New York Times. What *Knick* says about a property owner's right to Just Compensation as equal to all other Bill or Rights protections is not just a presumption. It is to be treated the same as the First Amendment or Fourth and all the others. The Act has a presumption that there is no trespass if the drone flyer is engaged in First Amendment activity.

How can that be after *Knick*? *Knick* cannot be dismissed as a procedural nicety. At page 6 of Slip Opinion:

> "Fidelity to the Takings Clause and our cases construing it requires overruling Williamson County and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the other protections in the Bill of Rights".

The reach of that principle is not easy to lay out until tested against fact patterns that arise. It is surely not just "a procedural nicety".

I did not reach out to any of those above who made objections to this Act. I did alert the Pacific Legal Foundation to the Act. Pacific Legal Foundation was counsel for Mrs. Knick. So all understand, I serve as a Trustee of Pacific Legal foundation and Chair its Litigation Program. what it may or may not say is its work, not mine, and I do not speak for it here. I do invite anyone who doubts the impact of *Knick* to consider Pacific Legal Foundation's knowledge and track record on inverse condemnation actions. I also come to this with 47 years of extensive experience in such cases. That experience makes clear to me that importing a takings standard into a trespass statute dealing with drones in the immediate reaches of airspace is the wrong thing to do.

7) Consider Oregon's approach. I set out ORS 837.380:

> "(1) Except as provided in subsections (2) and (3) of this section, a person who owns or lawfully occupies real property in this state may bring an action against any person or public body that operates an unmanned aircraft system that is flown over the property if:
>
> (a) The operator of the unmanned aircraft system has flown the unmanned aircraft system over the property on at least one previous occasion; and
>
> (b) The person notified the owner or operator of the unmanned aircraft system that the person did not want the unmanned aircraft system flown over the property.
>
> (2) A person may not bring an action under this section if:
>
> (a) The unmanned aircraft system is lawfully in the flight path for landing at an airport, airfield or runway; and
>
> (b) The unmanned aircraft system is in the process of taking off or landing.
>
> (3) A person may not bring an action under this section if the unmanned aircraft system is operated for commercial purposes in compliance with authorization granted by the Federal Aviation Administration. This subsection does not preclude a person from bringing another civil action, including but not limited to an action for invasion of

privacy or an action for invasion of personal privacy under ORS 30.865 (Action for invasion of personal privacy).

(4) A prevailing plaintiff may recover treble damages for any injury to the person or the property by reason of a trespass by an unmanned aircraft system as described in this section, and may be awarded injunctive relief in the action.

(5) A prevailing plaintiff may recover attorney fees under ORS 20.080 (Attorney fees for certain small tort claims) if the amount pleaded in an action under this section is $10,000 or less.

(6) The Attorney General, on behalf of the State of Oregon, may bring an action or claim for relief alleging nuisance or trespass arising from the operation of an unmanned aircraft system in the airspace over this state. A court shall award reasonable attorney fees to the Attorney General if the Attorney General prevails in an action under this section. [2013 c.686 §15; 2015 c.315 §11; 2016 c.72 §10]"

Oregon's approach drew support from both Democrats and Republicans, The ACLU, Chiefs of Police Association, Farm Bureau and Oregon Cattlemen's Association. That is a remarkable alignment. Take a look at how it protects the land owner by allowing notice to the drone operator who, without permission flies over the land, and is told not to do it again. It finesses the preemption issue by non-application to a commercial drone operator who has been licensed to fly as he or she is doing. It also has teeth with both punitive damages and attorney fee awards. Anyone see much of chance to get Oregon to adopt our Act as written? Or any State?

Finally, early on my suggestion to have a clear limit below which a drone could not fly (excepting emergencies, law enforcement efforts consistent with law) was accepted. But, that was later removed in favor of the substantially interfere with use and enjoyment language from *Causby* and the series of factors now in the Act. I missed the meeting in DC due to a blizzard that kept me in Bend, Oregon. The drafting committee had two telephone conference meetings after that. At the last, I submitted a writing and motion but we ran out of time and it was not heard. What I have learned since makes clear to me that made no difference to where we are now. I recently asked the Chair for an immediate telephone conference following the *Knick* decision with a request that the Committee ask Senior Leadership to remove the Act from final reading this year and allow more work. That did not happen but it has been made clear to me that senior leadership and the Chair of the Committee would oppose any such effort. It is equally clear to me that the Committee has not given full consideration to all of the objections from others I above. The Committee will meet again at the conference before we go to the floor but it is clear no more time will be allowed for further consideration unless it comes from the floor by you Members.

I am not sure what we can do in such short time once we are on the floor. Perhaps a motion to remove the reference to final reading. If so, I would urge adding a member to the drafting committee for the JEB and reaching out and inviting those who objected to sit as

observers. If not then hopefully all reference to the "substantially interferes" with language will go away. Perhaps that and making some, if not all, the considerations be made into per se aerial trespass violations might work. But, I am not sure if time will permit the task to be done properly at a final reading. Perhaps a sense of the house motion to go back and at least consider some of this and even reconsider coming to a definite altitude below which intentional flight is a trespass. It is mind boggling that a drone operator can fly around my home at one nano-meter above the lawn without that itself being actionable as a trespass. It is equally mind boggling why the industry folks would not agree to making that a trespass. I have never understood why industry opposed a clear rule at some reasonable height (and I am not wedded to a particular height) unless to persuade a majority of the Committee to give them all they ask for which in my view is what has happened. If we are given time, I will again see if an industry representative could arrange a demonstration of large and small drones so Committee Members see and experience firsthand what it is we were tasked with in drafting an Act..

I want to emphasize the respect I have for the participants in this effort. I just disagree with the product they put forth for Final reading and adoption.

Thank you for your time. I do hope you will give serious thought to not just my objections but to those of the other individuals and entities I have attached, and I will continue and prepare some motions to bring as we go along.

Respectfully,

Joe Willis

Donald Joe Willis

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ATTACHMENT 1

Willis, Joe

From: Lucy Grelle <lgrelle@uniformlaws.org>
Sent: Tuesday, July 9, 2019 7:10 AM
Subject: Uniform Tort Law Relating to Drones Act: comments from The Heritage Foundation
Attachments: 2019jul8_UTLRDA_Comments_Heritage Foundation.pdf

Dear Committee Members and Observers:

Attached are comments from Jason Snead on behalf of The Heritage Foundation. The comments are also posted on the committee's webpage: click here.

Respectfully,

Lucy Grelle

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July 8, 2019

Ms. Anita Ramasastry
Uniform Law Commission
111 N. Wabash Avenue, Suite 1010

Dear Ms. Ramasastry,

I write today to express my significant concerns regarding the current draft of the Uniform Tort Law Relating to Drones Act (the "Act"), and recommend that the full Uniform Law Commission ("ULC") not pass it.

The Act charts the wrong course for resolving the conflicts already occurring—and certain to become more frequent—between drone operators and property owners in the very low altitude airspace adjacent to our homes and communities. The Act effectively creates a presumptive right for drone operators to fly anywhere, even one inch above someone's backyard, while people are present for a private gathering. If the owner of the property objects to such intrusive behavior, his or her only recourse would be to sue and hope to prevail under the Act's tortuous (and non-exhaustive) 13-factor aerial trespass test. This aerial trespass scheme substantially hinders the ability of property owners to address unwanted intrusions, and is in fact, as pointed out by Professor Henry Smith in his June 20 letter (the "Smith letter") even less protective than the existing aerial trespass doctrine for manned aviation.[1] The complexity and cost of the litigation called for under this Act will almost certainly have a chilling effect on owners seeking to challenge drone operators, particularly when the operator is a well-funded multinational corporation. In fact, the Act is so skewed against property owners that it does not provide them with so much as a rebuttable presumption that a drone flying mere inches above the ground has indeed committed a trespass.

The Committee justifies this largely by claiming that drones are "aircraft" and that the airspace in which they fly is "navigable," or what the law treats as a "public highway" through which everyone has a right to transit.[2] As a result, the Committee claims, property owners simply cannot exclude drones. This is simply not the case. The Federal Aviation Administration (FAA) has made a regulatory determination that the federal legal term "aircraft" includes drones; this decision, however, is not determinative of how states should address, for purposes of trespass law, extremely low-level drone flights. Indeed, even the FAA acknowledged in a 2015 fact sheet that "[l]aws traditionally related to state and local police power—including land use, zoning, privacy, trespass, and law enforcement operations—generally are not subject to federal regulation."[3] Nor has the FAA formally redefined the "navigable airspace" to include every cubic inch of air down to the ground. Even if it were to do so, at least one federal judge has expressed grave doubts that so massive a regulatory power grab at the expense of the states is permissible under existing law or the Constitution.[4] The Committee Memorandum and the Act's Prefatory Note, however,

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[1] Smith Letter
[2] *See*, the Act, Prefatory Note. For the statutory definition of the "navigable airspace," see 49 USC § 40102(a)(32).
[3] Federal Aviation Administration, *State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet*, Dec. 17, 2015, https://www.faa.gov/uas/resources/policy_library/media/UAS_Fact_Sheet_Final.pdf.
[4] *Huerta v. Haughwout*, No. 3:16-cv-356 (JAM), 2016 WL 3919799 (D. Conn. July 18, 2016), at 8. "It appears from oral argument as well as from the FAA's website that the FAA believes it has regulatory sovereignty over every cubic inch of outdoor air in the United States (or at least over any airborne objects therein). If so, that ambition may be difficult to reconcile with the terms of the FAA's statute that refer to 'navigable airspace,' *see, e.g.,* 49 U.S.C. § 40103(b)…Congress surely understand that state and local authorities are (usually) well positioned to regulate what

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treat it as a given that the air adjacent to every yard, every home, every farm, and every business is no longer the owner's alone, but is in fact a public domain under federal control. One suspects that the property owners whose rights this Act so casually casts aside would disagree with this assessment.

Having been involved in the Drafting Committee's ("Committee") deliberations as an observer, I have developed a deep respect for the ULC's commitment to a collegial and deliberative process. This approach is the best way to strike a balance between the interests of all stakeholders. However, that process can only function when all the stakeholders around the table are willing to compromise. This, sadly, has not been the case. For years, representatives of the "drone industry" have worked to advance policies that would give its largest commercial members the widest possible latitude to operate while holding them to the minimum level of account when their conduct offends those over whom they fly. They have lobbied Congress and regulators with the goal of preempting and blocking state and local government efforts to regulate, pursuant to their inherent police powers, drone conduct which directly impacts their jurisdictions. Now with the ULC, the industry seeks a proposal that denies individual property owners any firm right to exclude drones, no matter how low they may fly. In the course of lengthy deliberations, industry groups have demonstrated little willingness to compromise on this point. Its representatives argued against a *per se* rule, and publicly attacked the ULC for proposing one.[5] In May, industry groups even promised to "vigorously oppose" this Act if it were modified to afford property owners a presumption that "substantial interference" has occurred for a low-level overflight.[6]

I understand the incentives for private companies to seek legislation that advantages them. However, the ULC bears the responsibility of crafting sensible, rational, and fair public policy suitable for uniform adoption throughout the nation. If the ULC passes this one-sided Act, it is endorsing the subordination of the long-held legal rights of millions to the commercial interests of corporations and drone operators. Any state which subsequently enacts it will be seen to do the same. This Act will prove so controversial and lopsided that this "uniform" tort law will almost certainly fail to pass in numerous state legislatures, if it passes any at all.

The opportunity now before the ULC is to reject this proposal and return it to the Drafting Committee. The Committee's initial approach—which established a bright line *per se* trespass standard—is far simpler and cleaner, and would produce predictable outcomes for both drone operators and landowners. Protecting property rights—including a *per* se trespass standard up to a reasonable height—and advancing efficient drone operations are not mutually exclusive, and this approach should be the framework for future discussions.

Further, as the letters and comments from property law experts and organizations opposed to this draft have made clear, their expertise and voice are needed around the table if the Committee is to succeed in developing a compromise that facilitates drone activity without unduly diminishing the rights of property owners.

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people do in their own backyards… No clause in the Constitution vests the federal government with a general police power over all of the air or all objects that leave the ground."

[5] Brian Wynne, Gary Shapiro, *The Biggest Threat to Drone Innovation is a Group You've Never Heard* Of, TECHCRUNCH (Oct. 25, 2018), https://techcrunch.com/2018/10/25/the-biggest-threat-to-drone-innovation-is-a-group-youve-never-heard-of/. Industry now praises the ULC for offering the present, greatly modified, Act. Brian Wynne, Gary Shapiro, *The Biggest Threat to Drone Innovation is a Group You've Never Heard* Of, TECHCRUNCH (Jul. 3, 2019), https://techcrunch.com/2019/07/03/new-approach-to-state-drone-laws-balances-privacy-and-innovation/.

[6] *See*, Comments from NetChoice, et al, submitted May 15, 2019.

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Finally, I have included below a short and non-exhaustive list of shortcomings to the current approach which counsel strongly against passage.

1. The Act purports to transform airspace immediately above private land into a public highway, seriously degrading the long-standing property rights of owners.
Prior to the advent of manned aviation, the common law *ad coelum* doctrine provided that landowners possessed an unlimited column of airspace extending from the ground to the heavens.[7] Unquestionably, this doctrine is no longer in effect. In 1926, Congress abrogated it in the interest of fostering manned aviation.[8] Aircraft were flying longer distances at higher altitudes, and it became impractical for a pilot to secure an avigation easement from thousands of individual property owners—particularly given that these flights would take place tens of thousands of feet above the ground, where they are seldom seen and never heard. The Supreme Court subsequently upheld Congress' action in the 1946 case *United States v. Causby*.[9]

Crucially, however, neither Congress nor the high Court has acted to outright eliminate airspace property rights. Rather, both institutions have recognized a distinction between high- and low-altitude airspace. Congress reserved the former, the "navigable airspace," as an aerial highway which generally begins at an altitude of 500 feet, in which Americans have a right to transit.[10] The Supreme Court in *Causby,* meanwhile, affirmed that the latter remains, of necessity, within the possession of whoever owns the land beneath. As the opinion in *Causby* made perfectly clear, the airspace may be a public highway, but "if the landowner is to have full enjoyment of the land, ***he must have exclusive control of the immediate reaches of the enveloping atmosphere.***"[11] *Causby* remains good law; thus, there is the high altitude "navigable airspace" that constitutes an aerial public highway, and the low-altitude "immediate reaches" that is unquestionably private property attached to the land beneath.

Troublingly, the Act cites *Causby* to justify effectively eliminating that distinction altogether. The Committee Memorandum expressly states that it determined that the "airspace in which drones can fly is navigable airspace of the kind described in *Causby* and the Restatement." In other words, the Act purports to bring the high altitude aerial highway Congress created in 1926 *all the way down to the ground.* As the Smith letter rightly points out, this effectively "imposes a presumptive navigation servitude on every cubic centimeter of space above the surface of the land"[12]—in other words, it eviscerates the "exclusive control" which property owners enjoy under *Causby*. That may seem like a trivial concern today, as most drone flights are infrequent, one-off events. But that will soon change. As the Prefatory Note observes, drones are rapidly proliferating and in just three years will total between 1.96 and 3.17 million, according to estimates from the Federal Aviation Administration (FAA).[13] Major companies are already testing platforms for large-scale commercial operations in populated areas; one test by Google's Project Wing

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[7] *See* Bury v. Pope, 1 Cro. Eliz. 118, 78 Eng. Rep. 375 (Q.B. 1587). *See also*, James D. Hill, *Liability for Aircraft Noise—the Aftermath of Causby and Griggs*, 19 U. MIAMI L. REV. 1, n.3 (1964).
[8] The Air Commerce Act of 1926, Pub. L. No. 69-254.
[9] 328 U.S. 256 (1946).
[10] 49 U.S.C. § 40103(b) sets out that the FAA "shall develop plans and policy for the use of the navigable airspace…" The navigable airspace is defined in 49 U.S.C. § 40102(a)(32) as "the minimum altitudes of flight prescribed by regulations." The FAA regulations which lay out the minimum altitudes are contained in 14 CFR 91.119, and generally begin at 500 feet above ground level in unpopulated areas.
[11] *Supra* note 9, at 264 (emphasis added).
[12] Smith letter, at 6.
[13] Act, Prefatory Note

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drew the ire of local residents in Canberra, Australia for the noise and frequency of overflights.[14] This the future of the drone "aerial highway": it will not be an unfrequented back road, but a vibrant freeway, and this Act places it in the backyards of millions of Americans.

2. The Act essentially empowers individuals to violate the property rights of others merely because the offending object is a drone.

Property law has long recognized the right of landowners to exclude any number of aerial intruders that cross their property line, even if the offending object does not come into contact with his real or personal property. The Restatement (Second) of Torts, Section 159(1) plainly states that "a trespass may be committed on, beneath, or above the surface of the earth."[15] The Restatement clarifies that this protection applies to, for instance, overhanging structures, telephone wires, a waving arm, a balloon, or a projectile. In these cases, owners have a right to—and expect that they can—demand the removal of the interloper. And as the Joint Editorial Board for Uniform Real Property Acts ("JEBURPA") pointed out in its letter to the ULC, given the character of existing trespass law, landowners would reasonably expect this right to apply to drones at similar altitudes.

Nevertheless, Section 5(a) of the Act proposes to radically scale back this right by adopting a nuisance-like requirement that a landowner show not only that the offending drone penetrated "the airspace over the land possessor's real property" but also that it "causes substantial interference with the use and enjoyment of the property." It is true that Restatement Section 159(2) similarly adopts, as regards manned aviation, a requirement that landowners show that an overflight caused substantial interference to prevail in a trespass claim. It is not the case, however, that this doctrine so plainly applies to drones as to be casually cross-applied, as the comments suggest.

For most of the history of aviation, drones—long referred to as "model aircraft"—were not considered "aircraft" for the purposes of federal law.[16] "Aircraft" were widely understood—including by the drafters of the Restatement and the Justices in *Causby*—to be manned vehicles markedly different than the drones at issue in this Act. *Causby*, for instance, dealt with large military aircraft which bear no resemblance to the small drones proliferating in US skies. Drones are generally small, operate almost exclusively at low—sometimes very low—altitudes, and may loiter over particular areas in a way most aircraft cannot. Manned aircraft, by contrast, are generally larger, fly at high altitudes, and for long distances. Even the Committee itself concedes in the Act's Prefatory Note and the Memorandum of June 10 (the "Memorandum") that drones and manned aircraft are fundamentally different, and so too are many of the challenges they pose. No compelling reason is given to ignore these differences and treat drones as "aircraft." The implication seems to be that, because the Federal Aviation Administration (FAA) has determined that drones are "aircraft," states ought to fall in line and modify their tort laws according to the decisions of a federal regulatory agency. That justification is severely lacking. Adopting this Act would produce outcomes that are, from the perspectives of property owners, truly bizarre.

Consider how the trespass regime created by the Act would play out in the real world. Suppose you see a stranger walking across your lawn without permission; you would be well within your rights to demand

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[14] https://www.wsj.com/articles/delivery-drones-cheer-shoppers-annoy-neighbors-scare-dogs-11545843552.
[15] Restatement (Second) of Torts § 159.
[16] *See*, Jason Snead, *The SkyPan Case: FAA Enforcement of Nebulous Drone Rules Undercuts the Rule of Law*, HERITAGE FOUNDATION BACKGROUNDER NO. 3197 (Mar. 16, 2017), https://www.heritage.org/sites/default/files/2017-03/BG3197_0.pdf.

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he immediately leave. The stranger would be compelled to do so because he is clearly trespassing; if he lingers, you are free to call the police, who could quickly resolve the situation. Any resulting litigation could be easily disposed of in court. Now consider that instead of a stranger, you see a strange drone hovering at eye level. Even assuming you can identify the operator, you have no default right to demand that the operator vacate the airspace over your lawn. The operator may not wish to; he may be engaged in a business activity, or may simply feel he has a right to fly there because the Act gives him a presumptive right to fly where he pleases. Regardless, if the operator and owner cannot come to an agreement, under this Act there is no easy resolution of this conflict because of the vague standards laid out in the Act. And lest one believe that drone operators will surely be respectful of property owners' rights and wishes in low-altitude airspace, consider that the July 1 letter from industry groups calls any comparison between a drone operating at 15 feet and a traditional trespass "facile."[17] In other words, drone users are seeking the right to operate in this space. It is therefore difficult to escape the perception that this Act empowers individuals to do things, remotely via drone, which the law otherwise clearly prohibits, such as occupying and using the property of another.

3. The Act creates a 13-factor test for proving "substantial interference" that is unworkable, burdens courts, will deter from property owners for pursuing meritorious claims, and results in unpredictable judgements.

The Act's solution to resolving the inevitable conflicts between drone operators and landowners is, remarkably, a non-exhaustive 13-factor balancing test which the Committee euphemistically calls "clarity."[18] It is difficult to take that claim seriously.

To begin, nothing is simpler or clearer than a *per se* trespass standard which affords property owners clear title to a reasonable portion of the airspace near the land, and which allows them to exclude drones from this zone as they would other similar aerial intruders. Under such a bright line rule, proving a trespass is a simple question of location; if the drone is inside one's three-dimensional property without permission, a trespass has likely occurred. Like trespass to land, specific exemptions can be made for conduct, such as emergency response or certain law enforcement activities, that are tailored to permit specific conduct without ameliorating the owner's property interest. The Committee's earlier draft adopted just such an approach, which promised to establish clear, reasonable, and predictable sets of rules under which both drone operators and landowners would understand their respective rights. One obvious benefit of this is that conflicts could be resolved relatively easily, without the bother or expense of litigation.

The Committee now rejects this approach as supposedly unworkable, and instead proffers a multi-factor balancing test that transforms every dispute over a drone trespass, whether one millimeter hundreds of feet up, into a fact-intensive inquiry which can *only* be resolved in court. Alarmingly, two of these factors are "the operator's purpose" and "the nature of the [owner's] use and enjoyment of the property." The Act thus explicitly invites courts to judge the validity of a property interest based on ad hoc, highly subjective judgements about the relative value of, say, a package delivery service compared to a solitary woman's desire to relax in her backyard free of drone overflights 20 feet above. Another is a catch-all that allows courts to consider "[a]ny other factor" which might be relevant to its analysis, which will encourage drone operators to take a "throw everything at the wall and see what sticks" approach to any litigation in hopes of convincing a court to, as Smith puts it in his letter, "balance away owners' rights."[19]

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[17] Letter from Drone Industry and Stakeholders, at 3.
[18] Act, Prefatory Note.
[19] Smith letter, at 2.

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Moreover, the Act's balancing test includes factors such as time of day, whether an owner was present, and whether he observed or overheard the flight. Consequently, two cases addressing otherwise identical drone activities could face divergent rulings based on the fact that one took place at night, or when the owner was home, or that one lingered for a few moments while the other merely transited the property.

This has consequences for all parties. For landowners, victory in one case does not make one secure in his property. He may immediately face another drone incursion, necessitating another round of costly litigation which he is at risk of losing if the facts differ—or if the operator is more creative in inventing reasons to justify his activity—from the first. Owners thus face perpetual litigation. From the perspective of drone operators, this risks creating a judicially-imposed "patchwork quilt" of unpredictable legal findings. The industry has long railed against creating a patchwork—and indeed, frequently argued against a *per se* rule partially on those grounds. It is odd that industry now embraces just such a patchwork, except one that hinges not on published laws or defined property boundaries, but on highly unpredictable and unknowable conditions like owners' personal schedules.

The reason for this may be the expectation that the cost, length, and extreme uncertainty of any litigation under this Act will deter many owners from pressing claims in court. This will be particularly true when an owner is not wealthy, or when a drone operator is a well-funded and well-lawyered multinational corporation. For that class of drone operator, this Act represents the surest invitation to wide-scale operations free from any significant hindrance. This is little comfort, however, to hobby fliers or shall businesses integrating drones into their activities. Many will eventually feel the financial sting of lawsuits, and under this Act's vague construction of aerial trespass, will never be truly certain they are free of the risk of litigation.

Conclusion

For these reasons, and for those issues flagged in the comments filed from JEBURPA, the ABA Real Property, Trust, and Estate Law Section, and Professor Smith, I strongly encourage the ULC to reject this version of the Act. The proposal, simply put, treats property owners like disfavored parties *on their own property*. It presumptively grants drone operators broad rights to fly where they please, contingent only on the willingness and the capacity of a property owner to file suit. Even then, the Act invites courts to engage in an ad hoc balancing of interests such that property owners may see their rights winnowed away based on the subjective inclinations of courts and the creativity of drone operators' arguments—that is, if these owners can afford to litigate, at all.

I strongly suspect that property owners, and for that matter local communities, are unlikely to merely accept this state of affairs. As drones proliferate and as conflicts arise in greater numbers, this Act could trigger an anti-drone backlash among property owners looking for a solution to end persistent intrusions. One alternative which immediately comes to mind would be land-use laws that bar take-off and landing of drones within a given jurisdiction. Large commercial interests may be able to get around such restrictions by situating drone facilities outside jurisdictional limits and merely hovering to deliver a package or perform some other task. But for local businesses or hobby fliers, such de facto bans would be difficult to avoid. I wish to stress that this is not an optimal outcome; but, if states adopt this Act, residents may see their options for dealing with drone externalities as having been reduced to a veritable on/off switch. With little hope of defending their rights in court, they may well wish to throw that switch. And whatever doubts may exist about the ownership of the air, the ownership of the land, and the authority of state and local governments to regulate its use, is clear.

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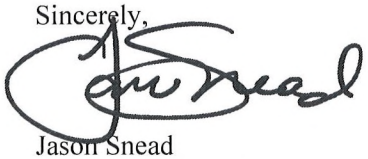
Drones can bring great benefits to our communities and our nation, and their operations should be encouraged. I hope that the ULC rejects this proposal and continues to work towards that goal by developing a truly balanced Act which not only recognizes, but properly safeguards, the property rights of citizens.

Sincerely,



Jason Snead
Senior Policy Analyst

ATTACHMENT 2

Willis, Joe

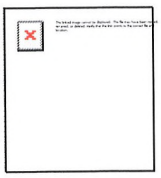
From: Lucy Grelle <lgrelle@uniformlaws.org>
Sent: Wednesday, July 3, 2019 6:55 AM
Subject: Uniform Tort Law Relating to Drones Act: comments from American College of Real Estate Lawyers (ACREL)

Dear Committee Members and Observers:

Below are comments from the American College of Real Estate Lawyers. The comments are also posted on the committee's webpage: click here.

Respectfully,

Lucy Grelle
Uniform Law Commission
(312) 450-6624 direct



To: The Commissioners of the Uniform Law Commission
From: American College of Real Estate Lawyers
Date: July 3, 2019

Re: Uniform Tort Law Relating to Drones Act ("Act")

The American College of Real Estate Lawyers ("ACREL") is an organization representing attorneys specializing in real property law. Its over 1,000 members include over two dozen law professors specializing in real property and attorneys representing virtually every conceivable interest in real estate including lenders, institutional investors, developers, community associations, private equity and mortgage securities.

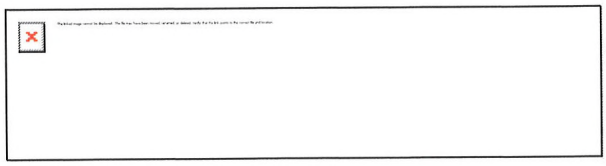
I am the chairperson of the Amicus and Public Advocacy Committee of ACREL ("Advocacy Committee") and a former president. The diversity of interests in ACREL almost always makes it impossible to take a uniform position on public policy because of the differing interests of the members and their clients. This is one of those extraordinary events where ACREL members are united in opposing the present legislative proposal on drones. ACREL does not support the Act in its present form and its members actively would oppose enactment of the Act in its present form by any state or other governmental entity.

The Act does not strike a fair, or virtually any balance, between the interests of land-owners and land-users and those who use drones and related photography. Technology is a powerful tool that has dramatically improved the life of virtually everyone from advances in healthcare, education, communication and multiple other areas. Technological innovation must be nurtured and widely adopted. On the other hand, the unfettered use of technology can cause serious problems and be

greatly abused. For example, facial recognition has benefits, but when used to create a "citizenship score", most would think it highly abusive. Similarly, remote digital photography, when misused, can create unacceptable invasions of privacy.

Drones serve many valuable purposes, including rescue operations, disaster management, surveys, inspecting storm damage and potentially shipping. On the other hand, the average land user/owner is ill-equipped to even identify the drone or its operator, let alone meet the standard required in the present draft to prevent an invasion of their privacy. Maybe one way to think of the balance is to imagine how you balance the delivery of critical life-saving rescue operations to your family, grandparents or grandchildren with the potential misuse of intrusive photography against these same extended family members.

ACREL supports changes, such as those in the JEBURPA and ABA correspondence you previously have seen and in the attached Memorandum from Professor Henry E. Smith (Reporter to the Fourth Restatement of Property), to strike a fairer balance. Also attached is Professor Smith's short response to the Drone Lobby's letter responding to comments of the JEBURPA, the ABA's Real Property Trust & Estate Law objection and his initial memo. Professor Smith cogently lays out proposed changes and the reasoning. Clearly there are other possible changes to remedy the present problems. Open discussion, civil discourse, compromise and a balancing of interests, are the keys to developing fair and effective legislation, especially in this complex area of evolving technology. The purpose of this short memo is not to lay out all of the complex problems and solutions as you have already been bombarded with such data, but to insist that the balance be made much fairer to private individuals who can greatly benefit from this technology when used for serious public purposes, but also be horribly victimized by invasions of privacy when the technology is abused or used haphazardly.



Contact Thomas F. Kaufman, Chairperson of the Amicus and Public Advocacy Committee

ATTACHMENT 3

Willis, Joe

From: Lucy Grelle <lgrelle@uniformlaws.org>
Sent: Tuesday, July 2, 2019 10:05 AM
Subject: Uniform Tort Law Relating to Drones Act: further comments from Henry E. Smith
Attachments: 2019jul2_UTLRDA_Memo_Smith_2.pdf

Dear Committee Members and Observers:

Attached are further comments from Henry E. Smith. The comments are also posted on the committee's webpage: click here.

Respectfully,

Lucy Grelle

Lucy Grelle
Publications Manager
Uniform Law Commission
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Direct 312.450.6624 | Office 312.450.6600 | Fax 312.450.6601

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: July 2, 2019

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

In response to my June 20, 2019 memo, the drone industry in a letter of July 1, 2019 raises two points and reiterates some others. The Letter points out that I did not offer a specific alternative to the May 30 Draft's Section 5, and it asserts that all alternatives were considered in the process culminating in the current version. The Letter also reiterates its views on "aerial trespass." None of these arguments is availing.

My interest in these issues is that of a property scholar, and, as before, I write in my personal capacity, and not on behalf of the American Law Institute.

The memo dismisses my criticism because I do not put forth an alternative. This is hard to take seriously. As I said in my memo, a number of approaches are consistent with the principles I set out. The importance of those principles do not depend on selecting one alternative. For what it's worth, I consider among those superior alternatives to be the earlier drafts – flawed in some respects though they may be – and in other feedback the UFC has received from many quarters. Nowhere has it been shown that presumptions of trespass or substantial harm are unworkable – or even some set of distances within which trespass would be presumptive. Perhaps more telling is that even a wide berth for drones would be better implemented as a defense to trespass law, rather than, as the Draft does, erasing current trespass and replacing it with a bespoke regime for drones. As I said in my June 20 Memo, the law of trespass is associated with a range of common law and statutory defenses ranging from necessity to the surveyor's privilege. What mix of rules and standards depends on the nature of the potential intrusion, but there is nothing in the problem presented by drones that tailoring a defense to fit the problem – as has been done repeatedly in the past – would not serve here as well. That the Draft blows by this possibility with nary a mention is a symptom of the problem.

It is a symptom of a process gone awry. Here too I profess no direct knowledge of what went wrong – just that something must have. The Letter repeatedly assures us that all alternatives were considered and rejected for good reason. This amounts to little more than an ipse dixit and will carry no weight with a skeptical public either.

For the rest, the memo rehashes ground that has been thoroughly covered before. It touts "aerial trespass" doctrine as supplying a complete justification for the extreme – and it is indeed extreme – approach in the May 30 Draft. For reasons stated in my memo, this kind of reliance

on aerial trespass doctrine is misplaced and feeds into a false dichotomy between unreasonable extremes. Indeed, in the hands of the May 30 Draft and the Letter, the notion of "aerial trespass" becomes an empty slogan. I would reiterate that a close reading of the case law and the Restatement Second of Torts casts grave doubt on the entire framing of the Draft Act. If this is the kind of "nuance" and "compromise" that characterized the process that got us to this point, then color me skeptical.

In this connection, the Letter completely misrepresents my views on trespass and fails to mention my Memo's discussion of nuisance. As I made abundantly clear, the law of trespass is a (relatively) simple presumption that has been elaborated with exceptions and supplements – including through the law of nuisance – in order to provide a highly flexible and dynamic system for resolving an important class of land use conflicts. That was the overall import of my Memo. That the Letter seem not to even begin to appreciate this greater context suggests to me that the deference being asked for is inappropriate. I stand by every word of my previous Memo.

ATTACHMENT 4

Willis, Joe

From: Lucy Grelle <lgrelle@uniformlaws.org>
Sent: Monday, July 1, 2019 1:34 PM
Subject: Uniform Tort Law Relating to Drones Act: a message from Committee Chair Paul Kurtz
Attachments: 2019jun28_UTLRDA_Message_Willis.pdf

Sent on behalf of Committee Chair Paul Kurtz to Committee Members and Observers

Attached is a note from drafting committee member Commissioner Joe Willis. Given the short amount of time before the annual meeting in Anchorage and the intervening Fourth of July weekend, we will not have time to have a committee meeting to consider his suggestion that we seek to withdraw the act from consideration at the annual meeting.

I have discussed Joe's email with ULC leadership which informed me that the act would be read, as planned, in Anchorage. I would note that the drafting committee does not have the power, as I understand it, to withdraw the act. Vice Chair Mark Glaser and I are in the process of preparing a substantive document responding to the memos from the JEB, the ABA's Section on Real Estate Law, and Professor Smith who is the reporter for the new Restatement of Property. It will also address the Knick case mentioned in Joe's note. We intend to distribute that memo before the annual meeting, hopefully next Monday.

Paul Kurtz
Committee Chair

From: Willis, Joe
Sent: Friday, June 28, 2019
Subject: RE: Tort Relating to Drones

Given the recent and strong objections from our JEB, ABA, Professor Henry Smith, reporter for ALI Restatement of Property IV and the inconsistent treatment of the ALI recent draft treatment of trespass AND THE VERY RECENT SCOTUS OPINION IN THE KNICK case I urge the Drafting Committee to arrange an immediate telephone conference to discuss asking to withdraw the draft from floor presentation prior to the meeting and allow us to work through those objections. I am convinced our draft will be DOA if ever it leaves the ULC in this form.

A word on Knick. First no consideration of it has happened yet in the committee. The opinion makes clear that a regulatory taking case can be brought upon passage of the offending regulation and avoid the ripeness prong of exhausting state procedures for inverse condemnation. IHMO if a state should pass our bill it could be sued immediately under 42 USCA 1983.The 11th Amendment likely would preclude the action in Federal Court but it can be brought in State Court. The state couldn't just apologize and repeal but would owe just compensation from the date of taking. Importantly Knick restored the just compensation clause to its rightful place of equal stature to the first amendment. What does that do to the presumption included for first amendment activity that also drew criticism.

I just don't see how with all the opposition, notwithstanding the industry liking of what it gives drone operators, it would ever be passed. Even if a model act, if followed and adopted by a local government, that would land them in federal court defending an inverse case.

I ask that each member of the drafting committee and voting leadership give this serious consideration and set up a conference call and then join me in asking for delay until next year while we try to come to something that cures the existing problems in our draft.

ATTACHMENT 5

Willis, Joe

From: Lucy Grelle <lgrelle@uniformlaws.org>
Sent: Tuesday, June 25, 2019 7:32 AM
Subject: Uniform Tort Law Relating to Drones Act: comments from Joint Editorial Board for Uniform Real Property Acts
Attachments: 2019jun5_JEB for URPA_Comments re Drones Act.pdf

Dear Committee Members and Observers:

Attached are comments from the Joint Editorial Board for Uniform Real Property Acts. The comments are also posted on the committee's webpage: click here.

Respectfully,

Lucy Grelle

Lucy Grelle
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JOINT EDITORIAL BOARD
for
UNIFORM REAL PROPERTY ACTS

June 5, 2019

To: Commissioners of the Uniform Law Conference

Re: Uniform Tort Law Relating to Drones Act

The JEBURPA is an advisory group comprised of representatives from the American Bar Association Real Property, Trust and Estate Law Section, the American College of Real Estate Lawyers, and the Uniform Law Commission (ULC), with liaison relationships with the American College of Mortgage Attorneys, the Community Associations Institute, and the American Land Title Association. The JEBURPA's purpose is to provide informed advice to the ULC with regard to uniform and model laws as they relate to real estate.

In carrying out this responsibility, members of the JEBURPA have significant concerns regarding a number of provisions of the Uniform Tort Law Relating to Drones Act (the "Act") as those provisions impact the rights of real property owners. **The JEBURPA does not support promulgation of the Act in its current form, and its members would not support the Act's enactment in the States.** The purpose of this letter is to highlight the JEBURPA's primary concerns regarding the Act, focusing specifically on its impact on the rights and obligations of real property owners.

The Act Restricts a Landowner's Control of the "Immediate Reaches" of the Airspace in a Fashion Inconsistent with Present Law and the Expectations of Most Landowners

Advances in technology have created incentives for individuals, companies and institutions to use drones to facilitate a range of activities, such as package delivery, aerial photography, and surveillance. These advances have also exposed a tension—to what extent may a landowner prevent the operation of a drone in the airspace immediately and directly above the owner's land?

Under existing trespass law in all American states, *A* can prevent *X* from traversing the surface of *A*'s land to deliver a package to *A*'s neighbor, *B*, without *A*'s prior consent. Furthermore, it is largely irrelevant to the trespass determination whether *X*'s actions would cause actual economic harm or damage to *A*. See, e.g., *Jacque v. Steenburg Homes, Inc.*, 209 Wis.2d 605, 563 N.W.2d 154 (1997) (upholding award of punitive damages against company that traversed farmer's land to deliver mobile home to neighbor over farmer's prior objection, despite absence of physical harm/damage). Can *A* likewise prevent *X* from flying a drone across *A*'s land at a height of 15 feet to deliver that same package?

Most American landowners would answer this question with an unequivocal "yes." Under existing trespass law, if my neighbor builds a structure that "overhangs" my land without my consent, a trespass has occurred. Likewise, if the branches of my neighbor's tree grow into the airspace above my property, a trespass has also occurred.

By giving the landowner the exclusive right to prevent third-party use of this low-altitude airspace, trespass law has created an expectation among landowners that they can likewise exclude third persons from engaging in drone overflights at very low altitudes. In this way, trespass law advances the landowner's expectations of safety (e.g., that a drone would not collide with a person or structure and cause injury to persons or property) and privacy (e.g., that a drone would not be taking images of the owner or the owner's family or property).

The Prefatory Note states that the Act "clearly adopts the 'aerial trespass' doctrine in relation to unmanned aircraft in the airspace above private land," and further states that the Act "clarifies that intentional unmanned aircraft intrusions on land are trespasses to land." In fact, however, the Act would create substantial doubt about the ability of a landowner to exclude drone overflights at low altitudes. This is because § 5(a) of the Act provides that "[a] person is liable for aerial trespass if the person intentionally and without the consent of the land possessor operates an unmanned aircraft in the airspace over the land possessor's real property ***and causes substantial interference with the use and enjoyment of the property***" (emphasis added).

Under § 5(a), a court may not simply conclude that an unconsented-to drone overflight at an altitude of six feet is *per se* a trespass. Instead, to establish a trespass, the surface owner would have to demonstrate (1) that the overflight was "intentional" and (2) that it caused a "substantial interference" with the landowner's use and enjoyment of the land. To meet this latter standard, the landowner would have to demonstrate "substantial interference" through a complicated analysis of the factors articulated in § 5(b) of the Act. Under this approach, a court could conclude that an unconsented-to overflight at an altitude of six feet was not a substantial interference—and thus not an excludable trespass—for potentially any of the following reasons:

- because it occurred at night [§ 5(b)(9)];
- because it occurred while the owner was not physically present on the land [§ 5(b)(10)];
- because the owner did not see or hear the drone during the overflight [§ 5(b)(11)];
- because the drone did not cause physical damage to person or property [§ 5(b)(7), (8)]; or
- because the drone overflight occurred only once [§ 5(b)(5)].

By contrast, none of these factors would negate a surface trespass (although they might be relevant to the calculation of the landowner's damages).

Furthermore, while the Prefatory Note suggests that the Act is a straightforward application of the principles of *United States v. Causby*, 328 U.S. 256 (1946), it is instead a dramatic overextension of that case. In *Causby*, the Court did reject the notion that a landowner's exclusive control of the surface

extended to the farthest reaches of the heavens, recognizing that a farmer could not use trespass law to prevent military aircraft overflights in navigable airspace (which is part of the public domain).

Nevertheless, the *Causby* court recognized that the surface owner did have a legitimate expectation of exclusive control of very low-altitude space:

> We have said that the airspace is a public highway. ***Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere***. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land.
>
> The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land.
>
> The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. ***We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.*** [*Causby*, 328 U.S. at 264-265 (citations omitted; emphasis added).]

Causby plainly stands for the proposition that use of the airspace in the "immediate reaches of the enveloping atmosphere" is subject to the landowner's exclusive control; at these low altitudes, it does not mandate a complex balancing of burdens and benefits to landowners vis-à-vis drone operators. By requiring such balancing in all drone overflight cases—all the way to ground level—the Act as presently drafted substantially overextends *Causby*, and in the process significantly limits the rights customarily associated with land ownership.

At a minimum, a landowner may reasonably expect that she or he can prevent someone from operating a drone over their land at an altitude where the drone could come into contact with people or structures on the land. If an operator flew a drone across an owner's land at an altitude of six feet without the consent of the landowner, we are confident that any judge today would treat that as a trespass—without regard to whether it was day or night, whether the landowner was at home, or whether the overflight caused no actual physical or economic harm. But § 5(b)'s required multi-factor analysis would render

such a determination less likely; that is the very nature of factor analysis. Thus, we question whether the Act is providing greater "clarity" or instead changing existing state trespass law.

We are of the view that if the Act is not going to treat overflights below a certain altitude as a *per se* trespass, then at a minimum the Act should create a rebuttable presumption of substantial interference in favor of the landowner below a specific height threshold. At a minimum, that threshold should be no less than the height of any structure on the land.[1] In our view, this is necessary and appropriate to permit the development of case law defining "substantial interference." As drafted, the UTLRDA and its "substantial interference" standard place a heavy thumb on the scale in favor of the drone operator. As such, it seems unlikely that all but the wealthiest or most litigious of landowners will bring an action to vindicate their expectations. Creating a rebuttable presumption in favor of the landowner below a certain threshold would be more likely to result in litigation when overflights occur at very low altitudes (if not to simply discourage overflights at such altitudes)—and this is appropriate because this is precisely the situation in which overflights pose the most obvious potential risk of harm.

The Act Creates a Dubious Rebuttable Presumption for "Conduct Protected by the First Amendment"

The comments to § 5 acknowledge that there is no first amendment privilege to trespass. While a speaker may wish to engage in protected speech or protected conduct, that speaker generally may not do so in my front yard, at least without my consent. But § 5(e) creates a rebuttable presumption that conduct protected by the First Amendment does not constitute "substantial interference." As noted above, the factor analysis required by § 5(b) already makes it extremely challenging for a landowner to meet the "substantial interference" threshold; this challenge will become effectively impossible with an additional thumb on the scales in the drone operator's favor.

Properly understood, if a non-media drone operator's conduct was a "substantial interference" under the circumstances, then so should be the same conduct committed by a media drone operator. Anything else creates—or profoundly encourages—a first amendment license to trespass.

The Act Imposes on the Landowner an Unclear and Unjustifiable Duty of Reasonable Care to Drone Operators

§ 7(a) requires that "[a] landowner or land possessor shall act with reasonable care in relation to known unmanned aircraft operating in the airspace over the landowner's or land possessor's property." The comments state that this section "makes clear that a land possessor owes the same duties to unmanned aircraft operating over his or her property as are owed to persons who are on their property."

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[1] To address the situation in which there is only one extremely tall structure on a large parcel of otherwise-unimproved land (e.g., a silo on a large farm), the Act could provide a lateral distance requirement (e.g., an overflight at 100 feet would not trigger a rebuttable presumption of "substantial interference" just because the parcel's tallest structure is 150 feet in height, as long as the drone was no closer than xx feet from that structure).

ATTACHMENT 6

Willis, Joe

From: Roy, Robin <Robin.Roy@americanbar.org>
Sent: Friday, June 28, 2019 9:42 AM
To: Jo-Ann Marzullo
Subject: Uniform Tort Law Relating to Drones Act
Attachments: RPTE Opposition Letter to ULC regarding Drones (00305974-3xD9A95).pdf

TO: Commissioners, Uniform Law Commission

FROM: Jo-Ann Marzullo, Section Chair-Elect, ABA Section of Real Property, Trust and Estate Law

RE: Opposition to Uniform Tort Law Relating to Drones Act

I attached for your review a memo outlining the ABA Section of Real Property, Trust and Estate Law's opposition to the Uniform Tort Law Relating to Drones Act. It is rare for RPTE to oppose acts under consideration by the ULC; in this instance, the sentiment against the act was so strong the Section felt compelled to let each Commissioner know of its opposition.

Should you have any questions regarding the attached, please do not hesitate to contact me at jmarzullo@reganante.com.

Robin K. Roy
Managing Director, Center for Member Practice Groups and
Director, Section of Real Property, Trust and Estate Law
American Bar Association
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Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

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DATE: June 27, 2019

TO: Commissioners of the Uniform Law Conference

FROM: Jo-Ann Marzullo, Section Chair-Elect

Re: Proposed Uniform Tort Law Relating to Drones Act

The Real Property, Trust and Estate Law Section of the American Bar Association ("RPTE") has over 21,500 members. One of RPTE's missions is to address the needs of the public concerning real estate law.

In furtherance of this mission, RPTE has reviewed the proposed Uniform Tort Law Relating to Drones Act (the "Act"). The RPTE Executive Committee and Council have voted to oppose the Act in its current form, including, but not limited to, the sending this letter of opposition to the Commissioners of the Uniform Law Conference.

RPTE was unaware until April of this year that the approach for the Act was drastically changed earlier this year. RPTE has attempted to let our misgivings with the Act be known, but only relatively minor changes were made in the Act in response to comments made as to real estate interests that need to be protected.

RPTE sought input from both the Joint Editorial Board for Real Property Acts and also from one of RPTE's members, Professor Steven Eagle. The comments from both JEB and Steve Eagle are attached.
RPTE's primary objections can be summed up as follows:

1. The Act is contrary to present real estate law and, therefore, the expectations of most landowners. By taking action to protect themselves, their family, and their property (home) from intrusions, an average homeowner could be treated as the wrongful party.

2. The Act allows images of people and places not visible at street level and the public way line to be obtained and retained. This is a violation of the natural privacy that land owners possess by

topography, fencing, landscaping or conducting activities or locating structures beyond what the natural eye can see.

3. The Act applies an unworkable balancing test to determine the liability of a drone operator. A landowner will have no reasonable means to identify the drone operator against whose operation it objects and the bringing of a lawsuit is an unreasonable requirement. A landowner should be able to prohibit a trespass onto its land and the near reaches above it.

4. There needs to be a zone into which a land owner may prohibit any entry by drones and a means to identify the particular drone operator for any drone operating outside the "no fly area".

Unless the Act is modified to the extent that RPTE may support it, RPTE is prepared to oppose the Act if and when it comes before the House of Delegates of the American Bar Association for a vote.

These Comments are presented on behalf of the RPTE alone. They have not been approved by the House of Delegates or the Board of the Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association as a whole.

JOINT EDITORIAL BOARD
for
UNIFORM REAL PROPERTY ACTS

June 5, 2019

To: Commissioners of the Uniform Law Conference

Re: Uniform Tort Law Relating to Drones Act

The JEBURPA is an advisory group comprised of representatives from the American Bar Association Real Property, Trust and Estate Law Section, the American College of Real Estate Lawyers, and the Uniform Law Commission (ULC), with liaison relationships with the American College of Mortgage Attorneys, the Community Associations Institute, and the American Land Title Association. The JEBURPA's purpose is to provide informed advice to the ULC with regard to uniform and model laws as they relate to real estate.

In carrying out this responsibility, members of the JEBURPA have significant concerns regarding a number of provisions of the Uniform Tort Law Relating to Drones Act (the "Act") as those provisions impact the rights of real property owners. **The JEBURPA does not support promulgation of the Act in its current form, and its members would not support the Act's enactment in the States.** The purpose of this letter is to highlight the JEBURPA's primary concerns regarding the Act, focusing specifically on its impact on the rights and obligations of real property owners.

The Act Restricts a Landowner's Control of the "Immediate Reaches" of the Airspace in a Fashion Inconsistent with Present Law and the Expectations of Most Landowners

Advances in technology have created incentives for individuals, companies and institutions to use drones to facilitate a range of activities, such as package delivery, aerial photography, and surveillance. These advances have also exposed a tension—to what extent may a landowner prevent the operation of a drone in the airspace immediately and directly above the owner's land?

Under existing trespass law in all American states, *A* can prevent *X* from traversing the surface of *A*'s land to deliver a package to *A*'s neighbor, *B*, without *A*'s prior consent. Furthermore, it is largely irrelevant to the trespass determination whether *X*'s actions would cause actual economic harm or damage to *A*. See, e.g., *Jacque v. Steenburg Homes, Inc.*, 209 Wis.2d 605, 563 N.W.2d 154 (1997) (upholding award of punitive damages against company that traversed farmer's land to deliver mobile home to neighbor over farmer's prior objection, despite absence of physical harm/damage). Can *A* likewise prevent *X* from flying a drone across *A*'s land at a height of 15 feet to deliver that same package?

Most American landowners would answer this question with an unequivocal "yes." Under existing trespass law, if my neighbor builds a structure that "overhangs" my land without my consent, a trespass has occurred. Likewise, if the branches of my neighbor's tree grow into the airspace above my property, a trespass has also occurred.

By giving the landowner the exclusive right to prevent third-party use of this low-altitude airspace, trespass law has created an expectation among landowners that they can likewise exclude third persons from engaging in drone overflights at very low altitudes. In this way, trespass law advances the landowner's expectations of safety (e.g., that a drone would not collide with a person or structure and cause injury to persons or property) and privacy (e.g., that a drone would not be taking images of the owner or the owner's family or property).

The Prefatory Note states that the Act "clearly adopts the 'aerial trespass' doctrine in relation to unmanned aircraft in the airspace above private land," and further states that the Act "clarifies that intentional unmanned aircraft intrusions on land are trespasses to land." In fact, however, the Act would create substantial doubt about the ability of a landowner to exclude drone overflights at low altitudes. This is because § 5(a) of the Act provides that "[a] person is liable for aerial trespass if the person intentionally and without the consent of the land possessor operates an unmanned aircraft in the airspace over the land possessor's real property ***and causes substantial interference with the use and enjoyment of the property***" (emphasis added).

Under § 5(a), a court may not simply conclude that an unconsented-to drone overflight at an altitude of six feet is *per se* a trespass. Instead, to establish a trespass, the surface owner would have to demonstrate (1) that the overflight was "intentional" and (2) that it caused a "substantial interference" with the landowner's use and enjoyment of the land. To meet this latter standard, the landowner would have to demonstrate "substantial interference" through a complicated analysis of the factors articulated in § 5(b) of the Act. Under this approach, a court could conclude that an unconsented-to overflight at an altitude of six feet was not a substantial interference—and thus not an excludable trespass—for potentially any of the following reasons:

- because it occurred at night [§ 5(b)(9)];
- because it occurred while the owner was not physically present on the land [§ 5(b)(10)];
- because the owner did not see or hear the drone during the overflight [§ 5(b)(11)];
- because the drone did not cause physical damage to person or property [§ 5(b)(7), (8)]; or
- because the drone overflight occurred only once [§ 5(b)(5)].

By contrast, none of these factors would negate a surface trespass (although they might be relevant to the calculation of the landowner's damages).

Furthermore, while the Prefatory Note suggests that the Act is a straightforward application of the principles of *United States v. Causby*, 328 U.S. 256 (1946), it is instead a dramatic overextension of that case. In *Causby*, the Court did reject the notion that a landowner's exclusive control of the surface

extended to the farthest reaches of the heavens, recognizing that a farmer could not use trespass law to prevent military aircraft overflights in navigable airspace (which is part of the public domain).

Nevertheless, the *Causby* court recognized that the surface owner did have a legitimate expectation of exclusive control of very low-altitude space:

> We have said that the airspace is a public highway. ***Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere***. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land.
>
> The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land.
>
> The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. ***We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.*** [*Causby*, 328 U.S. at 264-265 (citations omitted; emphasis added).]

Causby plainly stands for the proposition that use of the airspace in the "immediate reaches of the enveloping atmosphere" is subject to the landowner's exclusive control; at these low altitudes, it does not mandate a complex balancing of burdens and benefits to landowners vis-à-vis drone operators. By requiring such balancing in all drone overflight cases—all the way to ground level—the Act as presently drafted substantially overextends *Causby*, and in the process significantly limits the rights customarily associated with land ownership.

At a minimum, a landowner may reasonably expect that she or he can prevent someone from operating a drone over their land at an altitude where the drone could come into contact with people or structures on the land. If an operator flew a drone across an owner's land at an altitude of six feet without the consent of the landowner, we are confident that any judge today would treat that as a trespass—without regard to whether it was day or night, whether the landowner was at home, or whether the overflight caused no actual physical or economic harm. But § 5(b)'s required multi-factor analysis would render

such a determination less likely; that is the very nature of factor analysis. Thus, we question whether the Act is providing greater "clarity" or instead changing existing state trespass law.

We are of the view that if the Act is not going to treat overflights below a certain altitude as a *per se* trespass, then at a minimum the Act should create a rebuttable presumption of substantial interference in favor of the landowner below a specific height threshold. At a minimum, that threshold should be no less than the height of any structure on the land.[1] In our view, this is necessary and appropriate to permit the development of case law defining "substantial interference." As drafted, the UTLRDA and its "substantial interference" standard place a heavy thumb on the scale in favor of the drone operator. As such, it seems unlikely that all but the wealthiest or most litigious of landowners will bring an action to vindicate their expectations. Creating a rebuttable presumption in favor of the landowner below a certain threshold would be more likely to result in litigation when overflights occur at very low altitudes (if not to simply discourage overflights at such altitudes)—and this is appropriate because this is precisely the situation in which overflights pose the most obvious potential risk of harm.

The Act Creates a Dubious Rebuttable Presumption for "Conduct Protected by the First Amendment"

The comments to § 5 acknowledge that there is no first amendment privilege to trespass. While a speaker may wish to engage in protected speech or protected conduct, that speaker generally may not do so in my front yard, at least without my consent. But § 5(e) creates a rebuttable presumption that conduct protected by the First Amendment does not constitute "substantial interference." As noted above, the factor analysis required by § 5(b) already makes it extremely challenging for a landowner to meet the "substantial interference" threshold; this challenge will become effectively impossible with an additional thumb on the scales in the drone operator's favor.

Properly understood, if a non-media drone operator's conduct was a "substantial interference" under the circumstances, then so should be the same conduct committed by a media drone operator. Anything else creates—or profoundly encourages—a first amendment license to trespass.

The Act Imposes on the Landowner an Unclear and Unjustifiable Duty of Reasonable Care to Drone Operators

§ 7(a) requires that "[a] landowner or land possessor shall act with reasonable care in relation to known unmanned aircraft operating in the airspace over the landowner's or land possessor's property." The comments state that this section "makes clear that a land possessor owes the same duties to unmanned aircraft operating over his or her property as are owed to persons who are on their property."

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[1] To address the situation in which there is only one extremely tall structure on a large parcel of otherwise-unimproved land (e.g., a silo on a large farm), the Act could provide a lateral distance requirement (e.g., an overflight at 100 feet would not trigger a rebuttable presumption of "substantial interference" just because the parcel's tallest structure is 150 feet in height, as long as the drone was no closer than xx feet from that structure).

This simply is not true. If a particular state has, by judicial decision or statute, already imposed on a landowner a duty of reasonable care to all persons (including trespassers), then § 7(a) would merely codify existing law. By contrast, if a state has not imposed such a duty as to trespassers, or has specific limitations on the landowner's duties, this Act would impose a greater duty of care to drones and drone operators than the landowner would owe to surface trespassers.

While the scope of a landowner's duties to trespassers is debatable, it is not a subject on which there is a compelling need for uniformity. If Section 7(a) is truly intended to have landowners owe the same duties to drone operators as they owe to persons physically on the surface under other law of the state, then the text should say so explicitly.

The Act Does Not Preclude an Implication of Consent from a Landowner's Prior Silence

As noted above, the Act stacks the deck too highly in favor of drone operators. Landowners will have to meet a considerable—if not practically insurmountable—evidentiary burden to establish that an unconsented-to, low-altitude overflight constitutes a trespass. Faced with this burden, many landowners may not be inclined to pursue legal action to challenge unconsented-to, low-altitude overflights. Unfortunately, the Act does not preclude the possibility that a court might treat a landowner's prior silence as implicit consent to future overflights.

Section 5(d) does make clear that repeated overflights over a long period of time cannot result in the acquisition of a prescriptive easement. Unfortunately, nothing in the Act would prevent a drone operator from arguing—or a court from accepting the argument—that a landowner's silence in the face of prior overflights constituted consent to a later overflight. In fact, by permitting the court to consider "any other factor relevant to the determination of substantial interference," the Act plainly invites drone operators to make a "waiver by prior silence" argument.

Conclusion

For the reasons discussed above, the JEBURPA does not support promulgation of the Act in its current form, and its members would not support the Act's enactment in the States.

This letter reflects the position of the members of the JEBURPA, and does not reflect the official position of the JEBURPA's constituent and liaison organizations. The American Bar Association Real Property, Trust and Estate Law Section will separately issue its own concerns regarding the Act.

MEMORANDUM

To: RPTE Executive Committee

From: Steven J. Eagle, Professor Emeritus of Law
Antonin Scalia Law School at George Mason University

Date: June 6, 2019

Re: ULC 2019 Draft "Uniform Tort Law Relating to Drones Act"

This memorandum calls the Executive Committee's attention to the substantial diminution of private property rights inherent in the "Uniform Tort Law Relating to Drones Act" ("Act"), which will be considered for approval by the Uniform Law Commission (ULC) at its Annual Meeting next month.[1] It is intended to assist the Executive Committee in formulating RPTE's position regarding an ABA recommendation to ULC, and possibly regarding enactment by the states.

The proposed uniform act, which uses the term "drones" in its title only,[2] attempts to facilitate the development of the commercial unmanned aircraft industry.[3] The Act focuses almost exclusively on tort law, with only one incidental reference to "property law."[4] It would conflate on a massive scale property rights and tort remedies with respect to physical intrusions by unmanned aircraft in airspace immediately above private lands and structures. In essence, the Act replaces traditional protections of property against encroachment, through common law trespass and injunctive relief, with an amorphous and subjective balancing of the interests of property owners with those of encroachers. The ultimate effect would be to destroy much of the subjective value of property owners, and to transfer without compensation substantial pecuniary value from property owners to commercial drone operators.

I. The Act's Principal Purposes

The Act's "Prefatory Note" sets forth its principal purposes: "The Uniform Tort Law Relating to Drones Act provides a uniform state-level response to the development and utilization of unmanned aircraft in a variety of circumstances within the context of federal control over aviation as well as the importance of the advances promised by unmanned aircraft use."[5] Indeed, the Prefatory Note highlights that the Federal Aviation Administration (FAA) predicts that by 2022 there will

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[1] References to "the Act," are to the ULC Drafting Committee's "Draft for Approval" of May 30, 2019, which will be reviewed at the ULC annual meeting, July 12–18, 2019.

[2] "Unmanned aircraft" is the exclusive term used in the body of the Act, following federal legislative and regulatory terminology. "Drones" is used instead in the title assertedly because it is "lay terminology" that is more "transparent." *See* Act §1, Comment. "Drones" also perhaps focuses attention on the small devices used by hobbyists rather than unmanned aircraft used by commercial enterprises.

[3] *See* Act, Prefatory Note (stating that an unwieldy regulatory system may "inhibit the appropriate and beneficial development of unmanned aircraft systems for the variety of uses to which such technologies are suited.").

[4] Draft § 2, Comment (defining "land possessor").

[5] Act, Prefatory Note.

be between 1.96 7 million and 3.17 million small unmanned aircraft operating in the national airspace."[6] In the coming decades, the rapid development of unmanned aircraft of all sizes could be expected to have numerous benefits, many of which remain to be imagined. Yet history teaches that substantial technical advances can be put to uses that create harm as well as good, and that even technologies that produce net benefits can result in harm to many. That suggests restraint in overthrowing long-settled property law. Furthermore, it is reasonable to assume that guidance for unmanned aircraft would soon become at least as precise as that for the new generation of driverless automobiles. Just as these motor vehicles would be expected to stick to public roads and not cut across private lands, so could low-level unmanned aircraft would stick to corridors above public roads and turn off only at authorized locations. This likelihood also suggests restraint, as opposed to entrenchment of legal rights for unmanned aircraft operators.

The "context of federal control over aviation," as the Prefatory Note further sets forth, is "[t]hat the federal government has exclusive authority over aircraft operations in the national air space, as well as other attendant operational concerns, is well settled law."[7] "However, the power of Congress and the FAA to declare navigable airspace does not give anyone, including pilots, the right to trespass, create nuisances, unconstitutionally take private property, invade privacy, commit crimes, or commit state law torts."[8]

In delineating the interface of navigable airspace and private property rights, the Act in its present form would establish broad rights for unmanned aircraft operators, while curtailing the traditional rights and legitimate expectations of property owners.

II. The Act Relegates Aboveground Property Ownership Largely to Nuisance Remedies

Section 5 of the Act, "Aerial Trespass by Unmanned Aircraft," defines trespass as an overflight without consent that "causes substantial interference with the use and enjoyment of the property."[9] While conceding that it is "contentious," the Comment avers that "[t]his section establishes the cause of action for aerial trespass as the *exclusive cause of action* for intrusions of unmanned aircraft into the airspace over land."[10] As justifications for its position, the Comment cites the Supreme Court's seminal opinion in *United States v. Causby* (1946).[11]

A. The Act Misleadingly Recasts the Contours of Property Ownership

In *Causby*, the Court repudiated the ancient doctrine that ownership of parcels of land extends from the center of the Earth to the heavens (*ad coelum*).[12] As the Court observed, the *ad coelum* doctrine "has no place in the modern world."[13] Although it served as a useful reminder of the importance of property, and that fee ownership extends above the Earth's surface, before modern

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[6] *Id.*
[7] *Id.* (citing *Braniff v. Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590 (1954)).
[8] Wendie L. Kellington, *Drones*, 49 URB. LAW. 667, 669 (2017) (citing regulations and cases).
[9] Act §5(a).
[10] Act §5(a), Comment (emphasis added).
[11] Act § 5, Comment (discussing *United States v. Causby*, 328 U.S. 256, 260–61 (1946).
[12] *Causby*, 328 U.S. at 260–61 (discussing the "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.*").
[13] *Id.*

flight the conceit of *ad coelum* was grandiose—but also was harmless. Lying on one's hammock on a dark night and imaging that swarths of the full moon successively fall under one's dominion is but a romantic conceit. However, by effectively recasting the Court's repudiation of *ad coelum* so as generally to limit ownership protections to the surface *only*, the Act is equally grandiose—and quite harmful. To lie on one's hammock and not have *per se* rights regarding the several feet above it can create great harm, and great uncertainty. As the Court said in *Causby*, "it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere."[14]

The Act does violence to two basic concepts of property law. The first is that property must be clearly delineated. What distinguishes property rights from privileges of various sorts is that property is *in rem*, *i.e.*, valid against the world. A stranger should not be concerned with title; it is enough to know that it is not vested in him or her. While the rights of contracting parties may be as complex as they wish, the rights of owners must be objectively clear, so that strangers could quickly understand them.[15] As I will discuss shortly, the Act's attempt at multifactor balancing fails that test.

The second basic concept that the Act violates is the inviolability of property. In a seminal article,[16] Guido Calabresi (later Yale law dean and Second Circuit Judge) and Douglas Melamed pointed out the essential difference between holdings protected by "property rules" and those protected only by "liability rules." The property rule approach means that owners are protected through injunctive relief against harm and through trespass. There is no balancing of interests. A stranger desiring an easement or license for use would have to bargain to obtain the owner's consent.

Under a liability rule, however, the stranger to title may unilaterally take attributes of ownership and would be liable only for money damages. That approach is instantiated in the Act, so that even in the unlikely event that a landowner prevails, tort damages is the only remedy.

The Act explicitly rejects an alternative more consistent with property rights protection, under which "landowners hold title to some either undetermined or predetermined amount of airspace over their land," such as 500 feet above the surface, as suggested by Professor Troy Rule.[17] The only small island of certainty provided property owners with respect to areas above the land's surface involves "intentional . . . physical contact with a structure or plant."[18] Strangely, the Act does not provide for operator liability where an unmanned aircraft's contact with a structure is unintentional.

B. The Act's Multifactor Balancing Test for Aerial Trespass Gravely Lacks Clarity

The Act justifies denial of property owners *per se* dominion over *any* airspace by augmenting the repudiation of the *ad coelum* doctrine in *Causby* with the "additional clarity [that] comes from the

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[14] *Causby*, 328 U.S. at 264.

[15] This is why the common law has been very resistant to the creation of novel property rights. *See* Thomas W. Merrill and Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 119 YALE L.J. 1 (2000).

[16] Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

[17] Act § 5, Comment (contrasting Troy Rule, *Airspace in an Age of Drones*, 95 BOS. U. L. REV. 155, 159 (2015)).

[18] Act § 6 (a) and 6 (a)(2).

explicit identification of a non-exclusive list of potential factors for courts to consider when it is necessary to decide whether a trespass by unmanned aircraft has occurred." The list is "extensive, but not exhaustive."[19] The Comment further admonishes: "None of the factors listed should be viewed as determinative. Instead, they should be weighed and evaluated holistically."[20]

The coupling of a long, but not exclusive, list of factors to be judged "holistically" with "clarity" is oxymoronic. The vague regulation of low-level flights by unmanned aircraft incorporated in the Act will have important consequences for land use and development regulation, which is crucial in facilitating or thwarting the needs and aspirations of individuals, and the development of their communities.

The Supreme Court has observed that regulation without clear standards gives officials unchecked discretion.[21] When considering the many spillover effects of the Act well beyond the commercial deployment of unmanned aircraft, regulators and judges would be tempted to substitute for traditional property law concepts their own personal values, since "the act of balancing remains obscure,"[22] and an analysis based on the totality of the circumstances, as the Act requires, "masks intellectual bankruptcy."[23]

C. The Act's Sweeping Provision Favoring Unmanned Aircraft Operators' Exercise of First Amendment Rights Particularly Burdens Property Rights

Act Section 5 provides for a "rebuttable presumption" in favor of unmanned aircraft operations for "purposes protected by the First Amendment."[24] While the Comment declares that this presumption "is not intended to create or imply the existence of a journalistic or First Amendment privilege to trespass," and cites cases involving reporters, the Amendment is for more sweeping.[25] With respect to the First Amendment's free speech, free exercise of religion, and redress of grievances provisions, unmanned flights might be concentrated in areas close to large public gatherings, or to the residences of disfavored individuals, groups and officials. The Supreme Court has upheld the creation in a few states of what amount to free expression servitudes within shopping centers.[26] However, in those situations, owners have welcomed entry by the general public and historically encouraged them to regard the centers somewhat as public squares in addition to strictly venues for shopping. In the case of a presumption for exercise of First Amendment rights over private businesses generally, and especially residences, there is no such invitation.

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[19] Act § 5, Comment

[20] *Id.*

[21] *See* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (holding requirement that a criminal suspect provide "credible and reliable" identification unconstitutionally vague).

[22] *Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession* 349 (1993).

[23] Thomas W. Merrill, The Economics of Public Use, 72 CORNELL L. REV. 61, 93 (1986).

[24] Act §§ 5(e) and 5(e)(2) "There shall be a rebuttable presumption that the operation of an unmanned aircraft does not substantially interfere with the use and enjoyment of property ... if the unmanned aircraft was being operated for: (2) purposes protected by the First Amendment ..."

[25] U.S. CONST., amend. I (Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.")

[26] PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

While Section 7 (d)(2) allows that the presumption could be overcome by owners proving that unmanned aircraft at low altitudes overhead "substantially interfere with the use and enjoyment of property," it is difficult to imagine that the owners could establish an aggregate of substantial interference, much less that a court would then meter the overflights of particular aircraft operators or groups espousing one cause or another. The much more likely result would be that the rights of property owners would be vindicated only in the most egregious situations.

D. The Act Facilitates the Growth and Entrenchment of an Industry Bereft of Individual Privacy Protections

Act Section 8, titled "Unmanned Aircraft and Violations of Privacy," declares in its totality: "An unmanned aircraft is an instrumentality by which a tort in violation of privacy rights may be committed under federal or state law." The Comment notes that some states have laws regarding privacy that might be applicable to unmanned aircraft, and the Act tries to avoid "introducing duplicative or conflicting provisions into state law." The Comment continues:

> This does not diminish concerns raised by specific characteristics of unmanned aircraft operation, namely the low-level flights of unmanned aircraft, the ability to acquire and record images and other data that would otherwise be unavailable, and the perceived anonymity of their operation. This explicit clarification of the application of privacy principles to the operation of unmanned aircraft thus serves a signaling function for the public and the industry and makes clear that the state takes privacy concerns seriously, a reassurance citizens may seek in relation to the act.[27]

The Comment illustrates the Act's "reassurance" with illustrative parallels about peering through a bedroom window with a telephoto lens and climbing a tree to peer over a privacy fence.[28] But these homey examples do not begin to comprehend the uses to which massive amounts of aerially-obtained data, together with other huge data sets, might be employed in the future. The point here is not to suggest that the Act should contain detailed provisions protecting privacy. Rather, the brushing off of legitimate privacy concerns in the rush to ensconce interests of unmanned aircraft operators over property rights further illustrates that the priorities of the Act are misplaced. Similar concerns about the misuse of aerial surveillance and of data aggregation exist in other areas, such as civil rights and criminal justice, that are beyond the scope of this memorandum.

E. The Act Imposes Perilous Affirmative Duties on Property Owners

Section 7 of the Act spells out the "Duty and Liability of Land Possessors." It requires that owners act with "reasonable care in relation to known unmanned aircraft,"[29] have tort liability for "active counter-measures in response to the operation of unmanned aircraft,"[30] but do not have a duty to ensure that the airspace above the land ... is free from obstructions."[31] The Act does not specify whether "known unmanned aircraft" includes those of which the property owner arguably should have knowledge. The Comment says that "active counter-measures" should be interpreted as

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[27] Act § 8 Comment.
[28] *Id.*
[29] Act § 7 (a).
[30] Act § 7 (b).
[31] Act § 7 (c).

"direct active counter-measures that are aimed at an unmanned aircraft, such as would occur with the firing of projectile weapons or the use of radio frequency devices."[32]

What is the relationship between the imposition of liability for owners' affirmative "direct active counter-measures" and the owners' lack of duty to ensure that the airspace is "free from obstructions"? For instance, if an owner wishes serenity on a patio built between his or her home and garage, and small unmanned aircraft traverse that space, how would a new privacy fence along the front of the patio be treated? Is that "obstruction" a normal facilitation of enjoyment of one's family living space, or is it an actionable "counter-measure?" The disclaimer of an owner's duty to keep the unmanned aircraft "free from" obstructions suggests the latter. But the effect is to provide that pre-existing ("known") drone transits receive the very "prescriptive right" that the Act purports to disclaim.[33] The effect is a dramatic denigration of property rights that most Americans take for granted.

Furthermore, the Act makes no provision for property owners fending off unmanned aircraft that menace their families, animals, and structures with immanent harm. They may attempt to protect themselves only at the peril of defending against subsequent tort actions alleging that their self-defense constituted prohibited active counter-measure.

III. The Practical Effect of the Act Greatly Favors Unmanned Aircraft Commerce Over Private Property Rights

The Act does not require unmanned aircraft operators to notify property owners of overflights. What the Prefatory Note refers to as a "a perceived element of anonymity to their operation"[34] is more than a perception. It would be difficult for property owners to identify the identity of unmanned aircraft operators in most instances. Also, operators would typically be better financed and have more individually at stake than home- or small-business owners. Combined with the "substantial interference" standard, this makes the unmanned aircraft industry almost impregnable to challenge.

These facts, together with its considered refusal to provide a zone in which property owners could exclude unmanned aircraft, or even in which in which there would be a presumption in owners' favor, suggest that RPTE should decline to support the Act in its present form. The Executive Committee might want to go further and consider actively opposing the Act as drafted, a position that I would favor.

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[32] Act § 7 Comment.
[33] Act § 5(d) ("Repeated or continual operation of unmanned aircraft over a land possessor's property does not create a prescriptive right in the airspace.").
[34] Act, Prefatory Note

ATTACHMENT 7

Willis, Joe

From: Lucy Grelle <lgrelle@uniformlaws.org>
Sent: Friday, June 21, 2019 9:49 AM
Subject: Uniform Tort Law Relating to Drones Act: comments from Henry E. Smith
Attachments: 2019jun20_UTLRDA_Comments_Smith.pdf

Dear Committee Members and Observers:

Attached are comments from Henry E. Smith.

The comments are also posted on the committee's webpage. Please click here.

Respectfully,

Lucy Grelle

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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.