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Interview with Professor Kenneth Einar Himma

Street slang, "boxing challenges", hip-hop, enflamed philosophy resonate throughout lecture rooms when Kenneth Einar Himma, one of the world's leading legal philosophers gives his lectures. Specialising in Philosophy of Law, Philosophy of Religion and Ethics of Information Technology, Kenneth Himma has spent most of his academic career teaching at the University of Washington. His competence and love for teaching and traveling got him to Mexico and Russia where he was a visiting professor, but also Australia, Colombia, Brazil, Central African Republic, Thailand, and many other countries of the world as a guest lecturer. He has written more than a hundred articles published by distinguished publishers (Oxford UP, Cambridge UP, Princeton UP, Hart Publishing, etc.) and in renowned journals (Law and Philosophy, Ratio Juris, Oxford Journal of Legal Studies, Legal Theory, etc.), and is currently finishing the second of a three-book series on the nature of law for Oxford University Press.

Ken, as he asks us to call him, has been a visiting professor of the Department for General Theory of Law and State at the Faculty of Zagreb since 2014. He gives lectures twice a year, usually in October and March to first year students and since a year ago to a newly formed Zagreb Legal Theory Group.

Ken's lectures are hard to forget, provocative, and always a good break from the traditional formality in teaching. Above all, they bring legal theory and philosophy closer to generations of students, something that is immensely important for the sustainment of interest in legal theory in Croatia. You will not regret seeing them.

1. Thank you for catching the time for the interview, Ken. The number of universities, places you've taught is striking. What have you learned teaching to so many different cultures and did you ever have to adapt to the society you found yourself in?

Those are difficult questions to answer in a few words. To put it all-too-briefly, I have learned that people have more in common than they lack: everyone wants the same things – love, security, prosperity, meaningful work, art, time to play, friends, and knowledge. But one of the things that I was really pleased to discover is that people are really kind everywhere: people go out of their way to make sure I am comfortable and having fun just about wherever I go. As far as what I have learned about younger people is concerned, I have learned that they have much more to say than my generation gives them credit for and that, if you listen closely and you are open about yourself, you will learn so much more about yourself, life, and the world than folks my age might be inclined to think.

To some extent, you simply have to adapt yourself to the cultural norms of the places you visit. One, you don't want to say something that offends people or otherwise upsets them if you don't need to say it. I have lectured at a variety of institutions in North America, Latin America, Europe, Russia, China, Africa, and Australia. All these places share

many cultural norms, but there are cultural differences that it's a good idea to be aware of if you want people to enjoy your conversation and visit. There are things you can say in, for example, the U.S. that you would be well-advised not to say in some of the places that I have lectured in Africa. It's just good manners to avoid having to say things that are unnecessarily inflammatory – and its culturally patronizing to think otherwise.

That being said, there will always be people who are going to take offense at ideas they don't agree with – and, in my business, there is only so much you can do to avoid upsetting folks like that. It's not worth anyone's time to hear arguments for the obvious; the point of what I do is to defend claims that not everyone agrees with, so if you attend one of my talks, chances are I will say something that you disagree with. I always take seriously dissenting views, but sometimes someone's feelings get hurt.

I never want to hurt anyone's feelings, of course, but I feel obliged to say this: if you attend a university, you should expect to occasionally hear things you disagree with. And if your feelings are easily hurt by ideas you disagree with, you probably need to do something about that because, to be blunt, the real world doesn't give a blink about your feelings. A university that protects students from legitimate ideas to avoid their having their feelings hurt isn't helping them prepare for the real world; it's crippling them.

2. Your teaching philosophy differs from what law students are accustomed to. In particular, you don't just encourage students to participate in discussions; you encourage them to disagree with you and actively challenge your views. Why is that?

What I do is different from what is typically done in the kind of lectures students are accustomed to in law school. The goal in a law lecture is to impart facts about legal practice that students must know in order to be qualified to practice law. It is a fact, for example, that the law prohibits murder.

There are, of course, many questions one can ask about the content of the law prohibiting murder – moral and otherwise. For example, is it "murder" to perform an act knowing it will certainly result in someone's death — even if those deaths are not intended? In the 70s, Ford discovered a dangerous design defect of the Ford Pinto: the gas tank was improperly placed and would explode after even a very minor collision with such force that it was likely to kill passengers in both cars. The chairman of Ford calculated that it was cheaper to pay off the families of all the people who would die because of the defect than to recall the Pinto and repair the defect, so they left it out there – a decision led to the death of more than 500 people. That, on my view, looks a bit like something that should be regarded as murder, but the persons who made the decisions were never charged with even involuntary manslaughter. If it is not now technically murder, should the law be changed to treat such conduct be treated as a lower degree of murder?

But, as a general matter, there isn't much room to challenge claims about the law. One could not plausibly challenge a law professor teaching criminal law by arguing that the law really doesn't prohibit murder. It makes sense to ask questions about what the law requires and how best to interpret the law, but it doesn't make sense to challenge, except in very unusual circumstances, what the professor is teaching with respect to the content of the law. If someone thinks that the law doesn't prohibit murder, he or she is really confused either about the law, murder, or both.

What I do when I give lectures is different. I am not teaching facts that cannot reasonably be disputed; I argue for a claim that people disagree on – and one that is usually controversial. There's no sport to be had in discussing the obvious; in philosophy, the fun is to be had in discussing claims that people disagree strongly about.

But I feel compelled to point out that I'm not trying to convince students that I am correct. As far as I am concerned, the game is about making and challenging arguments, so I lay my position out there with the best reasons I can muster and challenge students to shoot my arguments down by making well-reasoned counterarguments that are grounded in widely shared views. The point of my lectures is not to try to change anyone's mind, though sometimes I discuss issues I feel very strongly about; it's to get people to rigorously defend their views on the strength of something that counts as evidence. Which, of course, is what they will have to do as lawyers.

I think everyone benefits from the approach. Student participation benefits me insofar as I learn something from student comments; indeed, I cited a student from Zagreb in my forthcoming book, Morality and the Nature of Law, because he said something that changed my mind about something I had discussed in the book and I changed the discussion. It also benefits the students who participate because they are exercising and developing the very analytic and reasoning abilities that they will have to exercise well in order to be successful as lawyers. And such discussion benefits every other student in the class because they get to hear the ideas and perspectives of someone other than the person standing at the front of the room. As far as I am concerned, everyone wins when students participate in my discussions because everyone has something valuable to contribute.

3. That sounds fun for students, if not a bit unusual, but tell us this: your approach might be fun, but how does it fit with the traditional pedagogical approach in law schools as a means of producing good lawyers?

Both approaches are needed to produce good lawyers. The typical approach is needed because someone has to know the law in order to practice law, so you need law professors to give the kind of lectures that are customary in law schools. They impart the basic content of what every student needs to know to be qualified to practice law. But I think that what I do is also helpful because it is not enough to know what the law is in order to practice law well. One must also know how to reason with the law and argue one's case.

So, I view what I do when I give a paper as complementary to what professors do when they teach a course in substantive law. Traditional courses impart the practice; I try to get students to think critically about conceptual or moral issues involving legal practice and thereby to help them develop not only their own views but also the very analytic skills they will need to be successful as lawyers.

4. A lot of students and even law professors in Croatia portray legal theory using words like "boring," "unnecessary," and "impractical." This is consistent with the Faculty's curriculum, given that there isn't a mandatory course in legal theory or philosophy after the first year. Where do you see the importance in legal theory? In particular, can it be of help to students in their future careers as legal practitioners?

I can understand why academic lawyers and practitioners feel the way they do about legal theory. People who are drawn to the law are interested in doing things that make the world a better place; the practice of law is concerned about what people ought to do and what the law ought to be. In contrast, legal theory is very abstract and does not, tell you much, if anything, about how lawyers should behave or what laws or practices a society should have. Purely descriptive claims about the nature of law are just not logically equipped to entail value clams about people should do; as Hume pointed out, you cannot logically derive a value from a fact.

This doesn't mean, however, that the conceptual theorizing of the sort that is done by legal theorists is never relevant with respect to questions concerning legal practice. To begin, sometimes lawyers have to determine what statutory language picking out a concept actually means – and this requires the kind of analysis that is employed by legal theory. One might have occasion to figure out whether a motorcycle counts as a "vehicle" under some traffic law governing vehicles.

Sometimes important normative issues can't be resolved without getting clear on certain concepts. One might think that if marijuana has any legitimate medical uses, then it should be legally allowed for at least those purposes. But then the question is what is meant by the term "medical use" and how is a medical use different from a recreational use.

As it turns out, the distinction between a medical use and recreational use in that context is a bit fuzzy. For example, people frequently use alcohol as a means of reducing anxiety in social situations – or, so to speak, as a "social lubricant" – and characterize this as a recreational use.

But notice that medications like Valium, Xanax, and other sedatives are prescribed to reduce the felt effects of social anxiety. This suggests, somewhat perplexingly, that the most common use of alcohol is analogous to the most common uses of those prescribed drugs and hence is as much a "medical use" as those of the prescribed medications. It is true, of course, that some uses of weed might be unambiguously medical: if it is true that marijuana reduces the pain and nausea that attend chemotherapy, then that would be an unambiguously medical use. But there are also uses, like the use of a substance as a "social lubricant," that raise conceptual questions about the distinction between medical and purely recreational uses.

We cannot begin to think responsibly about whether laws prohibiting marijuana possession should be liberalized without getting clear on certain conceptual issues that have to be resolved by doing exactly the kind of thing that legal theorists do. No matter how boring legal theory might be, it is sometimes necessary to exactly the kind of thing that legal theorists do – and that is a good reason to think that every law student should have some exposure to the substance and methodology of legal theory.

5. Have you ever practiced law? What did you think of the experience?

I practiced law in Los Angeles for a short period of time after law school, and I can't say that I really enjoyed it. The first problem was intellectual: the things that I was doing didn't really interest me. I was doing a lot of research in corporate law, an area that didn't excite me at all, and writing commercial real-estate leases – which was, quite possibly, the most painful intellectual work I had ever done. It was simultaneously the most stressful and boring work I had ever done. Boring – because drafting a commercial lease is about as interesting as balancing a checkbook that hasn't been balanced in several years; that kind of work might be intellectually challenging, but it is torturously tedious. Stressful – because an error as seemingly trivial as a misplaced comma can result in millions of dollars changing hands.

The second problem was cultural: the firm was very corporate and very conservative in every way. We were not allowed, for example, to wear blazers and slacks; we had to wear suits every day, and we were not allowed to take our jackets off unless we were in our offices with the doors closed. Nor did we have much latitude with respect to the style of suits that were required to wear: charcoal jackets and pants with plain white shirts and 1990s-style power ties. There just wasn't a lot of room to express one's individuality, and I am the kind of person who needs the freedom to be authentic about who I am. Part of that was the time-period; the 90s were a weird time. But part of that

came out of the firm's roots in the Midwest, which is, in some ways, more conservative culturally than the South.

The money was obscene for the standards of the time, so that part of it was rewarding; but I knew I could not be happy practicing law. Since Maria and I were both missing Seattle, we decided to return to Seattle, where I finished my PhD in philosophy.

6. Let's ascend in legal philosophy and talk about topics that made and make you one of the world's leading legal theorists. Croatians students are familiar with the classical separation between natural law and legal positivism regarding the connection of law and morality. How do you see the relationship between law and morality, specifically would you consider an unjust system a legal system and why?

If what we mean by the term "law" is to pick out the rules that are recognized and enforced by the courts as law, which is what positivists mean when the explicate the concept of law, then it is obvious that there can be unjust laws; no one could plausibly deny that. The Nazis had many unjust laws, as do most legal systems – including that of the US. We had, after all, laws that permitted slavery. It accomplishes nothing to deny that those norms were really law in the ordinary sense of the term with which positivism is concerned.

Even natural law theorists like John Finnis and Ronald Dworkin accept that there can be – and are – unjust laws in this ordinary sense of the term. John Finnis, the most influential contemporary natural law theorist, has written: „'There is no necessary or conceptual connection between positive law and morality.' True, for there are immoral positive laws; 'there are two broad categories (with many sub-classes) of unjust laws…'. And a conceptual distinction or disconnection is effortlessly established by the move made in the *Summa*, of taking human positive law as a subject for consideration in its own right (and its own name), a topic readily identifiable and identified *prior* to any question about its relation to morality…. 'The identification of the existence and content of law does not require resort to any moral argument.' True, for how else could one identify wicked laws such as Israel's prophet denounced in words so often quoted by Aquinas: 'Woe to those who make unfair laws [*leges iniquas*] who draw up instruments imposing injustice [*iniustitiam*], and who give judgments oppressing the poor'?"

Dworkin likewise acknowledges that, in the sense of the term that positivists attempt to explicate, there have been unjust laws: „We need not deny that the Nazi system was an example of law … because *there is an available sense in which it plainly was law*. But we have no difficulty in understanding someone who does say that *Nazi law was not really law, or was law in a degenerate sense, or was less than fully law.* For he is not then using 'law' in that sense; he is not making that sort of preinterpretive judgment but a skeptical interpretive judgment that Nazi law lacked features crucial to flourishing legal systems whose rules and procedures do justify coercion." The „preinterpretive" sense in which the Nazis „plainly" had law is exactly the descriptive sense of law that positivists are concerned to analyze.

The sense of law that both Dworkin and Finnis are concerned to explicate is what it means to be law in the „fullest" or „ideal" sense or what I call in my book the evaluative concept of law, which is concerned with what law aspires to be at its moral best. For his part, Dworkin is explicit in the above quote that he is concerned to explicate the „interpretive" sense of the term law – which picks out what law should be if it is to morally justify the state's use of its coercive enforcement machinery. As is evident, the interpretive sense of law is explicitly evaluative and hence corresponds, if not in all particulars, to what I mean by the evaluative sense of the term.

7. This year the book "Law as an Artifact" was published by Oxford University Press. One of the reasons we mention it is that you co-edited the book with our Professor Luka Burazin, whom we are very proud of and to whom we say hello. The second reason is its revolutionarity. Why is this book important and what does it mean for law to be an artifact?

I don't think that the idea that law is an artifact is really revolutionary. It has been, and should be clear, to everyone with minimal experience with the law that it is a human artifact: if there is no one in a society making, changing, or applying norms we call law, then that is a society that doesn't have a legal system. Laws and legal systems are manufactured, as H.L.A. Hart observed, by the persons who serve as "officials" of the system to which their legislative and adjudicative activities give rise.

That being said, the book is important insofar as it draws attention to the need to take into account the existing literature on artifact theory in doing conceptual analysis. If law is, by nature, an artifact and there are certain conceptually necessary conditions for something to count as an artifact, then it follows that the conceptually necessary conditions for something to count as law include those conditions; something can't, after all, be law without being an artifact. And this is not just a technical logical requirement: much can be learned about the nature of law – including that law is contrived and used for certain characteristic purposes that constitute its conceptual function – from its nature as an artifact.

More than anyone else, Professor Burazin has called attention to the theoretical importance of law's status as an artifact. His seminal work has made clear that one cannot fully explicate the nature of law without understanding its artifactual institutionality. I expect to see his influence continue to grow in coming years and am proud to be his friend and colleague.

8. You gave lectures in a Washington prison for four years as a part of the University Beyond Bars program. Can you tell us a little about the program and your experiences with prisoners as students?

University Beyond Bars is intended to help inmates prepare for their eventual release into society by providing enough college course-work to enable them to earn an associate degree, which will help them re-assimilate into society by enabling them to find meaningful work.

This program is somewhat controversial. I have frequently gotten negative reactions from people who object to my participating in a program that provides inmates with a free education when most people have to go into debt these days to get a college education. While I understand that reaction, it is easy to forget that 97% of inmates housed in correctional facilities will eventually be released into the population. If we do not prepare them adequately for life outside the prison walls, they will likely reoffend and wind up back in prison. Educating inmates not only saves society money because inmates with an education are far less likely than other inmates to reoffend and wind up back in prison; it also saves a great deal with respect to the human suffering that comes with being victimized by violent crime.

There is clearly something wrong when inmates can get an education for free when other people can't. But the solution to that problem is not to deny education to inmates; it is to make a college education more freely available to everyone. Everyone benefits from a skilled, educated work-force.

Teaching inmates was an eye-opening experience in many ways. I learned a great deal about what it is like to be incarcerated. Truth be told, you can learn quite a bit about

the prison experience just by hearing those heavy metal doors clang shut behind you when you enter a secure area; I don't think I will ever forget the sound of those doors. You also get a sense for how inaccurate many of the stereotypes of inmates are. All but one of the students I taught admitted that they committed the crime for which they were convicted and expressed deep remorse for their crimes. The one who didn't is serving a life sentence for having been convicted of murdering his parents for insurance money when he was 18 or 19 years old. There is so much that is tragic and horrible about his story, but one thing that jumped out at me about him was his intellectual talent: he was quite the prodigy as a child and is one of the most natively intelligent people I have ever met. What a horrible waste of human potential.

I think that every law school should offer a program like this so as to give students a comprehensive look at the workings of the criminal justice system. Regardless of whether you are a hawk or a dove on the issue of criminal justice reform, it is hard to have an informed opinion about it without getting a sense for what life might be like behind bars and a sense for the demographic range of people who are locked up. There is no question that some folks need to be behind bars for their own safety and for the safety of other people. But it is sometimes shocking to hear some of the stories from decent intelligent people who are serving extended bids for non-violent drug-related crimes and who pose no threat to themselves or anyone else.

9. On the end, what's your impression of Croatian students comparing to students elsewhere? What's your advice to them?

Croatian students never fail to impress me with their keen intelligence and their profound kindness. They are as diligent and smart as any I have ever taught anywhere – and that is particularly impressive given that their interactions with me are in English, which is not their native language. In fact, it seems to me that your average Croatian student has much greater facility with the English language than the average college student in the U.S. I have made a number of friends in Zagreb with whom I keep in touch and whom I see whenever I visit, and I would characterize many of them as brilliant. It simply never occurs to me, when interacting with them, that English is not their native language. It is truly a pleasure and an honor to be able to have conversations with undergraduates who are as consistently impressive as the students are at Zagreb. If they are indicative of the quality of young people throughout Croatia, the future of Croatia is quite bright.

I'm not sure students as talented and hardworking as the ones I encounter in Zagreb need any advice from me, but what I would tell them is this: work even harder. To be blunt, your generation has a very challenging future; they are projected to be the first generation since the industrial revolution that will not be more prosperous than their parents. Your generation has been victimized by the self-indulgence of mine: you will have to deal with the worsening effects of climate change, which will become increasingly expensive for the world to deal with and which will for that reason have an effect on what young people can expect to earn in the future. I also worry a lot about the effects on AI on the job market. The benefits of AI will eventually and vastly outweigh any costs, but I don't think we will get to that point without a period of rather turbulent economic disruption where AI starts eliminating jobs people need to pay the bills. The best way to protect oneself from any potential worst-case scenarios is to be sufficiently skilled to be able to compete under the most unfavorable circumstances.