

Qualitative Judgments and Social Criticism in Private Law: A Comment on Professor Keating

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INTRODUCTION

Professor Keating's paper is one more fascinating block in the wall he has been building over the past few years. His project, if I understand it correctly, is the development of an interpretive theory of accident law. An interpretive theory must be able to suggest a set of underlying principles that can both account for at least the bulk of the prevailing doctrine and present it, from the normative standpoint, in the best possible light.¹ Keating's theory breaks away from the two more familiar routes of accident law theory. He does not accept the corrective justice prescription of rectifying wrongdoing as an adequate justification of accident law, insisting instead that corrective justice must rest on a deeper distributive dimension.² In the same vein, Keating rejects the utilitarian justification of accident law that concentrates on the minimization of the combined costs of accidents and their prevention. The main reason, according to Keating, for going beyond

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1 See Ronald Dworkin, *Law's Empire* (1986). Conceptualizing law as a dynamic justificatory practice that evolves along the lines of fit and justification has its origins in Karl N. Llewellyn, *The Common Law Tradition* 36-38, 44, 60, 222-23 (1960).

2 See Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. Cal. L. Rev. 193, 200-01 (2000). I have expressed a similar view in Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 Mich. L. Rev. 138 (1999).

the utilitarian goal of cost-justified precaution is that the utilitarian calculus "aggregates incommensurable benefits and burdens *across persons*," thus failing "to take seriously the distinction between persons."³ Keating's theory of accident law in general and his article in this Volume in particular seek to avoid the utilitarian trap by focusing on the way accident law distributes costs and benefits. His distributive analysis of accident law is, more precisely, a celebration of Rawlsian fairness: Accident law, explains Keating, should "reconcile liberty and security on terms that are both favorable and fair. Favorable terms enable people to pursue their aims and aspirations over the course of complete lives; fair terms reconcile the competing claims of liberty and security in ways that benefit even those they disadvantage."⁴ It is with this underlying conception of justice as fairness that we should approach his current article.

I. PROFESSOR KEATING'S MAIN PROPOSITIONS

Keating's background assumption is that the utilitarian cost-benefit analysis is acceptable when the interests at stake are commensurable.⁵ But this conventional approach of "public" theories of accident law should not apply, in his view, with respect to risks of "devastating injury, injury that is severe and irreparable," risks that can "ripen into death and incurable disease."⁶ Regarding such risks of severe and permanent injuries, he maintains, it is appropriate for accident law⁷ to "press precaution beyond the point of cost-justification,"⁸ because "[n]o number of trivial gains can ever compare to a single one of the devastating injuries that are their price. The gains and the losses are simply not comparable, morally speaking."⁹ Furthermore, Keating rejects in this context the familiar law and economics division of labor argument of maximizing wealth and then redistributing it fairly: "Because

3 Gregory C. Keating, *Irreparable Injury and Extraordinary Precaution: The Safety and Feasibility Norms in American Accident Law*, 4 *Theoretical Inquiries L.* 1, 13 (2003) (citing John Rawls, *A Theory of Justice* 24 (rev. ed. 1999)).

4 Gregory C. Keating, *Fairness and Two Fundamental Questions in the Tort Law of Accidents* 4-5 (U.S.C. Olin Working Paper No. 99-21, Jan. 2000).

5 Keating, *supra* note 3, at 9-10.

6 *Id.* at 8, 13.

7 Keating focuses on non-tort accident law. But, as Keating himself notes, *id.* at 2-4, there is no reason to limit the normative prescriptions he advocates to these administrative alternatives to tort law.

8 *Id.* at 6.

9 *Id.* at 43.

devastating risks are not fully compensable, the actual gains of those who win cannot be used to repair the harm done to those who lose."¹⁰

Keating notes that

[t]he fairness rationale is ... [that] it is (presumptively) unfair to devastate a few for the sake of gains that are not comparable, morally speaking, to the hardship wreaked by death and devastating injury, no matter how many others may reap those gains and even if the total quantity of "benefit" as measured by cost-benefit analysis exceeds the total "cost" of the devastation that is its price.¹¹

Thus, "[r]educing risks of devastating injury beyond the point of maximal benefit (economically conceived) is justified when the gains to be won are not morally comparable to the death or devastation that is their price."¹² More particularly, Keating endorses the legislative safety-based and feasibility-based standards as the proper standards for these risks:

Reducing risks of devastating injury to the point where they are "insignificant" — the demand of safety-based regulation — is justified when the benefits of bearing a "significant" risk of devastating injury are not comparable, morally speaking, to the burdens. Reducing risks of devastating injury as far as we feasibly can without crippling the beneficial activity that generates the risks — the demand of feasibility analysis — is justified when crippling the activity in question would work a harm comparable to bearing a significant risk of devastating injury.¹³

An important part of Keating's effort is devoted to explaining why — notwithstanding his main claim regarding the incommensurability of devastating injuries and trivial benefits — accident law is still justified in protecting only against "significant" risks, and, in certain contexts, only insofar as such protection is "feasible."¹⁴

The "significance" requirement, he maintains, derives from "[t]he fact that a low level of risk of devastating injury — the background level of

10 *Id.* at 20.

11 *Id.* at 24-25.

12 *Id.* at 12.

13 *Id.*

14 As an aside, one should not underplay the difficulties of the legislative strategy of non-verifiable sanction-backed aspirational commands. See James A. Henderson, Jr. & Richard N. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 Colum. L. Rev. 1429 (1978).

risk — is an inescapable price of activity ... and activity is worth having."¹⁵ Thus, it may be justified in some cases to impose

risks of devastating injury ... even though each instance of their imposition realizes only trivial benefit, because there is no plausible way of distinguishing among instances of the risk imposition ... and the burden of eliminating all instances of such risk imposition *is* comparable to the significant risk of devastating injury that the practice creates.¹⁶

Once we realize that "the elimination of *all* discernible risk requires the elimination of all discernible activity,"¹⁷ the "significance" requirement becomes necessary to "distinguish the realm of irreducible, or unavoidable, risk from the realm of avoidable risk":¹⁸

"Significance" separates those risks whose elimination is desirable from those whose elimination is not. If a particular risk really *is* significant, then that risk is different from a number of other risks, and the distributed cost of eliminating that risk is not the cost of eliminating a host of indistinguishable risks.¹⁹

"Significant" risks of severe and irreparable injury should be eliminated — rather than merely "internalized" as economic efficiency prescribes — "when the costs of doing so are not comparable to the devastation that significant risks are sure to wreak."²⁰ The reason for this stringent standard, explains

15 Keating, *supra* note 3, at 42.

16 *Id.* at 44-45.

17 *Id.* at 50.

18 *Id.*

19 *Id.* As Keating insists,

[t]he fairness of insisting that some precaution be taken depends not so much on the cost of taking that precaution in the case at hand as it does on the cost of taking that precaution in the *class of cases* to which it applies. Practices of risk imposition, not individual instances of risk imposition, are the law's basic unit of analysis.

Id. at 47. Therefore,

[i]f it is impossible to distinguish among a substantial number of very small risks of grave harm, each of which might be eliminated by a precaution whose cost is very small, and if the aggregate cost to each prospective injurer of taking all these precautions is unacceptably high, then it is rational not take any of the precautions, even though each of them, viewed individually, appears justified.

Id. at 49.

20 *Id.* at 51.

Keating, is that "health has a special urgency":²¹ because health is "something that *each person needs* in order to realize her aims and aspirations over the course of a normal lifespan,"²² it "takes priority over lesser goods, inessential goods."²³ Health should never be sacrificed for these lesser goods; health is not commensurable with productivity, and thus health and productivity should not be balanced, whatever the level of excess productivity may be.²⁴

Tradeoffs begin only "[w]hen the burden of bearing the precaution necessary to reduce a 'significant' risk of devastating injury (and all indistinguishable risks) to the point of 'insignificance' is of a *kind* that might outweigh the burden of devastating injury that is the price of the risk."²⁵ Keating acknowledges that judgments of comparability are intuitive, but they "reflect a general idea":²⁶

Harms are comparable when their impact on the lives of those they affect is similarly grave — when they impair ordinary activities, or important activities, or the pursuit of rational life plans, in similarly severe ways. Harms are comparable when they strike at the preconditions of rational agency in similarly severe (or similarly mild) ways.²⁷

So there are cases where health is justifiably sacrificed: activities that "are sufficiently valuable that shutting them down would work greater hardship than allowing them to continue."²⁸ In such cases, instead of requiring the elimination of all significant risks, it is justified to apply the more attenuated standard of feasibility that allows "a 'significant' level of risk — when our only alternative is to shut down a valuable activity."²⁹ These significant but unavoidable risks are bearable because the risky activity is "sufficiently valuable that shutting the activity down would work a greater hardship to those who benefit from it than would asking those workers endangered by the activity to bear significant risks of devastating injury."³⁰ Because "the value

21 *Id.* at 60.

22 *Id.*

23 *Id.*

24 *Id.* at 60-61.

25 *Id.* at 62.

26 *Id.* at 10.

27 *Id.*

28 *Id.* at 63.

29 *Id.* at 63-64.

30 *Id.* at 63.

of the activity is greater than the devastation that is its price," bearing the risk is more justified than shutting down the activity.³¹

The regulatory framework Keating examines embodies a judgment respecting the comparability of "significant risks of devastating injury [and] the termination of economically productive, but everyday, activities."³² Keating acknowledges that this judgment may be controversial, but still goes on to defend its application by the law because these activities are "deeply entrenched in our social world" so that "[e]nding them abruptly would cause massive, unpredictable dislocation."³³ The enormous influence of such socially "contingent" facts regarding the value of certain activities does not undermine the law's integrity, insists Keating. Thus, in discussing the feasibility standard, Keating concedes that "the importance of various activities whose elimination would eliminate significant risks of devastating injuries ... depends on contingent facts."³⁴ But he insists that because "our need for activities that are socially contingent and historically transitory" is "as deep as our need for bodily integrity," we still should not "take the risk of shutting down a significantly risky activity lightly" unless "an equivalent range of values can be realized by [a] set of activities that do not create a significant risk of devastating injury."³⁵

II. INCOMMENSURABILITIES AND QUALITATIVE JUDGMENTS

Keating's theory is not merely a critique of, and an attractive alternative to, cost-benefit analysis. It also resists the even broader convention of balancing competing interests, which is — at least since Roscoe Pound's seminal contribution³⁶ — the predominant way of addressing legal questions. Keating insists that the *incommensurability* of health and productivity generates a lexical priority between these two distinct types of goods.³⁷ This lexical priority requires the elimination of risks of severe and irreparable physical injury, without any consideration of possible competing interests. Only the existence of *comparable* harm — in the form of elimination of all discernible activity or the crippling of a sufficiently socially valuable activity, one that

31 *Id.* at 65.

32 *Id.*

33 *Id.* at 67.

34 *Id.* at 76.

35 *Id.*

36 Roscoe Pound, *A Survey of Social Interests*, 37 Harv. L. Rev. 1 (1943).

37 On lexical priority, see Rawls, *supra* note 3, at 42-44.

is essential to personal liberty — can justify the relaxation of this imperative and the introduction of the provisos of "significance" and "feasibility."

Keating may be interpreted as confronting head-on Guido Calabresi's insistence that legal discourse suppresses the uncomfortable idea that life does have a price, that law regularly compromises the lives of a significant number of people in order to preserve and facilitate the leading of a good life for the rest of us.³⁸ But this is not the only way to understand Keating's approach. An alternative interpretation — the one I find more appealing — is as a proposal for the introduction of some qualitative distinctions among values and interests, with no particular stance vis-à-vis the myth of the sanctity of life.

Read along the lines of the first interpretation, Keating's analysis seems to me dubious, at times even apologetic. It is unconvincing to maintain that accident law does not sanction tradeoffs on life and health because, in Keating's words,

[L]osing a job (the consequence to those most severely affected of shutting down some ordinary economic activity) does not appear comparable to losing life or limb or to suffering a health impairment that will permanently and severely impair normal functioning and shorten the span of one's life — typical consequences of serious occupational diseases.³⁹

Furthermore, if the normative ideal of accident law is the sanctity of life and health, arguing that, because "ongoing, productive activities, which flourish in a market economy, ... have passed the market's test of value," they are "something of significant value to many people"⁴⁰ appears to be an exercise in apology. If the idea is that our commitment to life and health is beyond any gain to be garnered in terms of leading a good life, then law's compromises appear to be sheer sham, cloaking the harsh reality of the unjustified immunity granted to capitalist activities. If this is the case, then the contention that most legal norms are just as hypocritical as the "safety" and "feasibility" standards only adds insult to injury.⁴¹

38 Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem* 1, 5 (1985).

39 Keating, *supra* note 3, at 66.

40 *Id.*

41 This is so because this claim merely highlights the success of law as an instrument for denial and apology. In other words, it vindicates the CLS claim that law restricts our imagination to the prevailing arrangements in society and thus artificially secures the prevailing structures of power, hegemony, and subordination; that law mystifies social life, encouraging people to think that the practices codified in law have fixed

But I believe that a more charitable reading of Keating is possible. Rather than vindicating the sanctity of life and health and the banality of productivity, Keating can (and I believe should) be read as calling for qualitative analysis in accident law. What is important to appreciate, under such an interpretation of his article, is not the inviolability of life and limb, but, rather, that the values and interests accident law must consider are irreducible to some ultimate, single value. Insisting that some values — life and health *as well as* the daily activities that define our social reality or some subset thereof — should be viewed as incommensurably greater than marginal outputs does not require the denial of tradeoffs between health and productivity. Rather, it entails a social deliberation that identifies and validates the interests and activities that are, for the given community, intrinsic objects of value and that brings about a resolution of conflicts between divergent interests and activities according to the community's hierarchy of values.⁴²

The viability of this interpretation of Keating's theory, as a call for qualitative judgments in private law, can be demonstrated by looking at the qualitative distinctions among different types of resources that pervade current law. A conspicuous example is the rules governing monetary recovery following the appropriation of different types of resources: land and chattels; copyright, trademark, and patent; trade secrets, contractual relations and performances, and pre-contractual expectations; individual reputation

and frozen what they can hope to achieve, thus de-politicizing contingent choices and immunizing the prevailing ideology and the existing power structure from any political critic. See, e.g., Robert Gordon, *New Developments in Legal Theory*, in *The Politics of Law: A Progressive Critique* 413 (David Kairys ed., rev. ed. 1990).

42 See Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 Mich. L. Rev. 1520, 1557 (1992). Pildes advances his claim in the context of constitutional adjudication, which, he maintains, should not be understood as a quantitative process, but rather as a qualitative one: Government can infringe on rights for reasons consistent with the norms that characterize the common goods that those rights are meant to realize, but when government infringes rights for reasons inconsistent with these common goods, it violates individual rights. Impermissible justifications are not subject to an all-things-considered balancing test; rather, they simply make government action unconstitutional.

Parenthetically, I may add that Pound's most recent biographer, Edward McLean, maintains that even Pound — a propagator of balancing — did not reduce social choice to purely mechanical calculation. Rather, as McLean reads Pound, weighing the competing interests should proceed on the basis of applying the rich and complex values of "a civilized society." This is, McLean explains, an intentionally non-neutral term, referring to a specific — liberal — social vision. Edward B. McLean, *Law and Civilization: The Legal Thought of Roscoe Pound* at xvi, 219-20 (1992).

and dignity, commercial attributes of personality, and even identity and physical integrity.⁴³ Not all cases of appropriation of these resources lead to the same measure of recovery; different measures of recovery apply to different resources. Thus, there are resources with respect to which the mere appropriation triggers a rather severe measure of recovery that allows the resource holder to choose between the fair market value of the resource or its unauthorized use and the net profit gained by the appropriator. In American law, this is the case in respect of appropriations that are invasions of the resource holder's identity, physical integrity, or land. However, there are resources whose invasion triggers pecuniary recovery only if the appropriator employed improper means. Thus, the mere appropriation of trade secrets or pre-contractual expectations triggers no liability. Between these two poles we find several other interesting points along the spectrum. In the case of appropriation of copyright, the resource holder can choose between the fair market value of the copyright at issue and a proportional part of the appropriator's profits. With the appropriation of patents, however, the resource holder is entitled to only recovery of fair market value.

This diversity of measures of recovery with respect to the appropriation of different resources makes no sense in terms of cost-benefit analysis. But it is by no means chaotic or unprincipled. Rather, the diversity reflects the differing degrees to which society perceives those certain resources as constitutive of their possessors' identities. Thus, the more closely a resource is regarded as attached to its possessor's identity by her society, the greater the degree of protection accorded to that resource, and vice versa.

The legal choices among the different pecuniary measures available to the injured party — from mere compensation for the harm suffered, to various intermediate measures such as fair market value of the resource (or its use), to profits garnered by the appropriator at the resource holder's expense — embody a choice between competing values. The profits measure of recovery implies that transfers can be made legitimate only by obtaining the plaintiff's *ex ante* consent. By deterring nonconsensual invasions, the profits remedy vindicates the cherished libertarian value of control. The remedy of fair market value, in contrast, does not deter appropriations — indeed, at times, it may even encourage them. Fair market value as a remedy secures the (objective) level of well-being that is embodied in the appropriated resource, thus vindicating the utilitarian value of well-being.

43 The discussion in the rest of this Part derives from my previous work on the law of restitution, Hanoch Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* (1997).

Finally, recovery limited to compensation for the harm suffered serves the appropriator's claim to a share of the resource holder's entitlement so long as the former does not actually diminish the latter's estate. Thus, the harm-based measure of recovery vindicates the value of sharing; it is a form of limited institutionalized altruism, a legal device that calls for other-regarding action and seeks to instill other-regarding motives.

The qualitative distinctions between the various resources people hold mirror (and arguably also shape) the intrinsic significance of those resources: the degree to which they are perceived as constitutive of their holders' identities. The law vigorously vindicates people's control regarding their most precious, constitutive resources: their identities, physical integrity, reputations (as dignity), and land. Interests invested with a lesser degree of personhood — copyright and (to a smaller degree) the commercial attributes of one's personality and patents — are less protected. Finally, the mere appropriation of resources from the third group (which includes the least personal resources — contractual relations and performances and information) does not trigger liability unless the invasion was conducted by improper means. It is mostly with regard to resources that are relatively remote from the crux of selfhood that a prescription of sharing applies.

Law's qualitative judgments become more complex in cases where the active participant in the legal drama, the defendant, did not appropriate the plaintiff's resource, but, rather, harmed that resource while engaging in a valuable human activity. In such cases, the law cannot focus merely on the significance of the plaintiff's resource, namely, life and limb in the cases Keating considers. Rather, it must take into account the significance of the defendant's activity as well. In cases of valuable activities that may be crippled by a stringent precaution requirement, tradeoffs are warranted. Such tradeoffs should be (and are) based, as Keating insists, on qualitative judgments of the intrinsic value of the plaintiff's resource and of the defendant's activity or, more precisely, on judgments of the significance of the *type* of resource and of the *type* of activity at stake.

III. SOCIAL VALUES AND SOCIAL CRITICISM

Qualitative judgments of the relative intrinsic value of resources and activities are frequently premised on socially contingent facts. Keating's discussion accepts and justifies this feature of the law. One premise of his

defense is the distinctive feature of a legal regime that accepts "so much of our existing social world."⁴⁴

Insofar as resorting to socially contingent facts is legitimate, it must be justified from the standpoint of political morality.⁴⁵ In this respect, the comments that follow may reinforce Keating's defense of the importance of socially contingent facts to private law determinations. But this support has a price. Only some socially contingent facts, not all, may, upon reflection, turn out to be morally acceptable and therefore deserving of an elevated role relative to their morally unacceptable counterparts. Regarding the latter type of facts, the law should not defer to our contingent reality. Instead, in order to preserve its integrity, the law must respond to, rather than shy away from, its latent (and potentially radical) ideals.

In Keating's analysis, privileged activities are those activities that are so "deeply entrenched in our social world" that their "abrupt" disappearance would work "inconceivable disruption in our lives."⁴⁶ Similarly, the privileged resources in the discussion of remedies above are perceived of as constitutive: resources to which people, here and now, are attached because these resources are understood by those people and their society as reflecting their holders' identities. In both cases, the *social meaning* of the activity or the resource in question — which is local rather than universal, contingent rather than necessary — determines its relative value. How can these *social* values be sanctioned as a matter of political morality? How can we distinguish between "good" and "bad" social values?

I believe that political morality *can* sanction the contingent values that we as a society ascribe to certain resources and activities, even if these values are contingent in the sense that it would have been morally acceptable for us to have different values. No relativism, skepticism, or nihilism is involved in this proposition. Value pluralists, who convincingly reject the meta-ethical positions of the relativist, the skeptic, and the nihilist, still insist that some significant degree of cross-cultural variability is morally acceptable. Following Isaiah Berlin, value pluralists maintain that human life is replete with competing values that cannot be reconciled, as well as with legitimate wishes that cannot be truly satisfied. Because some values intrinsically conflict and because we cannot have everything we want, we must make choices. "The need to choose, to sacrifice some ultimate

44 Keating, *supra* note 3, at 75.

45 Keating does not seem to dispute this point. *Id.* at 74-77.

46 *Id.* at 67.

values to others, turns out to be a permanent characteristic of the human predicament."⁴⁷

Many of the claims to resources and activities require private law to make such difficult accommodations. Every society is called upon to pick and choose certain resources and certain activities as more valuable, and given value pluralism, there is no single "right" choice. Frequently, the contingent social meanings of resources and activities will themselves determine the resources in which people invest their personalities⁴⁸ and the activities they perceive as indispensable to their lives.

The contingency of privileged resources and activities does not necessarily undermine their moral significance.⁴⁹ The practice of personality-reflection in resources is morally valuable because external identifications and registrations of the self in (socially contingent) resources impose consistency, permanence, and stability upon people's resolutions, plans, and projects; this practice requires responsibility, self-discipline, and maturity and thus fosters people's moral development.⁵⁰ Likewise, many valuable socially contingent human activities in our world — that are absent from, or insignificant in, other social environments in other places and other eras — provide *us* with invaluable channels through which we are able to express ourselves or with means that expand our options and allow us to achieve objectives we would otherwise be unable to achieve. Because these resources and activities are justifiably valuable, the law is justifiably deferential to these socially contingent facts.

But by no means does it follow that the law must blindly accept the contingent content of our social world — either in general or in legal discourse. Theories like Keating's should lead us to constantly reexamine our (too often implicit, even subconscious) assumptions of the relative value

47 Isaiah Berlin, *Introduction*, in *Four Essays on Liberty* at l-li (1969).

48 Usually there is no reason to think that subjective valuations will be particularly idiosyncratic: Resources gain their significance as reflections of the self *socially*. People perceive certain resources as greater reflections of their personalities than other resources are and thus attach to these resources subjective value, because other people in society — to whom the external image of the self is communicated — share with them the same symbolic understanding. Therefore, not only considerations of rule of law, but also the nature of the phenomenon of constitutive property itself justify law's reference to social (objective) meanings.

49 *But see* Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 *Stan. L. Rev.* 347 (1993) (claiming that relying on, and inculcating, existing understandings create or compound social problems).

50 *See* Jeremy Waldron, *The Right to Private Property* 353, 364-65, 369-70, 372-73, 378, 385 (1988). *See also* Peter G. Stillman, *Property, Freedom, and Individuality in Hegel's and Marx's Political Thought*, 22 *NOMOS* 130, 135 (1980).

of resources and activities. His theory is potentially subversive because it helps us realize that in order to validate our current practices, we need to justify the relative value we attribute to resources and activities. The requirement of justification is always potentially challenging to some of our conventional opinions because it requires at least a respectable universalistic façade, an idealized picture, that can be — and often is — a fertile source of social criticism, for it sets standards that our current practices do not necessarily live up to. The idealism of our social world, even if it is a hypocritical idealism, is the best source of any critical engagement.⁵¹

Take, for example, our understanding of land as constitutive property and the resultant significance we attach to land ownership. Traditionally, land has been one of the most prominent objects of property rights in Western culture, accorded a unique status as a symbol of the self and as a resource closely linked to personal freedom, rank, and power.⁵² This social value invites a certain degree of refinement: the distinction between "personal land" (like the family home or farm) and "fungible land" (used solely for commercial purposes). If some of the legal privileges accorded to landowners are justified by reference to the nature of land as property of a constitutive nature, as they frequently are, then arguably these privileges should be limited to personal land only.⁵³ More generally, if land (or some other resource) is important to the individual because only through owning

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- 51 See Michael Walzer, *Interpretation and Social Criticism* 22, 30, 41, 43, 46-48, 61 (1987). See also Margaret Jane Radin, *Lacking a Transformative Social Theory: A Response*, 45 *Stan. L. Rev.* 409 (1993). (We should not always and everywhere act on our knowledge that everything is unstable and dependent upon everything else. Some contexts must remain intact in order for others to be transcended. Some conceptions must be taken for granted in order for others to be challenged. Deconstruction is therefore not necessarily a good idea, though at times it is.)
- 52 See Donald W. Large, *This Land Is Whose Land? Changing Concepts of Land as Property*, 1973 *Wis. L. Rev.* 1039, 1040; Clare Cooper, *The House as Symbol of the Self*, in *Environmental Psychology: People and Their Physical Settings* 435, 437-38 (Harold M. Proshansky et al. eds., 2d ed. 1976); Herbert McClosky & John Zaller, *The American Ethos: Public Attitudes toward Capitalism and Democracy* 138 (1984); Lynton K. Caldwell, *Land and the Law: Problems in Legal Philosophy*, 1986 *U. Ill. L. Rev.* 319, 320; Margaret J. Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957, 992, 1013 (1982); Russell W. Belk, *Possessions and the Extended Self*, 15 *J. Consumer Res.* 139, 153 (1988); E. Doyle MaCarthy, *Toward a Sociology of the Physical World: George Herbert Mead on Physical Objects*, 5 *Stud. Symbolic Interaction* 105, 116-17 (1984).
- 53 Some clues to such a distinction can be found in *Hawkes Estate v. Silver Campsites*, [1994] 7 *W.W.R.* 709, 721 (B.C.); *Centex Homes Corp. v. Boag*, 820 A.2d 194 (Sup. Ct. N.J. 1974). See also Margaret J. Radin, *Reinterpreting Property* 12 (1993) (the strongest justification for according control over resources — the

and controlling property can she confer on her will a stability and maturity that would otherwise not be possible — if absent some constitutive ownership, people's moral development is seriously at risk — property (that is, potentially constitutive property) must be available to all.⁵⁴

A similar analysis should apply regarding activities. In discussing the heightened risks associated with motorcycles, Keating notes that these risks are "inseparable from the characteristics [that] define the activity of motorcycling [and] give it its distinctive value as a form of recreation and mode of transportation."⁵⁵ Because our current practices sanction motorcyclists' "sensual thrill of experiencing high-speed travel,"⁵⁶ any precaution that "transforms the activity of motorcycling" by "killing the joy of [this] activity" is deemed "infeasible."⁵⁷ I assume, along with Keating, that this deference to current social practices respecting motorcycling is justified given what we know of the risks and the benefits of this activity. But should the same deference apply with respect to the activity of smoking? Should the value of smoking be determined solely according to people's current preferences? I think not.⁵⁸ It seems to me that in considering, for example, prohibitions on smoking in public or anti-smoking advertisement, we must take into account the epidemiological studies that now show, even to the satisfaction of the tobacco manufacturers, that smoking tobacco is a major cause of devastating illnesses, including cancer, heart disease, and emphysema.⁵⁹

The lesson of this example is that conceptualizing the "feasibility" standard as a test that implies that an activity is qualitatively privileged, so that a risk of its elimination justifies risking life or limb, requires us to scrutinize the activities that we currently privilege, to reexamine their status given the risks they generate as well as their potential contribution to human flourishing. And reaffirming prevailing attitudes toward motorcycling does not automatically confirm social attitudes toward smoking. In other words, activities are indistinguishable only if both the risks they generate and their

justification from personhood — does not apply to the vast majority of proprietary interests and certainly does not apply to the typical resources of modern-day capitalism).

54 See Waldron, *supra* note 50, at 377-78, 385-86, 429, 444.

55 Keating, *supra* note 3, at 70.

56 *Id.* at 56.

57 *Id.* at 70.

58 Keating agrees, *id.* at 57-59.

59 See Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. Rev. 354, 358-59 (2000).

potential contribution to human flourishing are indistinguishable. Therefore, pace Keating, the mere fact that many things are likely to inspire children to play with fire does not necessarily make toy lighters in gumball machines indistinguishable from matches, lighters, gas stoves, outdoor grills, television shows, or dry conditions at the end of a hot summer.⁶⁰

Indeed, like most helpful positive theories, Keating's theory of non-tort accident law provides not only an explanatory account of the law as we know it. As with most positive theories, we should not expect his theory to explain every feature of the law. The blemishes of theories, like Keating's, that seek to unveil law's justificatory premises, namely, the gaps between existing doctrinal rules and normative justifications, may well be the most important output of such theories, because they provide an opportunity to rethink those cases in which the law does not live up to its own implicit ideals.⁶¹ In such cases, positive theories of law, including Keating's analysis of non-tort accident law, must discard their explanatory role in favor of critique.

CONCLUSION

In his article in this Volume, Keating presents a persuasive justification for the standards set by the administrative alternatives to tort liability that go beyond cost-justified precautions. Rather than as advocating the myth of the sanctity of life, I suggest to read his theory as a subtle celebration of qualitative distinctions among activities according to the risks they generate as well as their potential contribution to human flourishing. Under this reading, Keating's analysis of the value law attributes to activities people engage in coheres with the value attributed by private law to the various resources people hold.

In judging the values of both activities and resources, the law accords significant importance to prevailing social understandings. In many, maybe most, cases, this is not an embarrassing feature that requires tormented excusing. Rather, this local, cultural dimension of law is unobjectionable given value pluralism. But this is not always the case. An articulation of

60 Keating, *supra* note 3, at 48. Cf. Calabresi, *supra* note 38, at 5 (noting that fireworks are prohibited and automobiles not, even though fireworks kill far fewer people than automobiles do).

61 See Ronald Dworkin, *Taking Rights Seriously* 118-23 (1977) (noting the inevitability of developing some theory of institutional mistakes within even an ideal theory of law).

the qualitative distinctions that law makes among resources and activities is, or at least should be, also an invitation for critical reassessment of the justifications underlying our current legal practices.