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Interpretations of Quine’s “Naturalized Epistemology” and the Character of “Naturalization of Law”

Introduction

Quine’s naturalistic approach to epistemology,¹ emphasizing the role of scientific methods, has both initiated and strengthened many analogical ideas in different disciplines. Consequently, contemporary philosophers discuss not only the appropriateness of ideas posed by the American thinker in the field of study of knowledge, but also in metaphysics, ethics, esthetics, philosophy of language and anthropology, among others. One can easily be led to the opinion shared by great number of philosophers according to which these disciplines can no longer be effectively developed without taking into consideration the knowledge gained due to the progress in the empirical sciences and psychology. As a result, evolutionary psychology has become a relevant part of ethics,² neurosciences help to formulate theories from the field of esthetics,³ cognitive linguistics (especially cognitive metaphor

¹ W. van Orman Quine, *Epistemology Naturalized*, [in:] *Ontological Relativity and Other Essays*, New York 1969, pp. 69–90.

² See, for instance: M. Slote, *Ethics Naturalized*, “Philosophical Perspectives” vol. 6 (1992), pp. 355–376.

³ See, for instance S. Brown et. al., *Naturalizing Aesthetics: Brain Areas for Aesthetic Appraisal Across Sensory Modalities*, “NeuroImage” 58 (2011), pp. 250–

theory) are a crucial part of reflections involving the genesis and nature of language,⁴ primatology helps anthropologists to understand human nature⁵ and physical theories are indispensable in contemporary metaphysical discussions.⁶ All this illustrates the role of science in many dimensions of the contemporary philosophical discourse.

It does not imply, however, that the methods of scientific theories' application in the philosophical disciplines are clear and uncontroversial. Instead, the present situation is the complete opposite. The case of epistemology and discussions concerning Quine's idea are appropriate examples of such difficulties.

The real authority science is endowed in philosophical debates also causes legal theorists and philosophers to be interested in the naturalistic approach to the problems of jurisprudence, both philosophical and practical.⁷ It does not mean, however, that it is possible to describe a coherent and widely acceptable model of such a "naturalization of law."

The problems linked to this term are numerous. The basic objection is as follows: the character of law is, generally, normative. "Legal systems" (whatever this term means) contain mainly prescriptive expressions, and this fact may seem to be *prima facie* the justification of the separationist view in the discussion on possibility of naturalization. Statements of science are generally of a descriptive character since they may be evaluated as irrelevant for law. However, such a position would be naïve. There is no norm without statements describing the elements of reality, creating either a worse or better view of the world.

This conclusion may lead to at least two means of interpretation.

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⁴ G. Lakoff, M. Johnson, *Metaphors we Live by*, Chicago 1980.

⁵ P. S. Rodman, *Peter S. Whither Primatology? The Place of Primates in Contemporary Anthropology*, „Annual Review of Anthropology” 10 (1999), pp. 311–339.

⁶ T. Bigaj, *Ungrounded Dispositions in Quantum Mechanics*, „Foundations of Science” 17 (2012) 3, pp. 205–221.

⁷ See, for instance: R. Allen, B. Leiter, *Naturalized Epistemology and the Law of Evidence*, „Virginia Law Review” 87 (2001) 8, p. 1503.

Pragmatic and realistic suggestions, which have been presented by the representatives of various legal traditions, lead legal theory to focus on the facts relevant from the perspective of the functioning of the law. Hence, the first philosophical models of the naturalization may be interpreted from the output of legal realists, particularly from the American realist tradition, Scandinavian school or Leon Petrażycki, a notable Polish scholar in legal philosophy. These days, however, such models may be evaluated as being out of date, mainly due to methodological regards.

Therefore, there is a need for different interpretations of what exactly it means “to naturalize” the law. The attempt to understand the role of the natural sciences in jurisprudence from other perspectives is the proposition of the interpretation of naturalization as a grade of the logical conformity between descriptive presuppositions of legal norms and actual knowledge concerning the relevant issues.⁸ Although the advantages of such a way of explanation are numerous (and it is doubtless more adequate), it also raises numerous problems chiefly regarding the nature of this “conformity” and the choice of scientific theories that may be considered sufficiently confirmed to be the basis for norms, which are to be in force in the state.

Regardless of the detailed ideas formulated by the representatives of legal theory and philosophy, the fact of existing similarities concerning the interpretation of *naturalized epistemology* and *naturalized law* itself is worth noticing. It may serve as a kind of orderliness of different problems concerning the “naturalization of law” in both of the aforementioned forms. This aim will be achieved by the presentation of three interpretations of “naturalization of epistemology” project, as described by Susan Haack.⁹ The main thesis of this paper is that Haack’s

⁸ See: B. Brożek, *O naturalizacji prawa (On the naturalization of law)*, [in:] *Naturalizm prawniczy. Interpretacje*, red. J. Stelmach et. al., Warszawa 2015, s. 24–47.

⁹ S. Haack, *Evidence and Inquiry. Towards Reconstruction in Epistemology*, Cambridge (MA) 1993.

interpretations can be applied (by analogy) to the interpretation of "naturalization of law".

Of course, the big question concerning the character of naturalization will be answered merely partially. Nevertheless, even such analysis seems to be relevant, especially due to the discounting of possible interpretations of "naturalized epistemology" other than simple replacement by legal philosophers who try to naturalize the law similarly as Quine attempted to change epistemology.

It behooves to begin with presentation of Quine's naturalistic project and its main proposals, which can be found in his famous paper "Naturalized Epistemology".

1. Quine's naturalistic approach in epistemology

1.1. Critique of positivistic foundationalism

One of main issues discussed by Quine is the critical approach to logical positivism, especially his rejection of analytic/synthetic distinction and the possibility of empirical foundationalism. The latter issue is particularly relevant because it is one of main causes of Quine's negation of the value of "classical" epistemology and is also one of the crucial issues canvassed in twentieth century.

Quine briefly recapitulates the thesis of Rudolf Carnap (and other prominent representatives of logical positivism) referring to his book *Die logische Aufbau der Welt*.¹⁰ In his opinion, the project of the eponymous *Aufbau* was the best attempt at executing the classical (traditional) project of epistemology founded on basic observational sentences (*protokolare Sätze*).¹¹ These expressions, which are reports from sensory experience, were to be the foundation of science. Quine argues that if it were possible to realize Carnap's project, it would allow us to express sentences concerning the world in the terms of perceptual data and logic (and set theory).

¹⁰ W. van O. Quine, *Epistemology Naturalized*, op. cit., p. 74.

¹¹ W. van O. Quine, *Epistemology Naturalized*, op. cit., p. 74.

Unfortunately, the failure of Carnap's program is a fact and the most important objection, known since Hume famously criticized the induction, is as follows: there is no theory that can be logically deduced from observation. The fact that a sentence is expressed in the terms of observation and logic does not imply that it can be proved on the basis of *Protokolarsaetze* and logic.¹² Such foundational epistemology cannot guarantee epistemologically valuable theories.

It is doubtful whether such an objection is sufficient for the rejection of "classical" epistemology, as made by Quine. Considering this fact, one should note his understanding of epistemology is radically narrow and not adequate in the historical context. The fact relevant in the context of his naturalistic project is the opinion that the natural sciences (*sensu largo*) are crucial from the epistemological view if we want to avoid the return of "Cartesian foundationalism". Quine's approach is *prima facie* simple substitution of classical epistemology, but, as will be posed below, such interpretation is not the only one possible, and perhaps not the most appropriate, especially in the context of making use of similar, naturalistic methodologies in legal philosophy.

1.2. Interpretations of "naturalized epistemology" as presented by Susan Haack

Although the impression and first interpretation of the Quine's paper may be that his main idea is a simple replacement, the case is more sophisticated.¹³ After Quine's paper was published, many philosophers have expressed their own interpretations concerning the character of "naturalization". One of the famous papers was published by Jaegwon Kim,¹⁴ who formulated an important

¹² W. van O. Quine, *Epistemology Naturalized*, op. cit., p. 74.

¹³ See: R. Ziemińska, *Zwrot naturalistyczny we współczesnej epistemologii*, „Filo-Sofja” 1 (2001), p. 307.

¹⁴ J. Kim, *What is "Naturalized Epistemology?"*, "Philosophical Perspectives" Vol. 2 (1988), pp. 381–405.

position in the discussions regarding the validity of the simple replacement of epistemology by psychology. Kim asserted that such replacement was inadequate mainly due to normative character of epistemology which, in his opinion, disappears when psychology becomes epistemology – radical naturalized epistemology is then purged of all normativity;¹⁵ therefore, such a reduction of a traditionally normative discipline to a purely descriptive one is unacceptable for him. Although the problem of the normativity of epistemology will not be discussed in the present paper, Kim's position may not be evaluated as fully sound due to some other factors, mainly because it presupposes a radical interpretation of Quine's program. Therefore, there is a need to consider a different way of interpreting Quine. In the present paper, I will focus on the interpretation presented by Susan Haack. The reason why is that her ways of understanding of epistemology naturalization are a good basis for the interpretation of the "naturalization of law" in spite of many evident differences between law and epistemology.

In *Evidence and Inquiry: Towards Reconstruction of Epistemology*, Haack has pointed out the main interpretations of the naturalistic turn in epistemology in the light of Quine's essay, which, in her opinion, are all consistent with Quine's main idea.¹⁶ She enumerated the following:¹⁷

- 1) an extension of the term 'epistemology' to refer not only to the philosophical theory of knowledge, but also to natural-scientific studies of cognition;
- 2) the proposal that epistemology be reconstructed as the philosophical component of a joint enterprise with the cognitive sciences, in which the questions about human knowledge tackled by philosophy

¹⁵ J. Kim, *What is "Naturalized Epistemology?"*, op. cit., p. 391.

¹⁶ S. Haack, *Evidence and Inquiry*, op. cit., p. 130.

¹⁷ Similar interpretation may be found in: R. Almeder, *On Naturalizing Epistemology*, [in:] *Knowledge and Inquiry: Readings in Epistemology*, ed. K. Brad Wray, Orchard Park (NY) 2002, p. 261.

will be extended to include new problem areas suggested by natural-scientific work;

3) the thesis that traditional problems of epistemology can be resolved *a posteriori*, within the web of empirical belief;

3') the thesis that results from the cognitive sciences may be relevant to and may legitimately be used in the resolution of traditional epistemological problems;

[(a) – all the traditional problems;

(b) – some of the traditional problems];

4) the thesis that traditional problems of epistemology can be resolved by the natural sciences of cognition;

[(a) – all the traditional problems;

(b) – some of the traditional problems];

5) the thesis that the traditional problems of epistemology are illegitimate or misconceived, and should be abandoned, to be replaced by natural-scientific questions about human cognition;

[(a) – all the traditional problems;

(b) – some of the traditional problems].¹⁸

These six possibilities do not only signalize the troubles philosophers encounter when trying to explain the character of epistemology naturalized but, generally, show the possible difficulties in the process of the application of scientific theories to other fields of human intellectual activity.

The first and second interpretations are quite obvious nowadays and are realized as contemporary influential cognitive science. Philosophy, and especially epistemology, is perceived as the important part of this multidisciplinary project.

To certain extent, it is related to the third way, according to which traditional epistemological problems can be rethought *a posteriori* (and perhaps resolved) through results from empirical sciences; consequently, scientific theories may be relevant from the point of view of the philosophical analysis of epistemological issues.

¹⁸ S. Haack, *Evidence and Inquiry*, op. cit., p. 118–119.

Such a statement may be treated as a declaration of *science utility in philosophy*. Of course, epistemology still remains philosophical discipline in that kind of naturalization, and saves the methodological autonomy. Therefore, such a position may be called moderate and partial naturalization (or, as Haack calls it, "reformist, aposteriorist naturalism"¹⁹).

The next proposed interpretation is "that traditional problems of epistemology **can** be resolved by the natural sciences of cognition". Haack suggests that there are two possible ways in this case: resolution of **all** problems or only **some of them**. The difference between the aforementioned interpretation and this one is relevant: scientific proposals now not only support philosophical research, but instead they replace such traditional methodology in epistemology. Although even if accepted, this way does not imply the necessity of such a replacement, it is one possible way of making epistemology. "Traditional" epistemology is not to be denied, hence this naturalization may be named as Haack does, "reformist, scientific naturalism".²⁰

The last interpretation is the most revolutionary,²¹ because it states that traditional epistemic problems will be replaced by scientific problems due to their illegitimation or misconception. This position assumes a lack of epistemic value of philosophical discussions and postulates the rejection of classical methodology in epistemology. One can call this position the "full-blooded" naturalization or, according to Haack, "revolutionary scientific naturalism".²² The reading of Quine may suggest that his position is this one; therefore, as previously signalized, such simplifying interpretation may be treated as not fully adequate.

It is not possible to evaluate either which of these modes of naturalizing epistemology is the most appropriate or which is closest to Quine's own philosophical view in the present brief paper. It

¹⁹ S. Haack, *Evidence and Inquiry*, op. cit., p. 119.

²⁰ S. Haack, *Evidence and Inquiry*, op. cit.

²¹ R. Ziemińska, *Zwrot naturalistyczny we współczesnej epistemologii*, op. cit.

²² S. Haack, *Evidence and Inquiry*, op. cit., p. 119.

is worth noting, however, that, from our current perspective, the third interpretation is simply trivial: concerning generally the relevance of science in philosophy is, generally, beyond discussion (however, the character of such “relevance” is controversial). On the other hand, the third, revolutionary way of rebuilding epistemology seems to be too radical: the question of whether psychology (generally descriptive discipline) may be treated as a substitute for epistemology (whose character may be named as descriptively normative) is still relevant and Quine’s replies to Kim’s critique are under discussion.²³ Also, Haack rejects this model, because, as she correctly notices:

two familiar epistemological questions, at least, [...] cannot plausibly be argued either to be illegitimate or to be resolvable by science [...]: the problem of induction and the problem of the epistemic status of science.²⁴

Indeed, these problems are of a methodological (induction) and strictly philosophical (epistemic status) character and there is no science (neither psychology, nor neuroscience) that can replace philosophy in the traditional sense in analyzing these issues.

When searching for the meaning of the naturalization of law, one can find positions that are analogical to these three views. They will be presented below:

2. Naturalization of law – possible explanations analogical to Haack’s interpretations of naturalized epistemology

In the contemporary discussions concerning the naturalistic approaches to the “legal science” and philosophy of law, three pre-

²³ See, for instance: W. van Orman Quine, *Pursuit of Truth*, Cambridge 1990, p. 19.

²⁴ S. Haack, *Evidence and Inquiry*, op. cit., p. 131.

sented ways of interpretation of Quine's naturalized epistemology are insufficiently emphasized, especially in the paradigm of legal realism. Authors usually concentrate on the replacement model (e.g. Leiter, Greenberg), and, as a consequence, the two other possible ways of the understanding of naturalization are discounted. The main thesis of the present paper is that all three models, as posed by Haack, may be harnessed to explicate the different aspects of naturalistic approach to jurisprudence. The proposal of such an interpretation will be presented below.

2.1. The reformationist aposteriorist approach in law

As was previously stated, the interpretation of naturalization as an ascertainment that *scientific theories may be relevant from the point of view of philosophical analysis of epistemological issues, some of which can be resolved by means of results from empirical sciences*, is obviously uncontroversial and may be evaluated as moderate and partial naturalization.

What is interesting, a similar kind of naturalization is widespread in law and is the only type commonly accepted. The thesis that scientific theories (of course, if the term "science" is understood *sensu largo* – denoting also psychology and empirical social sciences) may be appropriable from the point of view of some cases when law is to be applied is a truism. Across Europe and in almost all democratic countries in the world there is a function of *expert witnesses*: persons who have gained knowledge in certain scientific discipline (e.g. psychology or medicine) and cooperate with judges in the criminal, civil or administrative proceedings.

Their most prominent function may be observed during the criminal trials, when they *de facto* determinate the character of judicial sentence, by decision of whether the accused is of a sound mind, and, as a consequence, whether he or she is guilty or innocent. Therefore, the meaning of the legal term "sanity" is founded on psychological knowledge. Hence, the legal problem linked to the criminal responsibility in a certain set of cases is to be solved using psychology (as well as neuroscience).

The role of expert witnesses and science in the interpretation of law may also be espied in civil proceedings. For example, if one party to the contract was unable to make some decisions mindfully (e.g. due to the disturbance of mental processes), it is legitimated to claim annulment of the contract. The judge will have to decide whether there are premises to the acceptance of such a claim. Lawyers are not prepared for such analyzes, so they are obliged to apply to experts for their opinion, which is a crucial element for the decision.

According to Art. 553 of the Polish code of civil procedure, in the legal case concerning disablement (deprivation of the capacity to perform acts in law), the person who is to be deprived of such a capacity must be examined by a medical doctor (a psychiatrist or a neurologist) and a psychologist who have to express their opinions. These are extremely significant in the context of the decision of judges.

One can obviously enumerate more examples of such “naturalization” of law, which are in some aspects similar to the naturalization of epistemology in the first purport. What is intriguing is that legal philosophers rarely notice this dimension of naturalism in law. On the other hand, it is limited to practical and procedural aspects of concrete cases and, therefore, is not particularly relevant from the philosophical point of view.

2.2. „Medium” model of naturalization

There is a different situation when we discuss the second, “medium” model of naturalization, according to which some problems of the law **can** be resolved by the natural sciences. I propose not to limit such an attempt merely to practical aspects, as above. On the contrary, such a model may be relevant particularly from the perspective of legal philosophy. Additionally, it is in accordance to “naturalization-as-coherence” proposal mentioned in the introduction. These two issues will now be presented.

One of the crucial problems in legal philosophy is the question about the character of the normativity of the law. It is worth

pointing out that one can find at least two ways of philosophical investigations of this feature of the law. Since the nineteenth century (and also earlier), legal scholars have been responding to this question in various ways.

Representatives of legal positivism have expressed *antinaturalistic* opinions that the law has its obligatory power because it is made by people who have power and influence in society. Such a conception, presented by Austin²⁵ in his command theory, may be found in many forms in the beliefs of many contemporary prominent positivists. Perhaps the most radical representative of the positivistic "paradigm" is Hans Kelsen (the father of normativism), who aimed at the separation of law from descriptive disciplines (not only science, but also sociology), claiming that, from the legal point of view, merely the sphere of obligation (*Sollen*) may be treated as relevant.²⁶ With regards to naturalization, such an attitude may be called a "separationist model". In light of these propositions, science can play no role in the discussions concerning basic legal institutions and philosophical problems of the law.

The second way is to try to apply some scientific theories to the philosophical inquiries into the nature of legal normativity. Such disciplines as evolutionary psychology, primatology or neuroscience offer interpretations of some facts in a new light. It is possible to do research directed towards the attainment of such knowledge, gained through these disciplines, in the area of the methodology of the utilization of the findings of the empirical sciences in the study of law.

Such studies are becoming an important part of contemporary legal philosophy and may be helpful in the explication of the character of the normativity of law and the cause of the existence of legal obligations. Furthermore, in construing such scientific-philosophical models the propositions of legal positivists may paradoxically be treated as important points of view and, therefore, are not treated as misguided or simply senseless. Such "naturalized

²⁵ J. Austin, *The Province of Jurisprudence Determined*, London 1832.

²⁶ H. Kelsen, *Pure Theory of Law*, Berkeley-Los Angeles (CA) 1967.

philosophy of law” is still philosophy, which cannot be replaced by any scientific discipline or even theory.

One should also note that the “medium” model of naturalization may be treated as an interpretation of attempts in legal philosophy which may be called “naturalization – as – coherence”. It may be interpreted as follows: law is naturalized to such an extent to which its descriptive presuppositions (in particular, these presuppositions which are formulated by the representatives of dogmatics and judicature) are coherent with scientific knowledge in the logical sense.²⁷

Some similarities to the first interpretation may be noticed, but in this case there is no simple “use” of some scientific theories in the process of legal practice, but, rather, a philosophical program aiming at the naturalization of law in the “medium” sense. Law and legal philosophy do not cease to be autonomous disciplines, but some complex problems may be rethought thanks to psychology, neuroscience and many other branches of scientific knowledge. The analogy to the medium interpretation of naturalized epistemology seems to be adequate in this context.

2.3. Replacement – radical model of naturalized jurisprudence

The two aforementioned models may be evaluated as being moderate: although the methodological autonomy of law and legal philosophy is maintained, the role of science cannot be neglected. Such a cooperation may be evaluated as beneficial and, sometimes, as necessary.

It does not mean, however, these two models are the only ones possible. The situation within legal philosophy seems to be completely different. The discussion concerning naturalism in jurisprudence often is limited to various forms of legal realism.²⁸ One

²⁷ See: B. Brożek, *O naturalizacji prawa*, op. cit., pp. 44–47.

²⁸ About naturalization from this perspective I have written in: M. Jakubiec, *On the relation between philosophy of science and jurisprudence in the context of the naturalization of law* (paper originally published in Polish under the title: *O relac-*

can find at least two reasons for such a state of opinions. Firstly, the dominant interpretation of naturalized epistemology, which is thought to be a paradigmatic way for the naturalization of other disciplines, is the most radical: psychology replaces epistemology. The literal reading of Quine may suggest such an understanding, but, as was previously presented, it is not the only (and even not the main) way of "naturalizing epistemology". Consequently, the naturalization of law is not equivalent to the replacement of legal theory or philosophy by psychology. On the margin, "full" replacement is hard to imagine, due to, among others, prescriptive character of law.

Nevertheless, such attempts were made in legal philosophy and one example is Brian Leiter's conception of naturalized jurisprudence. Leiter refers to American legal realism; therefore, there is a need to encapsulate main thesis of the realists. It should be acknowledged that American realism was not the only such movement in legal theory in the twentieth century. No less interesting were Scandinavian realism and the psychological conception of Leon Petrażycki. Hence, these conceptions will be briefly presented below and then it will be said why models of radical naturalization may be connected with them, especially with American realism.

2.3.1. Main variants of legal realism

It was Oliver Holmes who initiated the American realist movement, known to be more pragmatic than philosophical (perhaps, as will be posed later, wrongly). In his famous "The Path of the Law", he depicted a proposal different from any previous conceptions of law. He stated:

When we study law, we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them

ji pomiędzy filozofią nauki a jurysprudencją w kontekście problematyki naturalizacji prawa, „Logos i Ethos 2 (2014), pp. 137–152.

out of court [...]. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.²⁹

Such a controversial declaration implies that the methodology of legal science (and also legal philosophy) is to be changed. Instead of the conceptual analysis or different linguistic methods, the method of jurisprudence is to predict the future behavior of judges. The law is what judges really do in courts and the legal science must be based on such a predictive method. Consequently, law is reducible to the mental sphere of people executing the “law in books” and *de facto* becomes a descriptive discipline³⁰.

A different approach was represented in Leon Petrażycki’s writings. According to his psychological approach, the law is not the result of the process of legislation, but rather a set of mental processes, in particular emotions. Investigation into the nature of law requires the analysis of these processes, especially *attributive emotions*; therefore, disciplines like psychology or biology become an immanent part of legal science.³¹

The similar naturalistic approach was presented by Scandinavian legal realists, a group of philosophers involved in Axel Hagerstrom’s project of positivistic rejection of metaphysics in philosophy and jurisprudence. A radical approach to the analysis of language led them to reflect on the character of legal concepts, the methodology of jurisprudence and the role of law in society.

One of the main theses of Vienna Circle philosophers was the verificationist theory of meaning: the meaning of a sentence is the method of its empirical verification. Therefore, the sentences that cannot be verified in such way are senseless. Metaphysical statements, as a philosophical discipline that aims at answering basic questions concerning the problems of entity, the character of whole reality etc., cannot be confronted with experience; hence, they are just linguistic excess. The

²⁹ O. Holmes, *The Path of The Law*, „Harvard Law Review” 10 (1897) 8, p. 457.

³⁰ M. Jakubiec, *O relacji...*, op. cit., pp. 139–140.

³¹ L. Petrażycki, *O nauce prawa i moralności. Pisma wybrane*, Warszawa 1985, p. 175.

same problem is linked to legal concepts, which are not of empirical origin.³² The essence of jurisprudence, therefore, is not the investigation of the legal regulations' character through, for instance, linguistic analysis, but rather the explication of facts linked to the functioning of legal imperatives. The philosophical analysis within jurisprudence is to be focused on the investigation of present and future feelings of citizens (in particular judges); the only "reality" which can be recognized as related to legal concepts is the mental one (and, in the materialistic perspective strictly empirical). Therefrom the methods of psychology and other sciences exploring human mental processes become strictly relevant from the viewpoint of philosophy of law, or these sciences are to replace law and legal philosophy.³³ The interpretation of Scandinavian realism depends on some detailed issues. Unfortunately, nowadays this movement is evaluated as anachronistic, and perhaps due to such opinion discussions regarding realistic models of naturalization are centered on American legal realism. Brian Leiter initiated such debate. In the following part of the paper, I would like to present a few selected aspects of Leiter's interpretation of American realism as a replacement model of naturalizing jurisprudence and the critique addressed to his ideas.

It is worth noting here that one will find no resounding declarations of "naturalization of law" in the publications of the aforementioned lawyers. The interpretation of their approaches as naturalistic is in part the effect of pursuance to naturalize different disciplines, as popularized by Quine.

2.3.2. American realism and replacement naturalism according to B. Leiter

In recent years, an attempt to use realistic methodology for creating a model of naturalizing jurisprudence was made by Leiter.³⁴

³² See: M. Jakubiec, *Tù-Tù Alfa Rossa a tezy skandynawskiego realizmu prawnego*, [in:] *Naturalizm prawniczy. Stanowiska*, ed. J. Stelmach et al., Warszawa 2015, pp. 201–220.

³³ M. Jakubiec, *O relacji pomiędzy filozofią nauki a jurysprudencją...*, op. cit., p. 141–142.

³⁴ B. Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, "Texas Law Review" 76 (1997) 2, pp. 267–315.

In several publications, a philosopher tried to interpret the naturalization of law (he interpreted naturalism broadly: he included not only psychology and natural sciences, but also social sciences³⁵ in the catalogue of relevant disciplines) in the context of disputes about the character of law canvassed between American realists. He criticized many interpretations of realism, including those of Dworkin and Hart, and claimed the need of “rethinking legal realism”.³⁶ As he sees it, “realism remains a joke, viewed simply as a movement that appealed to philosophically superficial lawyers, but which made no substantial contribution to philosophical thinking about law”³⁷ within Anglo-American jurisprudence. In *continental* Europe, the situation is no better: “outside Anglo-American jurisprudence, legal theorists have selectively represented – or simply misrepresented – realism, and in ways that do not bode well for understanding the realists as offering anything to a philosophical theory of law”.³⁸

Indeed, as already has been expressed, American realism is evaluated as simple pragmatism rather than as a sophisticated legal philosophy. One of the many reasons for such an opinion may be that Holmes, Frank, Lewellyn and others did not create any “philosophical school” as, for instance, the Scandinavian realists did. Nevertheless, Leiter tries to picture American realism and, particularly, predictive theory of law as relevant from the philosophical point of view. On the other hand, realistic perspective has dominated American thinking about law and legal culture, but this kind of influence is absent from the field of legal philosophy. Leiter’s aim is to change the situation.³⁹ He wants to explicate both the pragmatic and the naturalistic sides of realism, which are necessary in the predictive theory and are linked in the specific way:

³⁵ B. Leiter, *Rethinking Legal Realism*, op. cit., p. 285 (this paper is also re-printed in Leiter’s book *Naturalizing Jurisprudence*, Oxford 2007, pp. 16–59 (chapter one).

³⁶ B. Leiter, *Rethinking Legal Realism*, op. cit., p. 266–267.

³⁷ B. Leiter, *Rethinking Legal Realism*, op. cit., p. 274.

³⁸ B. Leiter, *Rethinking Legal Realism*, op. cit., p. 274.

³⁹ B. Leiter, *Rethinking Legal Realism*, op. cit., pp. 274.

To predict reliably and effectively what courts will do one should know what causes courts to decide as they do. The causes of judicial decision, in turn, are only available to the sort of empirical inquiry modeled on the natural and social sciences that the realists advocate. A naturalistic theory of adjudication, then, must produce a pragmatically valuable theory for lawyers, i.e., one that will enable them to predict what courts will do.⁴⁰

The crucial part of jurisprudence is to be naturalized in order to be epistemically valuable. Alternative methodology will not lead to appropriate conclusions (for instance mistaken "indeterminate normative theory"). Therefore, the two main aspects of the "radical naturalization" of epistemology may be found (by analogy) in Leiter's interpretation of realism as the naturalization of law: first, the evaluation of non-naturalistic methods as mistaken and leading to misconceptions and, second, the emphasis on the necessity of application the naturalistic methodology. As he writes:

The Realists [...] take the [...] step that Quine takes: replacement. According to the Realist indeterminacy thesis, legal reasons do not justify a unique decision, meaning that the foundationalist enterprise of theory of adjudication is impossible. Why not replace, then, the "sterile" foundational program of justifying some one legal outcome on the basis of the applicable legal reasons, with a descriptive/explanatory account of what input (that is, what combination of facts and reasons) produces what output (i.e., what judicial decision)?⁴¹

The replacement concerns then not the *whole* of law and legal philosophy, but rather the theory of adjudication. On the other hand, however, this theory is the basis for the whole American realists' "jurisprudence" (whatever this term may mean in such

⁴⁰ B. Leiter, *Rethinking Legal Realism*, op. cit., p. 286.

⁴¹ B. Leiter, *Naturalism in Legal Philosophy*, [in:] *Stanford Encyclopedia of Philosophy*, ed. E. Zalta 2012, <http://plato.stanford.edu/entries/lawphil-naturalism> (30.03.2015).

context). Such a position may seem to be highly controversial, but Leiter remarks in the following way: the theory created in the non-naturalistic way will be always worse than one based on natural and social sciences. He is aware that:

This response, of course, makes Replacement Naturalism vulnerable to conflicting intuitions about the fruitfulness or sterility of different kinds of theorizing.⁴²

The issue of the normativity of law (even “law in books”) and the character of the relation between legislature and courts are problems, which probably cannot be solved in such perspective.

Leiter’s motivation is similar to Quine’s with regards to epistemology if the essay “Epistemology Naturalized” is read literally: the problems of foundationalism (although differently interpreted) are the point of departure in formulating the naturalistic, appropriate methodology. The foundationalism in law is based on the following belief: legal reasons justify unique decisions. Realists rejected such view, claiming, as Leiter interpreted their opinion:

that the law is **rationaly** indeterminate in the sense that the class of legal reasons—i.e., the class of legitimate reasons a judge may offer for a decision—does not provide a **justification** for a unique outcome. Just as sensory input does not **justify** a unique scientific theory, so legal reasons, according to the Realists, do not **justify** a unique decision.

Such opinion is the main source of Leiter’s belief that “legal science” and the philosophy of law is to be replaced with a causal/nomological explanation of how judges decide cases. We should then abandon the philosophy of law and turn instead to psychology and sociology.⁴³

⁴² B. Leiter, *Naturalism in Legal Philosophy*, op. cit.

⁴³ M. Greenberg, *Naturalism in Epistemology and the Philosophy of Law*, „Law and Philosophy” 30 (2011) 4, p. 424.

Leter's way of naturalizing the law is questionable for many reasons.

First of all, it is doubtful whether such a naturalistic approach can be ascribed to all American realists (for instance, Underhill Moore certainly was naturalistically-oriented, but there is a question concerning other representatives of realistic thinking). Legal scholars like Holmes, Frank or Llewellyn and many others all represented different styles of reflection and did not create any "philosophical school of realism", as the Scandinavians did, for instance. These facts raise the mentioned question.

Secondly, Leiter's conception is based on a "radical" reading of Quine, which, as has been stated many times, is not the only possible one, and perhaps is not a fully adequate interpretation.

Eventually, there is the question whether "naturalized epistemology" can be seen as a model for naturalized law. According to Greenberg, "naturalized epistemology provides no rationale for the naturalization of philosophy of law".⁴⁴ There is no place here to present Greenberg's argumentation; what is worth noting is that his critical approach seems to be valid merely in the case of a radical reading of Quine.

Conclusion: which model is acceptable?

Leter's proposal is based on one interpretation of naturalization. Of course, simply rejecting "classical" jurisprudence and replacing it with another discipline is impossible; one can only naturalize parts of "legal science" and of the philosophy of law. Due to this fact, if Quine's proposal read as replacing epistemology by psychology it cannot be useful for legal philosophy as strict analogy.

The other possible interpretations of epistemology naturalization briefly presented in the previous paragraphs seem to be basis for models of naturalization of law. According to the first model,

⁴⁴ M. Greenberg, *Naturalism in Epistemology and the Philosophy of Law*, op. cit., p. 451.

functioning of the expert witnesses may be treated as naturalization in the moderate posterioric sense. The philosophy of law that is done in accordance with the scientific theories concerning e.g. the nature of human normative systems or the project of naturalization-as-coherence were interpreted as moderate naturalization of law, justified and valuable. The model of replacement and its example, which is Leiter's interpretation of realism, is dubious and is not "full" realism, which cannot be achieved within law. Therefore such models are to be treated as conceptions that fall into the second presented interpretation of naturalized law.

Summary

Interpretations of Quine's *naturalized epistemology* and the character of the *naturalization of law*

Quine's project of "naturalized epistemology" is usually interpreted as a rejection of classical epistemology, which becomes merely a "chapter of psychology". It does not imply, however, a different understanding of the character of naturalization is inadequate or wrong. Susan Haack's interpretations are briefly analyzed in the paper. Thereafter, they are harnessed as models of interpretation of the "naturalization of law". The main aim is to point the radical reading of Quine's project (the replacement model) is not the only acceptable one. Consequently, there are at least three models of the "naturalization of law" that are analogical to the "naturalization of epistemology". The author details their character.

Keywords Quine, naturalization, epistemology, law, jurisprudence, naturalization of law.

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