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Hart and Putnam on Rules and Paradigms: A Reply to Stavropoulos

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Abstract Near the end of the last century, some legal philosophers adapted the so called causal theories of reference to solve internal problems in legal theory. Among those philosophers, Nicos Stavropoulos adjusted Hilary Putnam's semantic externalism claiming it as a better philosophical view than legal positivism defended by Herbert Hart. According to him, what determines the correct application of a legal rule must be determined by the objects themselves. In that case, what determines the reference of legal terms is an issue to be solved by the best theory developed. However, this is not the case necessarily: Hart's model can reach to the same conclusions as an externalist adjustment of law. Furthermore, the epistemic criteria required by Putnam to deal with value judgements are also acceptable in a positivist model. This paper presents the central thesis of Putnam's semantic externalism, with Stavropoulos adaptations to law, and defends that Hart's approach to deal with legal rules and Putnam's approach to deal with language rules can converge.

Keywords Semantic externalism · Open texture · Cluster concepts · Rules

1 Introduction

One of the main controversies in the legal philosophy of the last century was the Hart/Dworkin debate. Among the criticisms made by Dworkin to Hart, the "semantic sting argument" stands out, and states that Hart's positivism cannot adequately account for legal disagreements. According to Hart, the rules of a legal system establish conditions which determine whether, e.g. something is a

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"contract". But legal concepts are open, and the use of such terms does not fall under necessary and sufficient conditions. Since society is constantly evolving and laws do not always keep up with social changes, it is impossible for any legal system to foresee all possible cases. There is always some room for a judge to decide whether a given rule applies. Against Hart, Nicos Stavropoulos [52] restated Dworkin's *semantic sting argument* as follows: if legal terms were determined only by conventions, then there could not be disagreements about what "contract" means. Yet, in the courts parties usually disagree about how to apply legal terms to actual cases. So, even if Hart does not view legal terms as definitions, this is how his model actually works. Hilary Putnam's semantic externalism seems to be a good alternative to Hart's conventionalism without giving into judicial discretion. Putnam's externalism holds that an individual's mental states do not on their own determine the reference of the terms that person uses. Rather, those references depend also on the objects referred (the environment in which that person finds him or herself) as well as the best theories available regarding the nature of those objects. Stavropoulos [52, 160] claims that Putnam's externalism fits well into Dworkin's model and is incompatible with Hart's model [52, 133].[1]

In this paper, I argue against Stavropoulos, who—along with other authors of that period—interpreted Putnam's externalism as a kind of essentialism.[2] Once this interpretation is given up, an externalist view of law can be reconciled with Hart's positivism. Thus, one of the goals of this paper is historiographical: to put forth an adequate interpretation of semantic externalism, and show that it can be adequately applied to legal theory.

A second goal of this work is to show that an externalist interpretation of law does not yield a better theory than the one found in Hart's positivism, but rather complements it. I argue that (1) the conventionalism attributes to Hart is undue, that (2) Stravopoulos' claim that legal cases should be decided on the basis of the best available theories about the subject-matters involved is acceptable for Hart, and that (3) judicial discretion is not a thesis, but rather a finding—that is, judicial discretion arises from the idea that in law (and in science generally) there are always borderline cases which have no clear solutions. Legal standards guide the solution of disputes, and limit the discretion of the judges. In this sense, Hart's positivism is anti-individualistic once it states that a judge's individual beliefs do not determine the application of the law—and this is exactly what Putnam's semantic externalism says about the application of natural kind terms.

[1] Hanina Ben-Menahem and Yemima Ben-Menahem [3] and Dennis Patterson [27] also claim that Putnam's externalism is compatible with Dworkin's views.

[2] Essentialist views say that certain classes of individuals (e.g. biological and chemical species) are identified by essences or micro-structural intrinsic properties. Without those properties or essences, those individuals would no longer be what they are. Brian Ellis states that "essentialists believe that there are objective, mind-independent, kinds of things in nature. These are the so-called 'natural kinds'. To explain the existence of these natural kinds, essentialists postulate that the sources of relevant similarities and differences are intrinsic, i.e. independent of circumstances, and independent of human knowledge or understanding." [13, 139–140]. Recently, Tuomas Tahko summed up essentialism in the following way: "there are at least some genuine, mind-independent natural kinds that are defined by their essential properties" [57, 796].

This paper has three sections: Sect. 2 presents semantic externalism; Sect. 3 lays out Stavropoulos's views on externalism about legal terms; and Sect. 4 indicates how to reconcile Putnam's semantics with Hart's legal positivism.

2 What is Semantic Externalism?

"Semantic externalism" is how Putnam's view of meaning came to be known. It states that the beliefs which someone has about an object are insufficient to determine the correct reference of a term used to designate that object. In the 1960–1970s, Putnam put himself at odds with the views held by logical empiricists on the meanings of words (and sentences). They split up the meaning of a word (or sentence) in two parts (or vectors): intension and extension, and claimed that the former determines the latter.[3] The extension or reference of a word is the set of things of which that word is true—for example, the extension of "lemon" comprises the set of all lemons. On the other hand, its intension is the set of features associated with the objects referred. The intension of "lemon" comprises attributes such as being a fruit, green, citric, etc.

But what would happen if Earth's atmosphere altered to the point that lemons turned red and square: would we say that lemons ceased to exist or that they have considerably changed? Putnam points out that objects might change quite a lot while still belonging to the same species [33, 140]. The examples of natural kinds have their proper identification in sciences such as biology and chemistry, even if the words which designate them have ordinary uses. Even if laymen have true beliefs concerning what lemons or ferns are, in cases of doubt whether an instance is really a lemon or a fern, "biologists would decide" [33, 152]. These cases of words which designate natural kinds led him to conclude (a) that a set of semantic rules grasped by an ordinary language speaker is insufficient to correctly determine the extensions of terms which designate some objects and (b) that it's not the case that scientific development alters the reference of those terms necessarily:

> I found myself driven to an idea that was wholly new to me, and apparently to other philosophers as well: *nothing* that is in the head of an average speaker suffices to determine what her word *gold* refers to. Meanings aren't in the head. Well, if they aren't in the head, where are they? Of course, the brain *is* in the head, and the brain has to undergo appropriate changes (maturation, and all the various effects of acculturation) before one can speak a natural language. "Meanings aren't in the head" does not mean that the brain has nothing to do with semantic competence. But what fixes the meaning of a speaker's words is not just the state of her brain; the reference of our terms is generally fixed by two things that classical philosophy of language either ignores or mentions only as an afterthought: *other people and the world* [46, 197].

As a response to this diagnosis—which says the philosophy of language and semantics of the time wrongly assumed that in order to know the meaning of a word it would be

[3] Rudolph Carnap, for example, wrote that "every intension determines uniquely an extension, but the converse does not hold" [6, 108] and that "the concepts of sense and of intension refer to meaning in a strict sense" [6, 125]. See Sam Cumming [8] and also Eliot Michaelson and Marga Reimer [48].

enough to know the intension of that word—Putnam formulates his famous Twin-Earth thought-experiment. With it, Putnam intends to show that two speakers who share the same language and are in the same mental states can use the same word and refer to different objects. In "The meaning of 'meaning'" (henceforth: MoM), Putnam invites us to visit a planet very similar to Earth, where people also speak English, which has mountains similar in appearance to the ones on Earth as well as rivers and seas and other things found on Earth. In this "Twin-Earth" (henceforth "TE") the word "water" is also used to refer to an odorless, colorless liquid which fills up rivers and lakes, which quenches thirst, and which falls from the sky when it rains. But on TE, that liquid is not made up of molecules of H_2O; rather, it is made of a much more complex chemical substance, which we can abbreviate as XYZ. Then, either (a) we accept that "water" has the same meaning in both planets but different extensions, or (b) the liquid which fills up TE's rivers and lakes is not water. For Putnam, the correct alternative is (b). Accepting (a) would mean that the mental states of a speaker solely determine the reference of a given word. Since we here on Earth demand that instances of water be made up by H_2O, whatever falls outside that standard, which is the current scientific standard, is to be rejected.[4] So, the reference of TE's "water" is not water.

Unlike Frege and Carnap, who split the meaning of a word into a pair of elements, Putnam divides it into four vectors: a syntactic marker, a semantic marker, stereotypes, and extension (for the purposes of this paper, I comment only on the last two vectors). Stereotypes are sets of perceptual aspects that we associate (direct or indirectly) to the objects referred by a term and which, in general, are sufficient for the identification of artifacts like chairs or tables. But in the case of natural kind words, such as "tiger", stereotypes are something like being a large feline, which lives in forests, which has orange fur with black stripes on it etc. Other features can be added to the stereotype, some may be abandoned (tigers might have three legs, be albino or live in cities). In the case of natural kinds, doubts regarding the correct identification of an instance of a natural kind term are settled by specialists. According to Putnam, *there is a division of linguistic labor in our society*.

The biological and chemical examples mentioned above show that scientific evolution does not entail (necessarily) ontological changes, as Kuhn and Feyerabend have suggested.[5] In the case of water, the liquid itself did not change with the

[4] For Putnam, whatever is understood as "necessary" is restricted to a specific body of knowledge. "H_2O" is a necessary element of what we call "water" by our current scientific standards: "In particular, when we say that a statement is necessary relative to a body of knowledge, we imply that it is included in that body of knowledge and that it enjoys a special role in that body of knowledge" [31, 240]. Hence, "water is H_2O necessarily" not because it has a metaphysical or an intrinsic property which exists independent from any theoretical context; it is necessary concerning to the fact that we accept as true our scientific descriptions. This was well implicit in "MoM" but was anticipated in 1962 and returned in "Rethinking mathematical necessity" [42].

[5] Juliet Floyd says that one of the main contributions of Putnam's semantic externalism was to present an alternative to relativism concerning the debate about theoretical terms: "[h]is causal treatment of reference, developed in the mid-1960s and most famously defended in 'The meaning of 'meaning'' was, *inter alia*, a response to the then popular idea that when our beliefs change (as when Science progresses), so do the meanings and referents of our terms. Because of the influence of Carnap, Kuhn and Malcolm, this relativist conception seemed viable at the time, and Putnam's response, accordingly, revolutionary" [16, 17]. However, it is questionable that Kuhn actually put forth a strong relativist view. About this topic, see Bird [4], and Oberhein and Hoyningen-Huene [26].

development of chemistry and the discovery of its formula. Even though our theories about water have changed, the reference "water" has not. According to Putnam, the reference of the word was fixed at some moment in the past by our ancestors who were in direct contact with the liquid. Our association of the word with *this*[6] thing which falls when it rains, which fills up rivers, etc. can be traced back through a chain of uses to its first uses. By analogy, the same reasoning applies to natural kind terms whose instances cannot be observed, such as "electron" and "photon".[7] Let us take a look at the case of the electron.

In 1874, John Stoney was investigating the existence of a minimum unity of charge in electrochemistry. Stoney stated that "[n]ature presents us in the phenomenon of electrolysis, with a single definite quantity of electricity which is independent of the particular bodies acted on" [53, 54]. Seventeen years later, in 1891, he wrote that "[i]t will be convenient to call [these elementary charges] *electrons*" [54, 583]. On Putnam's view, once we accept the results and the relevance of Stoney's investigations for the history of science, it is reasonable to concede him the benefit of the doubt, i.e. that we accept that he was in fact investigating the existence of a minimum unity of charge related to electrochemistry, that that phenomenon had a direct relation to atoms and so on. For him, Stoney was at liberty to create the name and fix its reference (the object of his investigation, electrons) through a *minimum description* of the object, and not as a set of descriptions that are necessary and sufficient for identifying it. Once the reference is fixed, later developments in science can incorporate new features or properties to electrons (new stereotypes) and others (properties) can be abandoned in this process, but it still may refer to that object initially dubbed by Stoney in 1891:

> […] there is nothing in the world which *exactly* fits Bohr's description of an electron. But there are particles which *approximately* fit Bohr's description: they have the right charge, the right mass, and most important, they are responsible for key *effects* for which Bohr thought "electrons" were responsible […] The Principle of Reasonable Doubt dictates that we treat Bohr and other experts as referring to *these* particles when they introduced and when they now use the term "electron" [36, 275].

Putnam's proposal enabled him to reconcile the stability of reference (in most cases) with scientific revolutions. The case of "electron" provides an example of scientific evolution which can be explained in a realist manner as Putnam sought:

> Over the considerable evolution of the concept of the electron that took place from 1896 to 1925 a core of meaning survived changes in theoretical perspective. Throughout that period nobody doubted that the electron was a

[6] Putnam's conception assumes that there is an indexical component in the fixing of the extension of a term which designates an object. So, the choices and the wills of the nominators would be constrained by the environment, either physical or social. See Putnam [35].

[7] Regarding the stereotypes of objects like electrons, Putnam said: "I myself would regard possession of the *stereotype*—not the *theory*—that electrons are charged particles ('little balls' with trajectories and unity negative charge) as part of our concept of the electron. In my opinion, stereotypes are far more stable than theories, and contribute to the identity of our natural kind concepts *without* providing necessary and sufficient conditions for their applications" [41, 445].

> universal constituent of matter, with certain mass and charge, and that it was the agent of radiation [1, 175].
> […].
> […] the change of the electron's representation does not imply that it ceased to refer to the same entity. The survival of a core of meaning and the stability of the term "electron" from 1896 to 1925 allows for a realist reading [1, 264].

If "electron" remains a positive example, there are other cases known in the history of science in which it is not possible to assert referential stability, like the cases of caloric and phlogiston. These cases were used against Putnam as counterexamples to the application of semantic externalism to terms which designate non-observable entities.[8] But Putnam did not think that the reference of theoretical terms was problematic. For him, given that we learn the use of those terms through experts—at school, or through some other kind of interaction with experts—there is no reason to think that these cases are distinct from those of observable entities (after all, we learn our first words from our parents).[9] Nevertheless, from the point of view of scientific practice, detailing these issues is important and Putnam provides some clues on how we can think about them: through the idea of *cluster concepts*—this will be very useful when we turn to legal concepts (Sect. 4.2).

Externalism is better understood when read as a semantic project which tries to explain linguistic rules based on social practices, how we make judgements concerning what is around us, and what are the central elements that we consider relevant for our beliefs. In our social practice, we share many beliefs with experts about, say, lemons, gold, and water. What we do not hold—as laymen—are the technical *means* for recognizing those species (unless we were in chemistry or biology labs). However, there is no difference in the *meaning* of "lemon" when uttered by a layperson or by a biologist. Between the layperson and the specialist, there are *epistemic differences* in degree; but there is no *semantic divergence*. When the issue is meaning, what really matters is the use and applications of the term in society. In other words, the social practice is what governs it. After all, "semantics is a typical social science" [33, 152].

[8] An issue neglected by interpreters of this phase of Putnam's philosophy was his notion of "interest", which permeates his view of scientific practice. The change or stability of the reference of a scientific term depends on the interests involved. In a 1962 paper, Putnam wrote: "When a patient has these symptoms we say he has 'multiple sclerosis'—but, of course, we are prepared to say that we were mistaken if the etiology turns out to be abnormal. And we are prepared to classify sicknesses as cases of multiple sclerosis, even if the symptoms are rather deviant, if it turns out that the *underlying condition* was the virus that causes multiple sclerosis, and that the deviancy in the symptoms was, say, random variation. On this view the question of interest is not, so to speak, the 'extension' of the term 'multiple sclerosis', but what, if anything, answers to our notion of multiple sclerosis. When we know what answers to our criteria (more or less perfectly), *that*—whatever it is—will be the extension of 'multiple sclerosis'" [37, 311]. This notion of "interest" appeared again in "MoM" and also in the 1990s when he said that "what we say about the world reflects our conceptual choices and interests" [40, p. 58]. Putnam's notion of "interest" implies that his semantics did not have any metaphysical commitments. His semantics is different from Kripke's view on proper names. See Hacking [19].

[9] See Putnam [30, 225].

3 Stavropoulos and the Externalist Adjustment to Law

For Stavropoulos, semantic externalism has emerged as a theoretical alternative in semantics which would overcome the conventionalist aspect of Hart's positivism. According to Hart, the meaning of a legal term, as well as of any other term of a language, has two aspects. The first aspect is clear: there are some cases in which there can be little interpretative doubt about its application. In these cases, a judge can only "recognize instances of clear verbal terms, to 'subsume' particular facts under general classificatory heads, and draw a simple syllogistic conclusion" [21, 125]. But the other aspect is unclear: in some cases, it is not obvious whether a term applies. Hart's famous example is the rule which prohibits driving in parks:

> In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will be indeed plain cases constantly recurring in similar contexts to which general expressions are clearly applicable ("If anything is a vehicle a motor-car is one") but there will also be cases where it is not clear whether they apply or not. ("Does 'vehicle' used here include bicycles, airplanes, roller skates?"). […] Canons of "interpretation" cannot eliminate, though can diminish, these uncertainties [21, 126].

When congressmen fix a rule of this type, they focus on paradigmatic situations which justify the introduction of the rule into the legal system. For this rule, the paradigmatic instances would be motorcycles, cars, buses, etc. Once the extension of the term is not clear, there is a certain indeterminacy concerning the purpose of the rule itself, insofar as it is possible to imagine that the legislators might intend to extend it to "skates, roller-skates or golf cars" [5, 17]. For this kind of situation, the judge has to decide. Hence, legal terms have an open texture, which stands on two main pillars: our ignorance concerning future human action and a language open to new meanings.

Under the influence of J. L. Austin and the later Wittgenstein, Hart claimed that legal rules should not be understood as definitions based on necessary and sufficient conditions. However, in practice, Hart's open texture view of law would function—for Stavropoulos and also for Dworkin—just like the logical positivist view. After all, in clear cases, the rule applies, but in unclear cases, there is room for choice. For this reason, Stavropoulos called Hart's model a "Criterial Model":

> The Criterial Model draws two important conclusions. First, the truth that something is a contract if and only if it is x, y and z, where x, y and z are the relevant criteria. […] Second, there will be cases in which the agreement among users that underlies the standard cases of application will break down. In those cases, there will be indeterminacy over the application of the concept [52, 3].

Putnam's externalism would allow for the overcoming of the conventionalism entailed by Hart's positivism, because it says that what determines what a term means depends, at least partially, on the object itself by that term. The same

reasoning applies in determining adequately the extension of "contract", "marriage" or "homicide". Then, the distinction between easy and hard cases would disappear, since in every legal case, what guides a legal decision is the object itself rather than legal conventions. What those legal terms denote has to be interpreted according to social practices, something which requires support from social, political, and moral theories. Hence, if every legal case must be solved in the light of what the legal terms actually denote, legal conventions have to be complemented by those theories about the objects denoted. What people actually do when they are exchanging goods and services is relevant for the legal meaning of "contract", the way people organize their marital relations is relevant for the legal meaning of "marriage", and so on. So, to describe precisely those practices is to commit oneself with *finding out* what those practices are, just as describing precisely what water is entails finding out about its composition.[10] So, it is possible to re-establish the necessary connection between law and morals insofar as a moral theory is required to solve any legal case. Let us look into two examples from the Brazilian legal system. The first case is about a condition for someone who wants to run for president in Brazil. The second is about marriage.

The current Brazilian Federal Constitution states (article 14, VI, *a*) that one must be at least 35 years old to run for President (also for vice-president or senator). According to Stavropoulos, with this rule, the Brazilian legislators would intend to establish certain conditions which mark a degree of "maturity, rather than age proper; and given the changes in life expectancy, length of education etc. since the introduction of the provision, the same level of maturity is now reached much later" [52, 139]. Therefore, if the legislative intention were to establish a minimum age which would mark an acceptable degree of maturity for somebody who wants to run for the highest office, the rule must be interpreted based on current circumstances, however, having as a guide for reasoning the initial objectives established by the original legislators. It may happen that the consensus on the minimum age for running for President has not changed, but this is only true because of "the current characterization is substantively correct, rather than agreement itself [the legal rule] *constituting* correctness" [52, 140]. Now, let us see the second case.

The Brazilian Civil Code (2002) states in its article 1723: "It is recognized as a family the stable union between a man and a woman, manifest in public continuous, and sustainable living, and established with the goal of constituting a family". Those who stand against gay marriage argue that it falls outside the norm. For them, gender difference between the individuals of a couple would be a *sine qua non*

[10] In this sense, the difference between scientific discovery and "discovery" in moral/legal scope would be merely a question of degree, as Dworkin also maintained: "The difference between natural kinds and political values that I emphasized of course remains after we have noticed these similarities. The deep structure of natural kinds is physical. The deep structure of political values is not physical—it is normative. But just as a scientist can aim, as a distinct kind of project, to reveal the very nature of a tiger or of gold by exposing the basic physical structure of these entities, so a political philosopher can aim to reveal the very nature of freedom by exposing its normative core. The physicist helps us to see the essence of water; the philosopher helps us to see the essence of freedom. The difference between these projects, so grandly described, and more mundane projects—between discovering the essence of water and discovering the temperature at which it freezes, or between the identifying the nature of freedom and deciding whether taxation compromises freedom—is finally only one of degree" [12, 13].

condition for them to constitute a family.[11] Nevertheless, the Brazilian Supreme Court interpreted the concept of "family" comprehensively so as to include gay couples. The decision was justified with reference to a hierarchy of norms: some fundamental rules of the Brazilian Constitution would break down if gay marriages were not allowed.[12]

However, in this case, it cannot be said that the meaning of "marriage" changed or that its reference has been lost. After all, men and women are still getting married and the term is still used to denote the "traditional" practice of two persons making up a family according to the Brazilian Civil Code. It would be more adequate to say that the social practices introduced into the meaning of "marriage" used to agree with the current social demands. Nowadays, the term has acquired new properties since it has broadened its scope of application to social groups which were marginalized previously in history. Thus, "in this matter the laws come to express the ideas of the community and even when written in general terms, in statute or constitution, are molded by for the specific case" [24, 503]. By this means, the incorporation of new criteria regarding the "new" subjects falling under the scope of the law regarding marriage adjusts to the stereotype vector: new practices or characteristics fall under the concept, and this does not mean that we make any different use of this term. Marriage is still being practiced by men and women but is, nowadays, allowed to new groups. So, to determine the correct application of a rule one has

> […] to say that a concepts' conditions of application are context-dependent and in principle revisable: correct application depends on theory and is therefore sensitive to circumstances. To offer a list of conditions of provocation is to claim that this list explains and justifies use of the relevant concept in the central cases (the stereotypes), and thus in the circumstances relevant to those central cases. In the light of different circumstances, the list is liable to be affected, and be substituted by an enhanced by a list that can better account for the original [52, 64].

Every rule introduced into a legal system can be inflated without losing its original reference, such as Putnam's model. The reference of a legal term is fixed by not only by legal conventions but also by social practices. Thus,

> the best explanation, then, of legal practice shows that lawyers treat legal properties as genuine properties over which not only lawyers in general but the original "reference-fixers" (the legislators) may be in substantive error. In terms of intention, legislators (crucially) intend that the *property* a concept stands for, rather than their own attempt at capturing its nature, be respected in

[11] According to Carlos Roberto Gonçalves [17, 544], the gender diversity would be a natural condition. So, he claims that it should be impossible to treat—in the lights of Brazilian civil law—gay couples as married.

[12] The reasoning of the Brazilian Supreme Court judges respected Kelsen's pyramid, i.e. the validity of any legal rule depends from a superior rule. Judge Ayres Britto vote summarizes most of the reasons for the Court's decision. See the Brazilian Supreme Court decision of this case on [9].

the law. The identification of the property is therefore a matter of theory [52, 46].

The ideal legal system is that whose purpose is to describe the world which it intends to legislate. Taking law seriously is—as Dworkin says—to inhibit legal decisions from the individualistic perspective, so as not to legitimize inconsistent legal practices [52, 46].[13]

4 A Convergence Between Hart and Putnam

Given this externalist view of legal terms, I turn now to a possible convergence between Hart and Putnam. My strategy follows these steps: I begin by arguing how Putnam's thought-experiment can be interpreted as a case of comparative law or as an example of easy legal cases. Next, I formulate a reply to Stavropoulos, and claim that Hart's linguistic approach to deal with legal rules is compatible with Putnam's claims in "MoM", and that both authors ground their conclusions concerning rules (legal rules in Hart's case, semantic rules, in Putnam's case) on social practices. Then, I present a possible Hartian's response to the two legal situations mentioned in Sect. 3. And finally, I argue that Hart could accept legal theories as a way of recognizing the law (as well as Putnam has argued we should use our theories to determine the reference of a given word with technical features correctly), and the judicial discretion is only moderate. I argue that the epistemic values mentioned by Putnam might be incorporated into Hart's model.

4.1 Travel to TE as a Case in Comparative Law or as an Easy Case

Stavropoulos has read Putnam as an essentialist. According to this interpretation, what determines the reference of a natural kind (and consequently its meaning) depends on their internal structures essentially. This is an inadequate interpretation of Putnam's semantic externalism. According to him, the internal structures of a natural kind *don't always make part of the meaning of the term which designates a specimen*.[14] Actually, what do determines the extension of things such as "water", "tiger" or "gold", in the accordance with chemistry or biology, entirely depends on the *interests* of those sciences. Additionally, Putnam claims that in order to be considered as a part one terms' extension, *in a linguistic sense*, the scientific determinations *must be incorporated* in the common usage of the language speaker. The fact that a science may alter its internal criteria about the identification of an object doesn't imply that the concept conceived to designate such object has also altered. If we want to discuss about the change of the meaning of a given word, it's necessary to evaluate whether its usage has modified in the community. It can be the

[13] Stavropoulos is not explicit regarding what he means by "theory". He acknowledged that a complete theory of legal interpretation needs to include other topics, such as constitutional interpretation [52, 4]. As I see it, in addition to legal norms, precedents, statutes, and so forth, his view of "theory" includes legal scholarship in a wide sense.

[14] See Putnam [38, 115].

case that a science changes its technical criteria to recognize one object and the usage of the term, coined to designate it, remains the same for the laymen.[15] Therefore, as I read Putnam's externalism, his mentions on essences are then best understood as additional criteria—extracted from our best theory available—to support the ones offered by stereotypes. They might be the decisive ones, insofar they help to decide the proper use and application of a natural kind term in cases where doubts may arise.

Let us think again on the TE expedition. If our astronauts asked TE physicists about what they understand by "electron" and they reply something radically different from what we would be inclined to say, then we could infer that what they mean by this term is not what we mean by it. Consequently, given that our approach to the microscopic world is only indirect (once it depends on what our theories say about it), then we have sufficient reasons to infer, or at least suspect, that $\text{electron}_{\text{E}}$ and $\text{electron}_{\text{TE}}$ are not the same things. If this argument sounds quite plausible (and I think it sounds) and we do not have strong arguments to deny it, then I sustain it's possible to extent this reasoning to legal terms. Please, dear reader, allow me to show you how.

Brazilian jurisprudence does not understand "marriage" in the same way as this term is understood in Saudi Arabian's jurisprudence. It's really reasonable to think that we mean different things, at least *partially*, about what this term denotes in Brazil and in Saudi Arabia.[16] Likewise, Earth and TE are different communities able to fix their own social behavior and scientific patterns in accordance with their own interests. As Wittgenstein has said: "measuring with elastic rulers is no different from measuring by the ell. It makes good sense for a community with concerns different from ours." [61, 91–94]. In this sense, in reading the TE thought-experiment with legal eyes, we might understand it as a fictional example of comparative law: different legal systems which introduce social rules according to their different interests. Another way to understand Putnam's argument, in a legal perspective, might interpret his thought-experiment as an example of an easy legal case.

In "MoM", Putnam excluded XYZ from the extension of "water" based on *our* present scientific consensus about water's current chemical formula. His argument was quite simple: every instance of water contains H_2O molecules. In the case of water_{T}, a necessary condition determined by our scientific pattern to identify water has not been met. Even if most features of water_{E} and water_{TE} are the same (both are liquid, insipid, colorless, etc.), a necessary technical requirement was not satisfied. The same reasoning might be applied to law. For instance, the Argentinian legal

[15] See Putnam [29, 208–209]. Actually, Putnam intended to make explicit which elements would be considered relevant for the composition of the meaning of a term; for instance, what would be guiding the linguist aiming to detail the meaning of a term in a dictionary (see Putnam [47, 272]. For him, the conventions of language are not separated from the world. There is no clear line separating and determining where semantic starts and where it stops. Therefore, it is natural that theoretical specifications be incorporated to the classificatory terms of a language. In the *Oxford Dictionary* [59], the term "gold" presents, as one of the parts of its meaning, its chemical symbol (Au). In addition, in the Portuguese dictionary *Aurélio* [15], the term "water" presents as one of the components of its meaning, its chemical formula (H_2O).

[16] Unlike Saudi Arabia, Brazilian's jurisprudence does not allow polygamy.

criteria for determines "*factoring*" do not match with all Brazilian legal features mean about that term.[17] But what happens on hard cases? For these cases, Putnam's semantic model is inadequate to deal with them.[18]

4.2 Between Criteria and Paradigms: Cluster Concepts and Family Resemblance

The Brazilian legal system determines—through their legislators—the criteria to determine, for example, what is a contract, a marriage, who can be considered as an employee and so forth. One may say that these criteria—when they were introduced—make up the core of the rules which regulate those practices in society. On Putnam's view, those criteria should be understood as minimum necessary properties related to a momentary *body of knowledge*. In the future, with the evolution of society and the necessity to reinterpret or modify legal rules, it is natural to expect that other social practices might be incorporated into the extension of the terms used that make up those rules. It might happen that future paradigmatic practices of, for instance, a contract, do not hold for any of the features of the contracts that were paradigmatic when these rules that govern them were introduced. But these minimum criteria—initially fixed—would not be interpreted by Putnam as intensions which determine the extension of a term. For him, theoretical terms could be conceived as "*cluster concepts*". This idea, first introduced by him in "The analytic and the synthetic", states that theoretical terms are not determined by a narrow set of properties: they are fixed by clusters of laws.[19] An example is that of "kinetic energy":

> […] 'kinetic energy' = 'kinetic' + 'energy' – the kinetic energy of a particle is literally the energy due to its motion. The extension of the term 'kinetic energy' has not changed. If it had, the extension of the term 'energy' would have changed. But the extension of the term 'energy' has not changed. The forms of energy and their behavior are the same as they always were, and they are what physicists talked about before and after Einstein. On the other hand, I want to suggest that the term 'energy' is not one of which it is *happy* to ask, What is its intension? The term 'intension' suggest the idea of a single defining character or a single defining law, and this is not the model on which concepts like energy are to be construed. In the case of a law-cluster term such as "energy", any one law, even a law that was felt to be definitional or stipulative in character, can be abandoned, and we fell that the identity of the concept has, in certain respect, remained [32, 52, 53].

It's possible to give up a few laws which determine a theoretical term such as "kinetic energy" without destroying its identity, as Putnam's suggested with the

[17] See Rogério Castro [7].

[18] Regarding hard cases on law and ethics, Putnam said: "The question of 'hard cases' is really outside of my expertise" [43, 7].

[19] According to Putnam, "the conclusions of 'The analytic and the synthetic' are closely connected with what was later called 'externalism'" [47, 193].

example. As well as it's possible to inflate its properties. However, it's impossible to understand those terms (and its applications) in isolation; theoretical terms in science interact in a web of relations with other laws and principles. It might be possible that a term such as "flogisto", after scientific revolutions, loses its reference. Nevertheless, whether that term in fact has lost its reference will depends on a variety of interconnected relations within that science, *and not because a set of beliefs has changed.*[20] We need to evaluate it case by case. Hence, according to Putnam, the application of a scientific term depends on other terms or laws. Regarding this consideration, a similar reasoning might be extended on legal scenario.

Infra-constitutional norms are directly assessed in accordance with constitutional norms. The norms of the Civil Procedure Code affect other areas of law, such as labor or administrative law, and laws on civil frauds (sometimes) turn on criminal norms. Legal rules are totally tangled.[21] The creation of legal rules needs to fix, initially, the minimum criteria to determine the correct application of that rule. After all, its applicability requires clarity for its implementation in the society. Likewise, Putnam claimed that scientists fix minimum conditions for something to be a photon, although its applicability is holistic, relating to other rules or laws. But where would Hart fit in that story exactly?

Hart's semantics approach is inherently *criteriological* and *paradigmatic*. When a legal rule is introduced, these elements coexist simultaneously; its goal is anchored on a paradigmatic situation which fixes the minimum criteria for rule's properties. However, its *application* is guided by the current paradigm and evaluating the relevant aspects of a given rule comprises with many elements and legal standards.[22] Those criteria fixed previously are necessary for stating a minimum content of a certain rule, rendering an useful feature for drawing a distinction between a rule *x* and a rule *y*, although its application will always face a web of social relations and connected rules. Whereas Putnam's thought about theoretical terms seeing as *clusters concepts*, Hart has conceived their application following Wittgenstein's notion of *family resemblance*. This Wittgensteinian view was presented by him in a famous passage of the *Philosophical Investigations*, which he states:

[20] In explanatory terms, cluster concepts are not thought under necessary and sufficient conditions, but describe objects through a web of laws. As Frederick Suppe says: "The laws constituting the identity of a law-cluster concept determine the extension of the concept, but they overdetermine it in several ways. First, the deletion of any one or a few of the laws does not alter the extension of the concept. Second, the laws do more than merely determine its extension; they also assert various factual connections purportedly holding between falling under the concept and other entities" [56, 74].

[21] There are many examples that could be mentioned in the Brazilian legal system. In labor law, e.g. when there is a case which does not fall under any explicit labor rule (or jurisprudence), rules from the Civil Code can be used (art. 8, Brazilian Labor Code). Another case: art. 200, VIII, of the Brazilian Federal Constitution (1988), states that environmental law can be used to regulate issues pertaining to the living conditions of a laborer. And one could also mention administrative law, which organizes the whole legal system. Hart made his point by saying that, for its application, a rule depends on a series of other connected rules, as can be seen in the following passage: "[…] the reference to duty or its absence is involved in the definition of such other legal concepts as those of a right, power, a legal transaction, or a legal personality" [20, 92].

[22] See Hart [20, 106–107].

> Don't say: "There must be something common, or they would not be called 'games'"– but look and see whether there is anything common to all.—For if you look at them you will not see something that is common to all, but similarities, relationships, and a whole series of them at that. To repeat: don't think, but look! —Look for example at board-games, with their multifarious relationships. Now pass to card-games; here you find many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ballgames, much that is common is retained, but much is lost. […] And we can go through the many, many other groups of games in the same way; can see how similarities crop up and disappear [60, 31e].

When we are pointing it out the features of instances which belong to a given kind, it is always possible to point out some differences among them. It is difficult to outline which properties belong to *all* instances. For instance, in the case of "vehicle", many similarities might be established between cars, golf-cars or airplanes (they have wheels, are used to transport and so forth). Nevertheless, it is not possible to state that there is a *single feature shared by all instances* that belong to the extension of "vehicle". It will always be possible to find features in *A* which will be not shared by *B*, in the same way that it is not possible to pinpoint all fundamental features shared by water_{E} and water_{TE} instances. Therefore,

> […] given that law aims at regulating certain categories which pertain to our common life, it is inevitable that rules use the common sense categories as "parks", "vehicles", "person" etc. [And] general legal terms refer to categories that are not defined by a set of necessary and sufficient properties which determine its application, these categories are imprecise and show stereotyped features. In sum, legal categories include cases that are connected by family resemblance [55, 83].

The internal functioning of a legal system has rules whose application depend on other rules. Additionally, those applications are not solely established by the superior status of the Constitution, but also by the interpolation among many areas within of the legal system that are inherent interwoven. Consequently, this way of dealing with legal rules draws on law as a whole.[23]

4.3 Practice as a Necessary Condition to Talk About Rules

It is a recurrent issue on Wittgenstein's later philosophy his derivative approach concerning the nature of linguistic rules. According to him, "the origin and the primitive form of the language is a reaction. […] Language—I want to say—is a refinement. 'In the beginning was the deed'" [62, 395]. Every established social rule (legal or linguistic ones) was preceded by a social practice in any community; the explanation of a given rule derives from a certain practice. If we want to understand the content of that rule, we have to focus our attention to its main cause: the

[23] If the reader wants to go deeper on the inherent connection between cluster concepts and family resemblance, see Khatchadourian [22]. And for their intrinsic connections and applications to deal with legal terms, see Payne [28].

practice.[24] This derivative aspect emphasized by Wittgenstein to explain rules is the common point between Hart and Putnam. Whether for Hart or Putnam, for both of them, the starting point to explain legal or linguistic rules is the same: action.

Hart sustains that legal rules are composed by two basic elements: (a) one empirical and other (b) normative. The empirical element concerns a standard behavior which is systematically practiced by people in a society. This is a necessary condition, but it is not a sufficient one. After all, there are many kinds of behaviors systematically practiced by people which we do not treat as "rules" as, for example, going to church on Sundays. The element that completes the Hartian view on "rule" is normative: some behaviors, practiced constantly and interpret as general, are criticized by the large group of society which also accept the social rules.[25] Let me give a simple example to illustrate Hart's intentions.

Few years ago, a Brazilian law was created to inhibit the consumption of cigarettes inside public bars and restaurants. Before the creation of this norm, many people used to smoke in public places. However, after some time, a considerable group of people have started to criticize this habit. The reflexive attitude from people who support legal conventions tends to be a preference for a behavior standard which saw as a bad habit to smoke in bars and restaurants. In this case, the rule content intends to inhibit this habit. The practice of smoking in public places justifies the creation of this rule. There is a *causal* link between the justified element derived from a paradigmatic case and the justification of an introduced rule. For Hart, there's no legal rule if there's no practice which corresponds itself. And the Putnam's strategy to explain the origins of linguistic rules is quite similar.[26]

According to Putnam, there is a social practice which anticipates creation and consolidation of semantic rules. For instance, if children learn to use "chair" based on instances of *this* piece of furniture that we use to seat, made of wood etc. and how adults currently apply the term, something quite similar might happen with a theoretical term:

> […] suppose I were standing next to Ben Franklin as he performed his famous experiment. Suppose told me that "electricity" is a physical quantity which behaves in certain respects like a liquid (if he were a mathematician he might say "obeys an equation of continuity"); that it collects in clouds, and then, when a critical point of some kind is reached, a large quantity flows from the cloud to the earth in the form of a lightning-bolt; that it runs along (or perhaps "through") his metal kite string; etc. He would have given me an approximately correct definite description of a physical magnitude. I could now use the term "electricity" myself [34, 200].

In this brief history told by Putnam, Ben Franklin would have then fixed the criteria for the laymen to use "electricity". There's a previous practice before naming

[24] He claimed that "to obey a rule, to make a report, to give an order, to play a game of chess, are *customs* (uses, institutions)" [60, 81e].

[25] This is what Hart called by "internal aspect of rules". See Hart [56, 21].

[26] In a reply to Gary Ebbs, Putnam stated that his realism proposed in "MoM" refers, mainly, to linguistic social practices. See Putnam [39, 349].

"electron". Some of the general conclusions extracted from the experiment by Franklin would fill up the core of the content of that term. By this means, Franklin, as an expert, has fixed what would be the right way to use the term and, dependent upon the degree of efficacy and the amplitude of the usage of this term in current corresponding situations by the individuals of a community, we are able to speak about an historical chain of speech-acts behind its meaning. In the case of "electricity", we delegate to specialists the habilitation to determine its technical identity. We do not acquire the means to recognize all objects which surround us, unless we turn to experts. Our beliefs about electrons or photons are only true if they fit in the current physical theory. If they are false, we are refuted based on this theory (or theories). Somehow, our *rationality* was shaped by a given social structure which conditioned us to delegate to a special class of speakers the faculty to distinguish e.g. between elms and beeches.

To talk about "language rules" is necessary to weigh language cognition conditions. We cannot disregard previously existent institutions and social practices which affect language itself and evaluate how it is possible to make judgements about the environment which surrounds us. A theory of meaning is connected to epistemology and the truth value of empirical statements depends on objects themselves and other people (including experts). Regarding the meaning of a physical term like "temperature", if technical statements does not fit onto use and applications made by ordinary people, we would say, on Putnam's view, that there is no semantic divergence between experts and the people. In this case, what occurs is that theoretical postulates would not be incorporate to the meaning of the term; technical stipulations were not used by laymen.[27] Thus, to talk about "meaning" requires, in the first place, the evaluation of the linguistic habits and practices spread in a community. If there is no linguistic practice concerning what is understood by "electricity" or "temperature", we are not able to treat those terms as "rules", on Putnam view. Therefore, Hart and Putnam methodological strategy to talk about rules is equivalent. For them, if there is no social practice established, we are not able to talk about "rules", whether on law, whether on language. Uses, costumes and social practices are the main factor to talk about rules.

4.4 Conventionalism, Eligibility Conditions to Dispute the Presidency and Gay Marriage: Hart's Possible Responses

As Stavropoulos has stated, the Hartian semantic approach—called by the criterial model—is committed with a conventionalist perspective, because of his way to deal with legal standards takes the following form basically: either the factual case fits into the properties fixed by the legal rule, or it becomes indeterminate. Hartian legal rules themselves would determine the truth value of a proposition which contains a legal term or the criterion for the application of a legal rule should be reduced to what was conceived by that legal standard. Let's look at an example. According to the article 3° of the Brazilian labor law (5452/43), it is considered as an employee "any person who provides services of a non-contingent nature to an employer, under

[27] See Putnam [38, 115].

his or her dependency for salary". Therefore, a proposition *Y* which states that "*x* is considered to be an employee" is true *if and only if x* renders usual services (property "a") to a particular employer ("b" property) and receives wages as a form of payment (property "c"). That is, *x* must have the properties "a", "b" and "c" in order to be considered as an employee. But this is not the way that Hart really thought about how to deal with legal rules.

Firstly, Hart's legal standards are simply initial guides that help in the elucidation of legal cases. However, they are not the defining criterion for the resolution of a particular case. Obviously, legal rules are crucial elements of the legal reasoning, but they are not the unique parameters taken into account for the solution of a concrete case. Each legal system has its sources, general principles and so forth. In order to clarify the reason why Hart cannot be embedded as a conventionalist in its strong sense, let us come back to two examples taken from the Brazilian legal system, already mentioned in Sect. 3. The first case deals with a clear rule (the minimum of age for running for presidency), and the judge would ban any attending candidate who not fit the requirement, according to Stavropoulos's interpretation. After all, there's no semantic indeterminacy considering the numbers.

Nevertheless, Hart would consider as naïve such an overestimation of the efficacy of language in dealing with legal problems. The resolution of legal cases, even those where there's a semantic agreement over the term in question "would be an oversimplification" [20, 106]. Legal rules are social constructions, built over social facts (and *not necessarily* contaminated by moral values), and are *retroactive* in relation to them. The application of the rules depends on their *empirical* correspondence. In our example, the judge might make appeal to the intentions of the law—searching for its content—contrasting with the current paradigm. There is an open dimension concerning the *proposals* of a law which Hart insisted on observing.

Therefore, the judge, considering the current scenario and following Hart's proposals, can abstain from applying the constitutional protocol. If the up-to-date rule doesn't agree anymore with the content he tried to prescribe (in this case, the minimum of age), then he is allowed not to apply this rule. By doing so, the magistrate following Hart's proposal would come to the same conclusions as the judge guided by Stavropoulos prescriptions. If the current paradigm shows a drastic change where the prediction radically differs from reality, it is a duty of the judge to search for the best answer according to the current paradigm. The *paradigm* is the cornerstone here. Let us look now to the second case, regarding gay marriage.

If Hart's model would count only on semantics to solve legal problems, its proposal would be doomed, since it's hard to say that, in current ordinary language, the concepts of "man" and "woman" have considerably changed. However, there are *moral reasons* to claim why the article 1723 should be differently interpreted or maybe even disregarded as it was. In this case, to apply the rule blindly would bring serious moral consequences. Actually, the application of this law contradicts one of the most fundamental principles of the Brazilian Republic, namely, the fight against any form of discrimination (enacted on the 3rd article of the current constitution). Restricting marriage only to heterosexual couples would imply that homosexuals would be citizens of a lower degree. Therefore, when this kind of conflict between

legality and equality is at stake, the judge might ask himself: "Should this law be obeyed?" [20, 75]. For Hart, a magistrate is allowed to not apply a rule even when its application is crystal clear. Existence and validity of a rule is one thing; its application (which depends on the rule's *merits*) is another. No one denies that legal rules are conventions, in a sense that it's necessary a minimum agreement by legislators to determine what "marriage" or "contract" are. Notwithstanding, the application of these rules isn't solely determined by language; it depends on many other features which surround legal reasoning.[28] Furthermore, there's another reason to state that Hart's philosophy was not perpetrated with a conventionalism at all.

Historically, conventionalism was the doctrine that held that some general principles of a science, or its most basic standards, were agreed upon, so they are not discovered. Conventionalism did not support the idea that the truth could be stipulated, but rather that stipulations are often confused with truths.[29] The concept of truth and its debate was *on the core of that doctrine*. In legal science, on the other hand, its standards are drawn up by men and women based on the circumstantial interests in question. The pursuit of truth is not the main goal that law wants to achieve it; legal standards are conceived to solve legal problems. When a rule is created, this "convention" is far from being the criterion for solving a case. And if we take a look to Hart's writings, there's nothing that we can identify that he was committed with any theory or conception of truth in a strong sense.

In conclusion, the Supreme Court decision which allows gay marriage was based on a positivistic framework. After all, the hierarchy of norms was used to justify the decision and it was alleged the existence of a discrepancy between the application of that norm and its own merits. The arguments carried out by the magistrates followed the rules syntax as well as the principles established on the Brazilian constitution. The reasoning behind it was essentially juridical one. Therefore, the externalist adaptation to law does not seem to be superior to Hart's model. In both cases, both approaches guide us into the same conclusions and it denounces that the Stavropoulos' interpretation that Hart's philosophy was committed with conventionalism is unfair.

4.5 Hart's Positivism and Legal Scholarship Inclusion

Let me call reader's attention briefly to a famous Dworkian criticism to Hartian model of rules. This consideration is extremely important to understand why Stavropoulos interpreted the semantic externalism as a conception able to be brought closer to Dworkin's legal philosophy.

Dworkin interpreted that Hart's positivism had consisted—among other things—in a connection of rules of the form "take it or leave it". That is, legal facts would

[28] I read Hart semantics approach in modest way. In my view, his mentions on tools from philosophy of language are better understood as a diagnosis about legal problems that lawyers and judges have to deal with in their routines. If a rule is established beforehand, it can, when contrasted with a concrete case, contain similarities, but not always all the conditions fixed by the rule, as it occurs in language. For a modest view about Hartian linguistic intentions, see Endicott [14].

[29] See Ben-Menahem [2].

be confronted with the respective legal predictions to be understood in the legal practice, as shared conventions: either the concrete case fulfills the requirements of the established rule or the case becomes a hard case, and the judge is allowed to apply his interpretation. Contrary to this perspective, Dworkin claimed that a legal system is not only composed by rules, but also by principles. For him, this division would be necessary since principles and rules have different aspects (in a logical sense). While rules would be standard definitions, the principles would be more flexible, not being able to show any pre-fixed criteria of their application. Therefore, the idea of recognizing law based on a rule of recognition would not actually describe what law is. After all, in absence of rules, the judges make reference to principles that, according to Dworkin, could not be registered or compiled under the form of rules.

Nonetheless, Hart's rule of recognition is not a compilation of rigid/fixed criteria used with the intention to recognize law.[30] That rule was not conceived under necessary and sufficient conditions and it's not static; it's as customary rule shared by legal authorities. Judges might inflate the criteria to recognize the law and fix, as an element to justify the identification of a legal rule, legal scholarship. They can, depending on the case, include moral principles in order to recognize law.[31] This is not forbidden by Hart's philosophy. What he criticizes is that the connection between law and morals as a *necessary one*. If judges use legal theories to justify their decisions and this practice starts being common on courts—in cases where there is no rule or jurisprudence—or using legal scholarship as an additional feature to recognize law, then this practice will be understood as a criterion to recognize the law (although legal scholarship, jurisprudence or legal rules do not determine how a judge has to decide).[32]

Hence, Hart might have accepted legal scholarship materials to solve legal problems. In his legal model, there are no meta-criteria or any algorithm to decide a case. Among his writings, it's not possible to recognize a general theory about legal decision. We could only sketch what would be the aspects he would be prompted to accept as generic elements able to guide the judge's decision. Maybe Hart might accept a pragmatic criterion for legal decisions: the best way to solve legal disputes directly depends on the nature of each dispute and the amount of legal material available to solve the case. Thus, in this case, Stavropoulos and Hart can reach into the same conclusions. Additionally, by "theory", if we mean it in a broad way as the application of the best theories which correspond to those practices on a community, then maybe Stavropoulos and Hart could shake their hands. After all, Hart strongly sustained that

> […] law and adjudication are political. In a different way, so is legal theory. There can be no "pure" theory of law: a jurisprudence built only using concepts drawn from the law itself is inadequate to understand law's nature; it

[30] See Leiter [23] and Lyons [25].

[31] See Hart [21, 204].

[32] Considering the use legal scholarship on many different legal system and its convergence with Hart's model, see Shecaira [51]. And regarding a work of comparative law that exposes the exhaustive usage of legal scholarship in USA, France and England, see Duxbury [10].

needs the help of resources from social theory and philosophic inquiry [18, xv].

In terms of explanation, to state that we might talk about the existence of contracts or homicides as well as we did with chairs or electrons, and sustain that every legal object has a hard core (or "essence") which has to be brought out through theoretical paradigm, then this is not a reason to reject legal positivism.

To sum up, as I read this debate, the real difference between Stavropoulos and Hart is the following: if we accept Stavropoulos proposal, we would transform all legal cases in hard cases, since that judge should find for legal essences in accordance with legal or moral theories. This perspective does not provide an accurate image of the law, since it disregards several clear cases decided by the judges in the most majority of cases.[33] After all, what would be the real essence of "contract", "robbery" or "acquisitive prescription"? Of course, some legal issues are philosophical, and moral issues are frequently discussed on a legal arena. However, a significant part of legal system does not operate like this. Even if we accept Stavropoulos' externalist interpretation of law, some cases would still have been decided by mere syllogism, others would be decided by precedents. And a few cases, because of their complexity involving constitutional issues, would be involved by important political and moral debates requiring, to their own solution, sociological/philosophical theories for reach the best decision.[34]

4.6 Discretion and Values

Let me explore briefly two Dworkian's classical remarks on Hart discretion thesis. The first one refers to its origins. Dworkin claims that "the concept of discretion was lift by positivists from ordinary language" [11, 31]. He also states that "positivists, at least sometimes, take their doctrine […] in the strong sense of discretion" [11, 34].

Regarding the first issue, language is *one* element of vagueness. Notwithstanding, this is only true because of our relationship with objects, the environment as a whole and our moral judgements are mediate by the language. The application of any classificatory term (standard of behavior, jurisprudence or legal rules) are sometimes faced with obscure circumstances which do not offers, *prima facie*, easy or indubitable answers. Whatever concerns law, its vagueness runs through two routes: on the one hand, as a product of limitations of language itself. On the other hand, as a product of our inability to predict human action, which imply that some legislation or jurisprudence, once applied in the past, in another context, turns out to be useless. The linguistic open texture and juridical open texture walk together; we can't split them.

[33] As it was said by Frederick Schauer: "[…] focus on the hard appellate case would seem odd, and indeed distorting, much like description of human nature that we might get from a homicide detective, or a description of the game of bride that thought it centrally important to explain what happens when someone is dealt the wrong number of cards" [49, 851].

[34] See Waluchow [58, 231].

Considering the other criticism, the consent of discretion to judges isn't a permission to they impose their own commitments. Hart denies this by comparing law with a scorer game. In a basketball game, the referees' decisions are definitive. Nevertheless, to assume that their decisions are absolute would deprive the game itself. After all, the referee who said that a ball which does not enter in the basket scored a point would be wrong. The same reasoning can be replicated on law. In many cases, there are clear conditions to state that a decision is wrong.

The clear cases bring out that law is not a mere game of choice. Nonetheless, in cases where discretion is inevitable, this permission is restrained. I agree with Scott Shapiro when he said that "the task of legal interpreter […] is to impute to legal practice the political objectives that the current designers of the legal system sought to achieve. The purpose […] are those that explain, rather than justify, the current practice" [50, 44]. Therefore, even when a judge has to decide issues which present semantic or legal open texture, he/she cannot justify his/her decision based on divine law or on class struggle. The limits of discretion are restrained by legal standards established on the Constitution: the discretion is primary a *negative thesis*. Conversely, the democratic ideal would fail, leading us down to a technocracy or a bureaucratic dictatorship where only the experts (the judges) would be right. Thus, the best way to understand the discretion thesis is figuring it out as an opposite to Dworkian's thesis which states that every legal or moral dispute has one single right answer:

> Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer. At this point judges may again make a choice which is neither arbitrary nor mechanical; and here often display characteristic judicial virtues, the special appropriateness of which to legal decision explains why some feel reluctant to call such judicial activity "legislative". These virtues are: impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision. No doubt because a plurality of such principles is always possible it cannot be *demonstrated* that a decision is uniquely correct: but it may be made acceptable as the reasoned product of informed impartial choice. In all this we have the "weighing" and "balancing" characteristic of the effort to do justice between competing interests [21, 204–205].

Legal decisions should be constrained by values and principles settled on the Constitution and its intentional—or accidental—deviation would renders legal practice inconsistent, as Stavropoulos alerted. If a Brazilian judge explains his/her decision based on Marxian historical materialism or on Anarchism, he or she would misguide the Brazilian Federal Constitution (1988), rendering the decision valueless. Thus, in this sense, Hart's positivism might be interpreted as an anti-individualistic perspective. Legal virtues as impartiality and neutrality must guide

legal decisions, virtues in which, in my view, would incorporate epistemic values required by Putnam to achieve an objective evaluation of value statements.

In *Ethics without ontology* [45], Putnam rejects the logical positivist thesis which claims that ethical or metaphysical statements are meaningless. For him, positivistic view derives from a strong interpretation of Humean division on analytic/synthetic statements [44, 20–21]. According to logical positivists, the application of terms which design observational objects such as e.g. "chair" might be reduce to set of beliefs catch by sense data. On the other hand, terms like "electron" have their applications entirely dependently on theoretical postulates on physics. But let me show another example. Let us think that the historian Jacques Le Goff, among his researchers about medieval age, had read the word "cruel", wrote by others historians from that period. Let us say that this term had referred to Vlad Tepes, the Impaler, whom was Wallachia Prince per three times on XV century and impaled his enemies. In this case, what are the internal postulates on history (if we see its discipline as a science) which denote to "cruel"? For Putnam,

> The statement that "Vlad the Impaler was an exceptionally cruel monarch", or the statement that "The cruelties of the regime provoked a number of rebellions", statements one can imagine encountering in a work of history, *are* descriptions; they are descriptions of, respectively, Vlad the Impaler and the causes of certain historical events, certain rebellions. (They are not, of course, descriptions of Plato's "Forms") But "Terrorism is criminal" and "Wife-beating is wrong" aren't descriptions; they are simply evaluating that convey moral condemnation [45, 73].

Putnam intends to demonstrate that the difference between facts and values is more tenuous than what was thought by logical positivists. For him, logical positivists have "failed to appreciate the ways in which factual description and valuation can and must be *entangled*" [44, 27]. After all, there are values spread on science which govern scientific practice such as "coherence, simplicity and plausibility" [45, 67] and there is no plausible reason to disregard these epistemic values elements to solve ethical or legal problems.

Bringing this discussion into the legal scenario, if these values are not presupposed on Hart's model, they could be incorporated easily. By "coherence", it might be understood as an epistemic prescription to judges—and other legal professionals—to elaborate a tiny system of propositions with its legal rules manipulated in a manner such as, once dealing with a case, they formulate a coherent micro-system of propositions where no contradictions can be derived. This tiny system must be in accordance with the political/moral principles of the legal system as a whole. The "simplicity" would appear on clear cases; not all legal cases are police romance. In many cases, a simple syllogism is enough to solve the dispute. Finally, regarding the plausibility, understand it as "whatever that is reasonable to decide in certain context", would appear in hard cases. For these cases, "weighting" and "balancing" means a prescription to reach for the best solution among the plurality of possibilities, and it is even possible to assume that could exist more than only one. Thus, we can get solutions on morals or in the legal

field assuming that they might be "more or less *warranted* without being *absolute*" [45, 129]. After all, we are men, not Gods.

5 Conclusion

In this paper, I have argued that Hart's explanation of the legal structure, as well as his means to treat legal rules and Putnam's semantic model to describe the workings of the language and our ways to make judgments about the environment, can be brought together. They take the same point of departure to explain their objects: in order to speak either about the legal rules or the language rules, the practice of the individuals living in society is a necessary condition to speak about rules in the first place. There's also a methodological similarity which regards not only this departure point but also the arrival point. Regarding the "arrival point" (how to interpret the rules' application) both approaches deny the treatment of classificatory terms as definitions. The application involves other elements (and rules), and cannot be reduced to a mechanical or deductive reasoning. The very epistemic values/principles used by Putnam to evaluate value judgments are possible to be incorporated to Hart's perspective. Someone might argue that it's not possible to deal with terms such as "contract" or "robbery" in the same way of "electron" or water", as Stravopoulos tried to deal with. I only focus on Putnam's intentions when he conceived his externalism and argue that there are evidences, which support that the best way to understand his thought and replicate into legal grounds can reinforce legal positivism in a wide sense. I didn't compare legal terms with physical terms: I just state that Putnam's way to think on theoretical terms was not quite different in the way we use to think about legal standards.

To sum up, two points were established: how could it be possible to fit the externalist approach into the legal framework and how its correct interpretation is very close to Hart's model, without presenting itself as superior to positivism. Putnam never intends to systematize a semantic for law in particular. Nevertheless, whether what I have sustained in this paper is correct, then it would be possible to assume that Putnam's view may be applies to Law, reinforcing the Hartian approach to the legal field.

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References

1. Arabatzis, Theodore. 2006. *Representing electrons: A biographical approach to theoretical entities*. London: University of Chicago Press.
2. Ben-Menahem, Yemima. 2006. *Conventionalism*. New York: Cambridge University Press.
3. Ben-Menahem, Hanina, and Yemima Ben-Menahem. 1999. Law and science–reflections. *Science in Context* 12: 227–243.
4. Bird, Alexander. 2011. Thomas Kuhn. *The Stanford Encyclopedia of Philosophy*. http://plato.stanford.edu/entries/thomas-kuhn/. Accessed 6 Jan 2015.

5. Bix, Brian. 1993. *Law, language and legal determinacy*. New York: Oxford University Press.
6. Carnap, Rudolph. 1947. *Meaning and necessity: A study in semantics and modal logic*. Chicago: Chicago University Press.
7. Castro, Rogério. 2009. *Factoring no Brasil e na Argentina: análise histórica, estrutural e funcional, estudo de direito comparado e Convenção de Ottawa do Unidroit*. Curitiba: Juruá.
8. Cumming, Sam. Names. 2013. *The Stanford Encyclopedia of Philosophy*. http://plato.stanford.edu/entries/names/. Accessed 10 Oct 2015.
9. Distrito Federal, Supremo Tribunal Federal (Tribunal Pleno). Ação Direta de Inconstitucionalidade 4277/DF. Autor: Procuradoria Geral da República. Relator: Min. Carlos Ayres Britto, Brasília, 14 out. 2011. http://www.stf.jus.br/arquivo/cms/noticianoticiastf/anexo/adi4277.pdf. Accessed 2 Jan 2016.
10. Duxbury, Neil. 2001. *Jurists and judges: An essay on influence*. Oxford: Hart Publishing.
11. Dworkin, Ronald. 1977. *Taking rights seriously*. Cambridge: Harvard University Press.
12. Dworkin, Ronald. 2006. *Justice in robes*. London: Harvard University Press.
13. Ellis, Brian. 2008. Essentialism and natural kinds. In *The Routledge Companion to Philosophy of Science*, ed. Martin Curd and Stathis Psillos, 139–148. New York: Routledge.
14. Endicott, Timothy. 2001. Herbert Hart and the semantic sting. In *Hart's postscript: Essays on the Postscript to The Concept of Law*, ed. Jules Coleman, 39–58. New York: Oxford University Press.
15. Ferreira, Aurélio. 2010. *Mini Aurélio: o dicionário da língua portuguesa, 8ª Edição*. Curitiba: Positivo.
16. Floyd, Juliet. 2005. Putnam's 'The meaning of "meaning"': Externalism in historical context. In *Hilary Putnam*, ed. Yemima Ben-Menahem, 17–52. New York: Cambridge University Press.
17. Gonçalves, Carlos. 2005. *Direito civil brasileiro: direito de família*. São Paulo: Saraiva.
18. Green, Leslie. 2012. Introduction. In *The concept of law*, 3rd ed, ed. Herbert Hart, xv–lv. New York: Clarendon Press.
19. Hacking, Ian. 2007. Putnam's theory of natural kinds and their names is not the same as Kripke's. *Principia* 11: 1–24.
20. Hart, Herbert. 1983. *Essays in jurisprudence and philosophy*. New York: Clarendon Press.
21. Hart, Herbert. 1994. *The concept of law*, 2nd ed. New York: Clarendon Press.
22. Khatchadourian, Haig. 2007. *Meaning & criteria: With to various philosophical problems*. New York: Peter Lang.
23. Leiter, Brian. 2003. Beyond the Hart/Dworkin debate: The methodology problem in jurisprudence. *American Journal of Jurisprudence* 48: 17–51.
24. Levi, Edward. 1948. An introduction to legal reasoning. *The University of Chicago Law Review* 15: 501–574.
25. Lyons, David. 1977. Principles, positivism, and Legal Theory. *The Yale Law Journal* 87: 415–435.
26. Oberheim, Eric, and Hoyningen-Huene, Paul. 2013. The incommensurability of scientific theories. *The Stanford Encyclopedia of Philosophy*. http://plato.stanford.edu/entries/incommensurability/. Accessed 8 Jan 2015.
27. Patterson, Dennis. 2006. Dworkin on semantics of legal and political concepts. *Oxford Journal of Legal Studies* 26: 545–557.
28. Payne, Michael. 1976. Hart's concept of a legal system. *William and Mary Law Review* 18: 287–319.
29. Putnam, Hilary. ed. 1975a. Memo on 'conventionalism'. In *Mathematics, matter and method: Philosophical papers*, vol. 1, 206–214. New York: Cambridge University Press.
30. Putnam, Hilary. ed. 1975b. What theories are not. In *Mathematics, matter and method: Philosophical papers*, vol. 1, 215–227. New York: Cambridge University Press.
31. Putnam, Hilary. ed. 1975c. It ain't necessarily so. In *Mathematics, matter and method: Philosophical papers*, vol. 1, 237–249. Cambridge: Cambridge University Press.
32. Putnam, Hilary. ed. 1975d. The analytic and the synthetic. In *Mind, language and reality: Philosophical papers*, vol. 2, 33–69. Cambridge: Cambridge University Press.
33. Putnam, Hilary. ed. 1975e. Is semantics possible? In *Mind, language and reality: Philosophical papers*, vol. 2, 139–152. Cambridge: Cambridge University Press.
34. Putnam, Hilary. ed. 1975f. Explanation and reference. In *Mind, language and reality: Philosophical papers*, vol. 2, 196–214. Cambridge: Cambridge University Press.
35. Putnam, Hilary. ed. 1975g. The meaning of 'meaning'. In *Mind, language and reality: Philosophical papers*, vol. 2, 215–271. Cambridge: Cambridge University Press.
36. Putnam, Hilary. ed. 1975h. Language and reality. In *Mind, language and reality: Philosophical papers*, vol. 2, 272–290. Cambridge: Cambridge University Press.

37. Putnam, Hilary. ed. 1975i. Dreaming and 'depth grammar'. In *Mind, language and reality: Philosophical papers*, vol. 2, 304–324. Cambridge: Cambridge University Press.
38. Putnam, Hilary. ed. 1978. Reference and understanding. In *Meaning and the moral sciences*, 97–122. London: Routledge.
39. Putnam, Hilary. 1992. Reply to Gary Ebbs. In *The Philosophy of Hilary Putnam*, ed. Christopher Hill, 347–358. Fayetteville: University of Arakansas Press.
40. Putnam, Hilary. 1992. *Renewing philosophy*. Cambridge: Harvard University Press.
41. Putnam, Hilary. 1992. Truth, activation vectors and possession conditions for concepts. *Philosophy and Phenomenological Research* 52: 431–447.
42. Putnam, Hilary. 1994. Rethinking mathematical philosophy. In *Words and life*, 245–263. Cambridge: Harvard University Press.
43. Putnam, Hilary. 1995. Are moral and legal values discovered? *Legal Theory* 1: 5–19.
44. Putnam, Hilary. 2002. *The collapse of the fact/value dichotomy*. Cambridge: Harvard University Press.
45. Putnam, Hilary. 2004. *Ethics without ontology*. Cambridge: Harvard University Press.
46. Putnam, Hilary. 2013. Comments on Tyler Burge's "Some remarks on externalisms". In *Reading Putnam*, ed. Maria Bagharamian, 272–274. New York: Routledge.
47. Putnam, Hilary. 2013. The development of externalist semantics. *Theoria* 79: 192–203.
48. Reimer, Marga and Michaelson, Eliot. 2014. Reference. *The Stanford Encyclopedia of Philosophy*. http://plato.stanford.edu/entries/reference/. Accessed 5 July 2014.
49. Schauer, Frederick. 1987. The jurisprudence of reasons. *Michigan Law Review* 85: 847–870.
50. Shapiro, Scott. 2007. The Hart-Dworkin debate: A short guide for the perplexed. *Public law and legal theory working papers, no.* 77.
51. Shecaira, Fábio. 2013. *Legal scholarship as a source of law*. New York: Springer.
52. Stavropoulos, Nicos. 1996. *Objectivity in law*. New York: Oxford University Press.
53. Stoney, George. 1881–1883. On the physical units of nature. *Scientific Proceedings of the Royal Dublin Society* 3: 51–60.
54. Stoney, George. 1888–1892. On the cause of the double lines and of equidistant satellites in the spectra of gases. *Scientific Transactions of the Royal Dublin Society* 4: 563–608.
55. Struchiner, Noel. 2002. *Direito e linguagem: uma análise da textura aberta da linguagem e sua aplicação ao direito*. Rio de Janeiro: Renovar.
56. Suppe, Frederick. 1974. *The structure of scientific theories*. Chicago: University of Illinois Press.
57. Tahko, Tuomas. 2015. Natural kind essentialism revisited. *Mind* 124: 795–822.
58. Waluchow, Will. 1994. *Inclusive legal positivism*. New York: Clarendon Press.
59. Wehmeier, Sally. 2000. *Oxford advanced learner's dictionary*. 6th ed. New York: Oxford University Press.
60. Wittgenstein, Ludwig. 1958. *Philosophical investigations*. Oxford: Blackwell Publishers.
61. Wittgenstein, Ludwig. 1978. *Remarks on the foundations of mathematics*. Oxford: Blackwell.
62. Wittgenstein, Ludwig. 1993. Cause and effect: Intuitive awareness. In *Philosophical occasions*, ed. Ludwig Wittgenstein, 1912–1951. Indianapolis: Hackett Publishing Company.