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Legal Hermeneutics: The Text and Beyond

Hermeneutyka prawnicza. W tekście i poza nim

In this paper I discuss legal hermeneutics, the role of interpretation in law. I proceed mainly by examining four examples and draw upon illustrations from United States law. I move from more specific, text-based examples to broader models of hermeneutic understandings. My claim is that legal hermeneutics—and hermeneutics more generally—offers four larger insights that each of the examples respectively represents. First, legal hermeneutics offers tools for a very sophisticated reading of a text; it allows us to discern more closely what is at work in the text. This discernment requires hermeneutic training in acts of judgment, an acumen that goes beyond the more formulaic and algorithmic resources of much contemporary education. Second, legal hermeneutics requires analysis of the interrelation between meaning and application over time. Often an existing rule cannot be applied mechanically to a new case; hermeneutics shows how the rule must be creatively extended. Third, legal hermeneutics emphasizes the quality of hearing: an attentiveness to the other that demonstrates the humanistic qualities of the law and of legal understanding. Fourth, legal hermeneutics aims to recover insights into human meaning in contrast to more reductive approaches that limit human aspiration to more confin-

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ing values such as economics. Legal hermeneutics—and hermeneutics as a broader field—is a wager in favor of meaning.

Let me begin with a case that required interpretation of a U.S. law that protects endangered species, that is, plants or animals whose numbers are small and under threat of extinction.[1] The case was brought by lumber companies that wanted to cut down trees on land they owned. Some endangered birds lived on the companies' properties. The companies claimed that the timber harvesting would not directly injure or kill any endangered species; the birds could simply fly away and live elsewhere. Critics responded that the timber cutting would harm the birds' habitat—the birds needed a certain area of wooded land in which to find food—and that habitat modification was prohibited under the statute. Here is a short summary of the statute's relevant provisions, which I have renumbered:

(1) It is unlawful for any person to *take* any endangered species of wildlife listed elsewhere in the statute.

(2) For the purposes of the statute, "to take" means to harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(3) The Government is authorized to acquire land as part of a program to conserve wildlife, and in particular to conserve endangered species. (emphases in italics added)

Section (1) makes it unlawful to "take" an endangered species of wildlife, section (2) defines what "take" means, and section (3) allows for the government to purchase private land in order to conserve endangered species. Nowhere is habitat modification specifically mentioned, and the question is whether habitat modification is a "harm", which is a prohibited activity in the list under section (2). So how should we interpret the statute, particularly if we have no other knowledge about this law or about environmental law more generally?

A first hermeneutic point would be to analyze section (2). It defines what it means to "take" an endangered species, which is prohibited, and includes a list of forbidden activities, including the "harm" of an endangered species. At first glance, we might say that the issue is easy, because in a general dictionary sense, timber harvesting is a habitat modification that obviously "harms" the endangered birds

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[1] *Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687* (1995).

by limiting their access to food resources by cutting down the trees. Yet is the issue that straightforward? If the legislature that created the law wanted any harm to endangered species to be prohibited, why did not section (2) simply state that to "take" such an animal or plant was simply to "harm" it? Why bother with all the other terms in the list? The timber companies argue that the creation of the list indicates that the legislature had something more narrow in mind. Think about the terms in the list. Do the terms themselves indicate something about the narrowness or breadth of the larger class of activities the legislature wanted to address? Do not all of the terms indicate an activity that causes intentional and direct physical injury to an identifiable member of an endangered species? We intentionally go out and hunt the bird, pursue it, trap it, capture it, collect it, and so on. If the legislature created the list in order to limit the kinds of activity that are prohibited, it might seem that they wanted to restrict only direct actions that intend to injure particular members of an endangered species. If that is the case, then the term "harm" should also be limited to the boundaries of the other terms in the list. In legal hermeneutics, this argument is discussed as an interpretive canon—an interpretive model—that uses the Latin phrase *noscitur a sociis*, which translates as a word is known by its associates. Under this view, the contested word should not be interpreted more broadly than the other terms in the list, because it was the legislature's intention to create a limited list. Otherwise, they would not have bothered with creating a list; they simply would have indicated that any injury to endangered species is a prohibited taking. According to the lumber companies, then, the breadth of the list is limited, the term "harm" should also be limited, and habitat modification is not a prohibited "harm", because it is not a direct, intentional injury of an endangered bird. The injury to the bird is simply an indirect result of the cutting of timber. Whether we agree or not, we are now seeing what may be at work in the text in ways that we would not have if we simply read the text without this hermeneutic principle in mind. Whether we agree or not with the lumber companies' argument, we need to respond to their argument at the level of what is going on in the text. We cannot argue simply general principles. The knowledge of this model should empower us in our sense of our ability to understand. And understanding is a basic goal of hermeneutics. Hermeneutics tries to think through what

does it mean to understand, whether the effort is to understand a text or, say, a friend. I will return later to the example of understanding in an interpersonal context.

Another argument in favor of the timber companies turns to section (3), which authorizes the Government to purchase land in order to protect endangered species. Think again from the companies' perspective their argument for the relevance of section (3). Why would the Government ever want to pay to protect the habitat by purchasing it under section (3) when it can simply prohibit timber cutting under section (2)? The companies claim that there would be no point to section (3) if habitat modification is prohibited as a "harm" under section (2). The argument here is another hermeneutic principle called "the whole act rule". We must read the various sections of the law together; the law forms a coherent whole. The law has a coherent structure. Under this view, it is artificial to read terms like "harm" in isolation, because their meaning may be modified by the larger linguistic context in the legal text. What may seem initially to be a matter of the plain meaning of the term "harm" may be more complicated and nuanced when we look at the term in its place within the law's larger structure. Again, whether we agree or disagree, awareness of the hermeneutic canon of interpretation alerts us to what may be at work in the text. More generally, hermeneutics tries to help us work our way through a close reading of what is going on in the text so that we can understand it in a richer, more sophisticated sense. We are not imposing our own meaning on the text; we are trying to attend, very carefully, to what the text has to say.

Are these readings by the lumber companies (or, more specifically, their lawyers) winning arguments? Not necessarily. We may read the text even more closely to raise some questions about the sufficiency of the lumber companies' arguments. For instance, in section (2), not all the terms necessarily imply direct, intentional injury. Pollution coming from an industrial smokestack many miles away may be sufficiently hazardous over time that it may "wound" or "kill" the birds. The owners of the smokestack did not intentionally seek to kill the endangered birds, but their smokestack's pollution indirectly caused the birds' death. It killed them. If the prohibited killing of the birds may be indirect, so may the prohibited "harm" also be indirect. Similarly with section (3). Perhaps a Government would more routinely simply prohibit habit

modification under section (2), but sometimes the endangered species may be so rare and so threatened with extinction that the Government wants to purchase the species' habitat under section (3) to ensure that no danger comes to the species. Again whether we agree or disagree, we would need to address these arguments.

There are two larger lessons here. First, legal hermeneutics offers the tools to assist a very close, very sophisticated reading of a legal text. We see relationships within the text that we likely would not have thought about before. Second, often there is no unambiguous right answer to the legal question posed. In the present example, while the U.S. Supreme Court ultimately ruled against the timber companies and held that habitat modifications were prohibited, there were good arguments going both ways over whether timber cutting of an endangered species' habitat was prohibited. The larger point here is also an important hermeneutic principle: the legal argument often rests ultimately not on the formalities of logic but on a judgment, a judgment that could go either way. One of the merits of hermeneutics is that it helps us appreciate the requirements of practical judgment, of practical wisdom. There is no mathematical proof available, no computer logic that will solve the problem. In a day and age when education is emphasizing a turn to economics and science, hermeneutics argues that there remains a significant place for judgment in the face of uncertain and changing circumstances. Judgment is a skill that hermeneutics both recognizes and helps us to develop, as in this example.

My second example is more expansive and requires not close attention to textual language on its own but to the meaning of that language over time. The United States Constitution came into legal force in 1789. A number of amendments to the Constitution, known as the Bill of Rights, were enacted shortly thereafter. My second example is drawn from the Eighth Amendment, which was adopted in 1791. The Eighth Amendment prohibits "cruel and unusual punishments". The United States permits the death penalty—putting someone to death—for someone convicted of a serious crime such as premeditated murder. A number of commentators, including a number of judges, contend that the death penalty seems like a cruel and unusual punishment that should be prohibited under the Eighth Amendment, and some states in the U.S. do prohibit the death penalty. Nevertheless, it is not prohibited to date as a matter of the U.S. Constitution. I would like to ask that we

set aside this larger controversy and consider a more narrow issue that will raise the same kind of questions: is it cruel and unusual punishment to impose the death penalty on someone young, under 18, who is convicted of a capital crime, that is, a crime normally punishable by death. An instantaneous reaction might be, of course it should be prohibited, but we need to see why the question is more complicated as a legal issue and how hermeneutics helps us resolve the problem. Accept first that when the Eighth Amendment was adopted in 1791 it is unquestioned that a youth who committed a capital crime would have received the death penalty. The authors of the Amendment were not challenging this practice; at the time it was not "cruel and unusual" to punish this guilty youth with death. And the Amendment today is enforced by U.S. judges who are not elected but appointed by other federal officials; the judges do not reflect the voice of the people. If the elected members of the federal legislature have not changed the language of the Eighth Amendment, the question arises by what right do federal judges have the authority and power to reinterpret its meaning? There are some prominent judges in the U.S. who argue—very vigorously—that the courts should not change this meaning. They maintain that courts should enforce the original meaning as adopted by the original legislature. To do otherwise, they insist, is for the courts to take on too much power.[2] If we disagree with those advocating original meaning here, would we feel differently if in another case we agreed with the original meaning and the judges who disagreed with that meaning were considering extending their power to interpret the legal language differently?

If we resist the original meaning in this case and think that today a court should rule that it is "cruel and unusual" punishment for a youth to receive the death penalty, then we need to use hermeneutic principles to arrive at a legitimate alternative understanding of the meaning of the phrase "cruel and unusual". How is that possible? In the case we are discussing, a majority of justices on the U.S. Supreme Court held that the original meaning of the language of the Eighth Amendment should not be enforced.[3] They held instead that the Court should apply "the evolving standards of decency that mark the progress of a matur-

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[2] A. Scalia, *A Matter of Interpretation: Federal Courts and the Federal Law*, Princeton 1997, p. 46.

[3] *Roper v. Simmons, 543 U.S. 551* (2005).

ing society". Under that standard, the Court held, it was indeed "cruel and unusual" under the Eighth Amendment to impose the death penalty on teenagers who had committed a capital crime. In these justices' view, the meaning of the language was not static; it was not bound to the original meaning; the language could evolve over time. As expressed in another opinion holding similarly, the Court held that the proper norms were not those that prevailed at the time of the Amendment's enactment in 1791 but those that "currently prevail".[4] The main point deserving recognition in these cases is the Court's recognition that meaning can evolve as it is applied in new circumstances.

This recognition highlights two important hermeneutic arguments. The first is what hermeneutic philosopher Paul Ricoeur calls the "semantic autonomy" of the text.[5] When an author or a legal body brings a text into being, the meaning of the text is not limited by its original context. Unless we are historians, we do not read a classic text mainly to learn about the lives in the original period but to learn how the text's meaning may apply to us. It may speak to us differently than it did to its original readers. Similarly, when a law is passed, it may have been passed to address a specific set of circumstances, but if on application the law extends beyond those circumstances, it will apply to the new situations too. Recognition of the semantic autonomy of the text entails that we readers disengage the text's meaning from its initial setting and apply it to our own. We are not restricted to what the author thought that he or she was doing by writing the text. The text becomes in some sense independent of the author's intentions. The meaning of "cruel and unusual" is not restricted to the legal authors' understanding of those terms.

The second and correlative hermeneutic argument that the Eighth Amendment example illuminates is the relation between meaning and application. Meaning is not fixed for all time at the time the legislature first speaks. We are historically distant from the time of legislative enactment, and new facts and understandings have come to light. Some historians even argue that because of our distance from the past, it remains debatable about what historical figures in fact meant. They

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4 *Kennedy v. Louisiana, 554 U.S. 407, 419* (2008).

5 P. Ricoeur, *From Text to Action*, transl. K. Blamey and J.B. Thompson, Evanston 1991, p. 298.

contend that it may be impossible to retrieve the original meaning to begin with.[6] In any event, at the point of application we do not deduce from the original, general principle what the particular point of application is in the case at hand, because there is historical slippage from the moment of enactment to the present. Meaning will change as it is applied. We cannot subsume the current particular under the original principle. Rather, as the hermeneutic scholar Hans-Georg Gadamer contends, application involves "co-determining, supplementing, and correcting [a] principle".[7] Meaning is not determined once and for all at the moment of origin but must be reassessed as the meaning is applied to new circumstances. For instance, in the Eighth Amendment cases to which I am referring, the Court acknowledged newer social scientific evidence that the brains of teenagers are not yet completely formed; their brains—as well as the youths themselves—are still maturing. Because their brains were not completely developed, these teenagers should not be expected to maintain the same level of accountability as an adult. They had a "diminished personal responsibility for the crime".[8] It would be a cruel and unusual punishment, therefore, to punish these youths with death for these crimes; the punishment would be disproportionate to their level of responsibility. We have a different understanding of teenager maturity now than did those in 1791. The meaning of "cruel and unusual" should change accordingly. Meaning is interrelated with application. As emphasized in my first example, here again it is important to recognize that this determination of meaning at the moment of application requires judgment. Because we are supplementing or correcting the principle as it is applied, this extension does not follow a clear trajectory. We have to judge, on the basis of the principle, the best way for the principle to apply in the new context. In other work, I follow Ricoeur and underline that this transfer of meaning requires the judgment of imagination.[9] Ricoeur writes of the "judicatory imaginary".[10] A known rule cannot directly be

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6 J.N. Rakove, *Original Meanings*, New York 1996.

7 H.-G. Gadamer, *Truth and Method*, transl. J. Weinsheimer and D.G. Marshall, New York 1992, p. 39.

8 *Kennedy v. Louisiana, 554 U.S. at 420* (2008).

9 G.H. Taylor, "Law and Creativity", in: *On Philosophy in American Law*, ed. F.J. Mootz III, Cambridge 2009, pp. 81–87.

10 P. Ricoeur, *The Just*, transl. D. Pellauer, Chicago 2000, p. 98.

applied to a new case, and so the rule must be creatively—imaginatively—extended. Hermeneutics helps us understand both that judgment is necessary and what this practical, creative judgment might entail.

It may be that one reason that the United States Constitution has survived for about 225 years—one of the oldest in the world—is that the text includes a number of general phrases such as "cruel and unusual" punishment that, precisely, allow the text's meaning readily to evolve over time. If the text had held that anyone convicted of a capital crime should be punished by death, the text would allow little room for flexibility.

My third example expands the breadth of legal hermeneutics beyond its interpretation of texts to larger elements of legal understanding. Here legal hermeneutics operates very practically at a more generic level in terms of its openness and attentiveness to the other. So I have in mind here not interpretation of texts but regard for the other in situations of legal dialogue. Let me offer an example to illustrate what I mean. In a famous U.S. case in 2009, former financial advisor Bernard Madoff was charged with execution over many years of a financial scheme that defrauded a long list of clients of their financial savings. Among the clients were a number of middle-class citizens who lost their life savings. At the time of his sentencing, Madoff was 71 years old, and his clients knew that any lengthy prison sentence for him was largely symbolic, as he would not live out the prison term. Why, then, did over one hundred clients take the time to send in letters to influence the judge's sentencing decision, and why did nine clients take time out of their lives to travel to the court so that they could present over the course of an hour their victim statements? Think about it: these statements made no economic sense. They would not lead to the return to these victims of the money, now largely spent, that they had transferred to Madoff. And, given his likely short remaining life span, the statements would have no impact on the length of time Madoff would actually serve in prison. In news accounts of the sentencing hearing, it is quite apparent that the speakers were well aware of these factors, and yet wanted to speak anyway.[11]

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[11] P. Lattman, A. Lobb, "Victims' Speeches in Court Influenced Judge's Ruling", *Wall Street Journal*, June 30, 2009. Available at: <http://www.wsj.com/articles/SB124632127336071155>.

I am struck that these victims principally wanted to be heard. They wanted their day in court, so that they could tell their heart-wrenching stories, even as they knew that these stories would make no difference to their economic redress. One of the powerful contributions of hermeneutics here is precisely its posture of hearing, of trying to bridge distance in order to understand. While not affecting their financial loss, being heard would offer some assistance to these victims' recovery. Stereotypically, the law focuses on economic damages, but legal hermeneutics can contribute to the larger, growing field of restorative jurisprudence.[12] Helping someone who has suffered injury to recover often requires more than monetary compensation. For the injured to become whole—or at least to move in that direction—requires a more holistic orientation to issues of affect, dignity, and integrity. This task of hearing has been shown to be relevant in other kinds of cases such as medical malpractice, where apology may be one essential element of redress.[13] Further, the task of hearing may encompass more than dialogue between individuals. The task of hearing has also been critical in systemic transactions such as truth and reconciliation commissions, as in South Africa and elsewhere.[14] Legal hermeneutics here should enter more into conversation with work that Ricoeur himself undertook on apology and pardon.[15] Along these lines I would argue that Ricoeur may give too much weight to the differences between apology or pardon and law—what more generally he writes of as the dialectic between love and justice.[16] As I have intimated, I by contrast see apology, pardon, and basic regard for the other as more integral to an expanded notion of the humanistic and hermeneutic aims of the law.[17]

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[12] See, e.g., *Restorative Justice in Practice*, ed. S. Murphy, M. Seng, Lake Mary 2015.

[13] P. Geier, "Emerging Med-Mal Strategy: 'I'm Sorry", *National Law Journal Online*, July 14, 2006. Available at: <www.sorryworks.net/nljo.phtml>.

[14] The Truth and Reconciliation Commission. Available at: <*www.justice.gov.za/trc*>.

[15] See, e.g., P. Ricoeur, *Memory, History, Forgetting*, transl. K. Blamey, D. Pellauer, Chicago 2004, p. 457–506; P. Ricoeur, "Love and Justice", in: *Figuring the Sacred: Religion, Narrative, and Imagination*, ed. M.I. Wallace, transl. D. Pellauer, Minneapolis 1995, pp. 315–329.

[16] See, e.g., P. Ricoeur, "Love and Justice", op. cit.

[17] For further exploration of these themes, see G.H. Taylor, *Ricoeur and the Limits of Law?* [forthcoming].

I do not neglect that all these settings face the difficult challenge of sorting between a genuine form of hearing and a more instrumental one where the regard for the other is not substantive but designed merely to lessen monetary damages or the jail term imposed. The doctor, for example, is not offering a sincere apology but just some words that the doctor's attorney forced the physician to memorize. I would add that the task is not just for the one injured to be heard by the one who has injured, as it is critical both for the injured's attorney and for the court to hear also. Often the client's attorney is so focused upon imposing the grid of legal doctrine on a case so to navigate the case through the legal dispute that the attorney neglects that imposition of the legal categories may not allow the client to be heard, either by the legal system or by the attorney. Legal hermeneutics has much to offer at this level. I would urge also that legal hermeneutics here also very concretely and demonstrably the reintroduction of ethics into the requirements of legal practice. Hearing the other is a very ethical demand. Consistent with other themes within restorative jurisprudence, legal hermeneutics expands the boundaries of what the law rightly encompasses. Legal hermeneutics is in this sense not ornamental, not just a pat on the victim's head before the law turns to the more serious debate about economic redress; legal hermeneutics is integral to making a person whole. Hermeneutics here could also engage in fruitful interchange with Ricoeur's work on recognition.[18]

My fourth and final example of legal hermeneutics draws upon the third just discussed. Here I move from an ethical hermeneutic concern to hear the other and address the larger ontological implications of this move, so its relevance for how we understand the nature of human meaning. My claim is that legal hermeneutics ultimately stakes its claim to significance in its attention precisely to human meaning, human value. Part of the challenge for legal hermeneutics is that it must stake out its claim about the significance within the law of human meaning against quite different and flourishing claims that the law is appropriately understood on the basis of other, social or natural scientific criteria. Let me offer four quick examples of alternative approaches that I discuss with students in a class on Law and Human Behavior. All four differ from legal hermeneutics on what our goals and motivations

[18] P. Ricoeur, *The Course of Recognition*, transl. D. Pellauer, Cambridge 2005.

as humans are. First, the field of law and economics has had great sway within the law over the past 30 years or so. Law and economics' assertion is that descriptively and normatively we humans are individualistic maximizers of our economic utility—we want to increase our interests against everyone else—and the law does and should reflect that reality.[19] Second, a newer generation of economic analysis called behavioral economics builds on pioneering work in cognitive psychology to argue that we humans in fact are not rational self-maximizers but prey to significant cognitive biases. We operate more typically on the basis of intuitive shortcuts than rationality. These snap judgments sometimes are accurate, but they are often wrong.[20] Third, the field of behavioral biology contends that our actions are ultimately reliant on unconscious biases that focus on our biological reproductive success. The claim is that this approach explains much criminal behavior, for instance.[21] Fourth, the innovative field of neurolaw—the conditioning of human decision by the operation of the brain—argues that human free will does not exist. Our actions are informed by the way our brains are hardwired. This field has also had increasing influence in criminal law, as it questions whether we act voluntarily.[22] I do not detail anything more about these theories except to say that they work to supplant, as nonscientific and nonsubstantiated, a hermeneutic emphasis on meaning.

In response, hermeneutics—and legal hermeneutics as a subcategory—often contends that its approach is more foundational than these theories because more grounded in the nature of human understanding.[23] While I am very sympathetic to the larger claim, I do not think that this response goes far enough. I would contend that hermeneutics has to accept descriptively that it is but one among several forms of interpretation or analysis. I would argue that hermeneutics has to make its distinctive case against these other claims and show why they do not suffice. In particular, I would join some other scholars and main-

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19 R.A. Posner, *Economic Analysis of Law*, New York 2014.

20 See, e.g., D. Kahneman, *Thinking, Fast and Slow*, New York 2011.

21 See, e.g., O.D. Jones, "Evolutionary Analysis in Law", *North Carolina Law Review* 1997, vol. 75, pp. 1117–1242.

22 H.T. Greely, "Law and the Revolution in Neuroscience", *Akron Law Review* 2009, vol .42, pp. 687–715.

23 See, e.g., F.J. Mootz III, "Hermeneutics and Law", in: *The Blackwell Companion to Hermeneutics*, eds. N. Keane, C. Lawn, Hoboken, N.J. 2016.

tain that Ricoeur's hermeneutics in particular is a *critical* hermeneutics, one engaged not simply in openness to the other—including other interpretive approaches—but in critical evaluation.[24] It is essential here to comprehend that Ricoeur's hermeneutics does not simply incorporate critical, explanatory moments drawn from elsewhere—from the social sciences, for example—but *itself* takes a critical perspective. Critical hermeneutics does not just listen to whatever the other wants to say. Although it is open to the other, critical hermeneutics is an oriented and directed form of interpretation. It ultimately seeks to extract the availability of ontological meaning from the other. In this sense, critical hermeneutics itself imposes an interpretive grid on its approach to the other. It applies an interpretive sieve that sifts through the other's statements to uncover the flecks of what it considers positive ontological meaning, and, I would contend, this is a good thing.

The methodology of hermeneutics is then oriented. It may extract kinds of meaning from an author that the author does not attend. Hermeneutics in this sense can be "deconstructive", if not in Derrida's way of showing the limitations or failures of a text to offer meaning or presence,[25] then in unpacking the text and taking it in a direction it does not want to go, in showing that the text offers a meaning that it does not accept as its own. This dimension of hermeneutics as critical contests the portrayal of hermeneutics simply as a form of listening and invitation. Directed and motivated, this hermeneutics extracts something other than what the author wants to say. The interpretive posture is something other than hospitality. The hermeneutic interpreter is not a passive host engaged merely in listening but is actively searching in the text for the "meaning" of being even when the text is engaged in another project. At a rare juncture, Ricoeur acknowledges: "The *choice in favor of meaning* is thus the most general presupposition of any hermeneutics".[26]

The implications for hermeneutics are several. First, the hermeneutic interpretation of "understanding" is itself selective in what it frames as "understanding", and this is contrary to the usual evaluation of hermeneutics. Hermeneutics imposes its own interpretive grid on other kinds of understanding. A second implication is that

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[24] See, e.g., D.M. Kaplan, *Ricoeur's Critical Theory*, Albany 2003.

[25] See, e.g., J. Derrida, *Of Grammatology*, transl. G.C. Spivak, Baltimore 1974.

[26] P. Ricoeur, *From Text to Action*, op. cit., p. 38.

the hermeneutic interpretation of understanding is not a "natural" form of reading but, as Ricoeur explicitly states, a "choice", a choice in favor of meaning. Again think of Derrida as a point of contrast in relation to a mode of understanding. More broadly, other interpretive approaches view their own explanatory orientations as better clarifications of the human predicament. The contributions of hermeneutics at this larger level of meaning is distinctive and separates legal hermeneutics from other dominant theories of knowledge and understanding in law such as, as I have mentioned, economics, behavioral economics, behavioral biology, and neurolaw.

The third and final implication for hermeneutics as a "choice in favor of meaning" is correlative and, to me, the most significant and pressing. As a choice, the hermeneutic approach must *wager* for the merits of its approach as over against other interpretive approaches.[27] Hermeneutics must prove its merits in a culture, both within the humanities and within the social and natural sciences, that today often engages in interpretation in ways where the hermeneutic orientation toward "meaning" is subordinated or dismissed. As an interpretive choice, hermeneutics undertakes the *task* of seeking meaning across the discordant.[28] It is a task, because ontological meaning is not something given. Instead, in our fractious, contentious, and heterodoxical times, the availability of meaning is very disputed, very fragmented, and very precious. We must seek both to establish this meaning and to preserve it when found, both of which are demanding and uncertain tasks. When Ricoeur writes that we must "speak of humanity […] as in fact a task, since humanity is given nowhere",[29] I argue that we must say the same of human meaning. An orientation toward human meaning remains a choice and a task. The choice in favor of meaning underscores the restorative character of hermeneutics that, as I noted earlier, I find legal hermeneutics can epitomize.

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[27] Cf. P. Ricoeur, *Lectures on Ideology and Utopia*, ed. G.H. Taylor, New York 1986, p. 312: "We cannot eliminate from a social ethics the element of risk. We wager on a certain set of values and then try to be consistent with them; verification is therefore a question of our whole life".

[28] See P. Ricoeur, *Time and Narrative*, vol. 1, transl. K. McLaughlin, D. Pellauer, Chicago 1984, p. 31, describing the tension in narrative between concordance and discordance.

[29] P. Ricoeur, *Lectures on Ideology and Utopia*, op. cit., p. 253.

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Streszczenie

W artkule omawiana jest hermeneutyka prawnicza, czyli znaczenie interpretacji dla prawa. Staram się wykazać, że z hermeneutyką prawniczą – i hermeneutyką w ogóle – wiążą się cztery ważkie zadania. Po pierwsze, hermeneutyka prawnicza oferuje narzędzia do bardzo wyrafinowanego odczytywania tekstu; pozwala nam to na dokładniejsze rozróżnianie tego, co w tekście funkcjonuje. Rozróżnienie to wymaga doświadczenia w hermeneutycznym akcie sądzenia, czyli umiejętności wykraczającej poza utarte i schematyczne środki, w znacznej mierze cechujące współczesną edukację. Po drugie, hermeneutyka prawnicza wymaga analizy współzależności pomiędzy znaczeniem i zastosowaniem w płaszczyźnie czasowej. Często istniejąca reguła nie może zostać automatycznie zastosowana do nowego przypadku, hermeneutyka ukazuje zaś, jak ta reguła winna być twórczo rozszerzona. Po trzecie, hermeneutyka prawnicza podkreśla znaczenie słuchania: skupienie uwagi na drugiej osobie ukazuje humanistyczne wartości prawa i prawnej interpretacji. Po czwarte, hermeneutyka prawnicza ma na celu ponownie nadać ludzki wymiar dążeniom jednostki, inaczej niż inne, bardziej redukcjonistyczne stanowiska, ograniczające aspiracje człowieka do bardziej przyziemnych wartości, np. takich, które wiążą się z gospodarką. Hermeneutykę prawniczą – i hermeneutykę w szerszym rozumieniu – można traktować jako opowiedzenie się za sensem.

Summary

This paper discusses legal hermeneutics, the role of interpretation in law. My claim is that legal hermeneutics—and hermeneutics more generally—offers four larger insights. First, legal hermeneutics offers tools for a very sophisticated reading of a text; it allows us to discern more closely what is at work in the text. This discernment requires hermeneutic training in acts of judgment, an acumen that goes beyond the more formulaic and algorithmic resources of much contemporary education. Second, legal hermeneutics requires analysis of the interrelation between meaning and application over time. Often an existing rule cannot be applied mechanically to a new case; hermeneutics shows how the rule must be creatively extended. Third, legal hermeneutics emphasizes the quality of hearing: an attentiveness to the other that demonstrates the humanistic qualities of the law and of legal understanding. Fourth, legal hermeneutics aims to recover insights into human meaning in contrast to more reductive approaches that limit human aspiration to more confining values such as economics. Legal hermeneutics—and hermeneutics as a broader field—is a wager in favor of meaning.

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