

Property as a Vehicle of Inclusion to Promote Human Sociability

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Daniel B. Kelly, *The Right to Include*, 63 **Emory L.J.** 857 (2014), available at [SSRN](#).

Quite often, “private property” brings with it characterizations of individualism, isolation, and exclusion along with images of fences, gates, locks, boundaries, and barriers. In fact, a “keep out” sign has often been identified as a symbol for the essence of private property rights and their function. [Professor Daniel B. Kelly](#) reminds us that such images and characterizations miss a huge portion of the utility served by property law that fosters the capacity and motivation to hang a different sign—one that says “come on in.” Professor Kelly’s recent article, *The Right to Include*, 63 *Emory L.J.* 857 (2014), catalogs and analyzes the range of legal options available to owners to include others in the use, possession, and enjoyment of real property.

In recent property law literature, the “right to exclude” has gotten most of the ink. In fact, Kelly explains that, “[i]n delineating the bundle of rights that characterizes property, courts have not identified the right to include as a distinct attribute of ownership,” (P. 868) and most scholars have only hinted at the importance of this separate strand of rights within ownership. Professor Kelly’s work is a welcome rectification of this imbalance of affection. If indeed human beings are dependent on each other to survive and flourish, then finding ways to facilitate inclusiveness in relation to property is vital to nourishing our “interaction imperative.” Kelly thoroughly explores the rules and doctrines in property and related fields of law that have emerged to ignite inclusion and spur human sociability.

Professor Kelly dissects the reality that we do, after all, exercise our right to include every day. And, with each such inclusion, we are faced with potential conflicts. It is useful to think about just how ubiquitous inclusion is in our lives by reflecting for a moment on some archetypal examples. We invite colleagues or friends over for dinner, including them in our home. We grant our gardener access to the back gate and license to roam the grounds, taking advantage of his specialized expertise so that he can beautify our home and surrounding land. The plumber is invited in to make sure all flows well. We may share our homes with strangers in operations like Airbnb and the like. We are willing to lease our property to others, including them in order to receive the benefit of income. We enter into co-tenancies to help reduce the costs of our housing.

With each of these arrangements (and others like them) there are both rewards and risks—the dinner guest who overstays his welcome; the gardener who breaks your lawn gnome because he is just not quite as careful with your property as you would have been or as he might have been with his own property; the overnight guest who unwittingly aids a bedbug migration into your space; the tenant who fails to report the cracks in the roof that could have been repaired to avoid the ceiling collapse; or the college roommate that never wanted to do the dishes but was happy to occupy more than her fair share of the apartment with her junk. One of the greatest benefits of Professor Kelly’s work is that he helps us understand how the law anticipates and navigates these pitfalls while optimizing the potential rewards of inclusivity along the way.

Kelly reveals a roadmap for how the law should support a wide range of inclusion options in order to move owners’ private incentives toward a convergence with the socially optimal level of inclusion. Inclusion can be informal (including by choosing not to exercise or waiving one’s right to exclude), contractual (including licenses), or enabled by strengthening inclusive property forms (such as easements, leases, trusts, concurrent estates, and co-ownership arrangements). Most of the time, inclusion is a matter of choice, but Kelly also takes a valuable moment to discuss those rules that cause “involuntary inclusion” as well, such as public accommodation and antidiscrimination laws.

Key factors to consider when identifying and protecting inclusion rights, according to Kelly, include whether the rights enable sharing and exchange, facilitate financing, spread risks, and promote specialization. Along the way, the law of inclusion rights struggles with coordination difficulties (when multiple parties must negotiate over when they may use or enjoy certain parts of the property), strategic behavior (where a party included tries to expand the scope of their inclusion or when owners acquire assets for the purpose of exploiting inclusion possibilities), and usage conflicts (when, for example, a non-owner might not internalize the long term costs of her actions so she uses the property excessively or does not maintain it well).

Each purposefully-varied legal form comes with differing rights of revocability, varying levels of certainty, different remedies to vindicate rights, and different costs of negotiation, drafting, and enforcement. Kelly taps into some key insights on human nature and owner fears when he explains that, "Owners are more likely to include others if they are able to select from among multiple forms [of inclusion regimes]," (P. 919), so the law has created this diversity of "'focal points' around which parties can organize their activities by including others through different combinations of anti-opportunism devices" that control unwanted strategic manipulation of the inclusion and coordinate among multiple users. (P. 920.)

One need only examine one's own activities to find anecdotal examples of our implicit recognition of the utility of inclusion. We must also remain acutely aware of some of the obstacles and problems with inclusion for which the law already has created varied legal forms to offer tailored solutions that, at the very least, mediate the potential negative effects so that we can maximize the benefits of including others in our property. By examining these issues in depth, Professor Kelly's work advances our understanding of the contours of the right to include and our appreciation for its unique characteristics.

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