

# On the Role of Prototypes in Appellate Legal Argument (Abstract)

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## 1 Introduction

Although most of the work on Artificial Intelligence and Law today is oriented towards the development of practical systems, there is a small group of researchers who are primarily interested in theoretical questions: How much of legal reasoning can be reduced to reasoning with rules? Is this rule-based component significant, or trivial? How is it possible to reason with cases at all? Are legal concepts just like ordinary common sense concepts, or do they have special characteristics? Is it possible to develop a computational theory of legal argument? The researchers who have investigated these questions include: Anne Gardner [11]; Edwina Rissland and her students, Kevin Ashley [38, 1] and David Skalak [39, 41]; Michael Dyer and his student, Seth Goldman [12]; Karl Branting [5]; and Keith Bellairs [2]. In addition, researchers such as Richard Susskind [45] and J.C. Smith [43], who have primarily built practical systems, have also been deeply concerned with the jurisprudential foundations of the field.

In this paper, I will describe my work on the *TAXMAN* Project, which for many years has pursued the goal of a computational theory of legal argument. More specifically, I am interested in *appellate* legal argument, rather than argument at trial, and I am trying to understand the role of *prototypical reasoning* in this process.

Prototypes are ubiquitous in legal argument, as many researchers have noted [37]: They appear as actual decided cases, which serve as precedents, and they appear as hypothetical cases, which serve to expose anomalies in an adversary's position. But what *theory* of legal argument would justify this prominent role for prototypical reasoning? Why, for example, does the citation of a hypothetical case have such a powerful effect?

In Section 2, below, I will discuss my early work with Sridharan on the *TAXMAN* Project, in which we attempted to answer some of these questions, and I will point out the difficulties we encountered. In Section 3, I will explain how my current research is intended to remedy these deficiencies. In Section 4, I will compare my approach to related work in the field.

## 2 Early Research on TAXMAN

Almost ten years ago, Sridharan and I proposed a theory of legal reasoning in hard cases [23, 32, 33]. We began by emphasizing the following three points, which should be familiar to most lawyers:

1. Legal concepts cannot be adequately represented by definitions that state necessary and sufficient conditions. Instead, legal concepts are incurably "open-textured".
2. Legal rules are not static, but dynamic. As they are applied to new situations, they are constantly modified to "fit" the new "facts". Thus the important process in legal reasoning is not theory application, but theory construction.

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3. In this process of theory construction, there is no single “right answer”. However, there are plausible arguments, of varying degrees of persuasiveness, for each alternative version of the rule in each new factual situation.

The first of these points has been thoroughly discussed by Anne Gardner [11], and seems to be generally accepted by researchers in AI and Law. The second point is less common, but it is related to the constructive approach to legal decisions proposed by Herbert Fiedler [10] and Tom Gordon [13], and to the rule-based representation of open-texture in law proposed by Trevor Bench-Capon and Marek Sergot [3]. The third point, of course, has been thoroughly debated by legal philosophers for many years as part of the response to Ronald Dworkin’s thesis [9]. Sridharan and I adopted this third point primarily as a methodological guideline: Since lawyers are more likely to agree on what counts as a plausible argument in a case than to agree on the appropriate outcome, we decided that it would be more fruitful to develop a theory of legal argument than to develop a theory of correct legal decisions.

This was the framework in which we worked. The specific theory we proposed was based on a representation of legal concepts by means of *prototypes and deformations*. Legal concepts have three components, we suggested: (1) an (optional) invariant component providing necessary conditions; (2) a set of exemplars providing sufficient conditions; and (3) a set of transformations that express various relationships among the exemplars. These three components are then refined further, for most concepts, so that one or more of the exemplars is designated as a prototype and the remaining exemplars are represented by a set of transformations, or deformations, of the prototypes. In this model, the transformations induce a partial order on the set of exemplars corresponding to the typicality gradient observed by psychologists in the study of human categorization [40, 42], and the application of a concept to a new factual situation automatically modifies the definition of the concept itself, as required by Levi’s classical account of legal reasoning [18]. This was our response to the first two points noted above. In addition, in response to the third point, we were able to show that the arguments of lawyers and judges in a series of early corporate tax cases could be explained very well by the theory of prototypes and deformations. Our principal example was *Eisner v. Macomber*, 252 U.S. 189 (1920), an early stock dividend case, in which the arguments of Justice Pitney and Justice Brandeis took the form of a sequence of transformations from precedent cases through hypothetical cases to the factual situation of *Macomber*. It is important to note that these “explanations” were hand simulations. The *TAXMAN II* theory

was partially implemented by Donna Nagel in her thesis [35], but a full implementation was never attempted.

I still believe that the *TAXMAN II* theory is qualitatively correct. But there were two major problems with our earlier work. First, the theory makes enormous demands on our knowledge representation language. To see this, it is sufficient to note that a transformation is a *syntactic* operation, and for such an operation to be meaningful it must correspond to the significant *semantic* relationships in the legal domain. However, the frame-based language in which we (re)implemented the *TAXMAN I* system [22, 31, 44] did not have an adequate semantic foundation, and this meant that a full *TAXMAN II* implementation would have been entirely *ad hoc*. The second problem involves the theory of prototypes and deformations itself. What determines the choice of a prototype? What are the criteria for constructing transformations? It was clear that the set of transformations had to be tightly constrained, or else anything could be “transformed” into anything. But what was the source of these constraints? Much of my work since 1982 has been devoted to finding solutions to these two problems.

### 3 Current Research

My answer to the first problem identified above has been the development of a *Language for Legal Discourse*, or *LLD*, which is described in [28]. *LLD* has facilities for the representation of *states, events, actions*, and various modalities over actions such as *permission* and *obligation*. There are similar facilities in the *Event Calculus* of Kowalski and Sergot [16], although Kowalski seems to have taken a principled stance against the explicit representation of the deontic modalities [15]. *LLD* also provides a systematic treatment of *sorts* and *subsorts* (e.g., an ‘Actor’ can be a ‘Person’ or a ‘Corporation’), and it includes both *count terms* and *mass terms* (e.g., ‘Person’ is a count term and ‘Stock’ is a mass term). For both technical and philosophical reasons, the language is based on *intuitionistic logic* rather than classical logic. I have argued elsewhere that an intuitionistic semantics offers distinct advantages for a logic programming language [26, 27], and these advantages are inherited by the action language and the deontic language in *LLD* [24, 25].

Why do I insist that *LLD* is a partial solution to the problems encountered in the *TAXMAN II* Project? First, it is no accident that the common sense categories embodied in the current version of the language are just those categories that we need for an initial representation of corporate tax law: count terms, mass terms, states, events, actions, permissions, obligations. Other

categories will surely be needed later, if we wish to develop a more sophisticated analysis of the tax code: purpose, intention, knowledge, belief are prime examples. More important than the substantive coverage of *LLD*, however, is the close correspondence between its surface syntax and its deep semantics. This correspondence is largely a result of the intuitionistic semantics of the language, and it addresses directly the first deficiency in our earlier work: Syntactic transformations now map directly onto significant semantic relationships.

The second problem is not completely solved by *LLD*, but the necessary tools are now available. I remarked above that the theory of prototypes and deformations requires a set of tight constraints on transformations. In our earlier papers [32, 33], Sridharan and I noted that these constraints seem to be related to a sense of “conceptual coherence”. But what does that mean? My conjecture now is that conceptual coherence can be explained, at least partially, by an analysis of the computational complexity of the inferences that we need to make in a language with the features of *LLD*. My research programme thus resembles, abstractly, the research programme of Marcus [19] and Berwick [4] for natural language grammars: Natural language grammars should be (i) easy to parse and (ii) easy to learn, Berwick suggests. Likewise, coherent concepts should be (i) *easy to compute with* and (ii) *easy to learn*. The problem, then, is to show how a representation of concepts using prototypes and deformations can have these properties.

So far, most of my work along these lines has been concerned with the proof theory for concepts represented by prototypes and deformations [29, 30]. An overview appears in [34]. The technical idea is to construct definitions of concepts using only (intuitionistic) *definite rules*, and then to use *circumscription* [20, 21] when we need to express indefinite information. To draw inferences in such a system, we construct a *prototypical proof*, which is complete but not sound for intuitionistic logic, and we achieve soundness by showing that the prototypical proof is preserved under the appropriate *transformations*. Intuitively, if the concept is “coherent” (in a certain context, and for a certain purpose), then it should be possible to compute the inferences that follow from the concept (in the specified context, and for the specified purpose) by applying only *local transformations* to prototypical proofs. Although much work remains to be done, I hope, in this way, to link some of our established criteria for computational tractability to the intuitive idea of conceptual coherence.

A second component of conceptual coherence, according to this research programme, is *learnability*. I have not yet pursued this approach in detail, but there are hints about how to do it in William Cohen’s recent dis-

sertation at Rutgers [6]. Cohen shows that an overly general theory (expressed in Horn clauses) can be specialized by inductive learning from examples, but only if the specialized theory takes certain restricted syntactic forms. Without syntactic restrictions, the specialized theory is not “*PAC*-learnable” according to Valiant’s criterion [46], but with syntactic restrictions, Cohen shows that it is possible to learn, e.g., the best opening bids in the game of bridge [7]. It is interesting to note that one of Cohen’s learnable classes (the class of “*k*-complete prefixes”) can be viewed as a type of prototypical definition. There is thus some hope that the conditions for tractable prototypical proofs and the conditions for *PAC*-learnable concepts will coincide to some extent.

So far, in these studies of prototypical proofs and *PAC*-learnable concepts, the knowledge representation language has been restricted to the simple first-order non-modal case. In fact, the language in [34] and [6] is restricted to Horn clauses. It is a major challenge to extend these ideas to the full complexity of my *Language for Legal Discourse*. However, the complexity of *LLD* actually *strengthens* the preceding arguments about conceptual coherence, assuming that we can work out all of the necessary technical details. Why is this so? As I pointed out in [28], deductive inference in a modal logic is notoriously difficult [47, 36], but prototypical proofs are relatively simple. We might thus expect the relationship between tractability and conceptual coherence to be especially pronounced in a language with the expressive power of *LLD*.

## 4 Related Work

In broad terms, I would summarize my approach to appellate legal argument as follows: The task for a lawyer or a judge in a “hard case” is to construct a *theory* of the disputed legal rules and legal concepts that produces the desired legal result, and then to persuade the relevant audience that this theory is preferable to any theories offered by an opponent. Empirically, legal theories seem to take the form of *prototypes and deformations*, and one important component of a persuasive argument is an appeal to the *coherence* of the theory thus constructed. Therefore, to obtain a deeper understanding of the phenomenon of legal argument, we need to explain, in computational terms, why one theory constructed using prototypes and deformations is more (or less) coherent than another. These considerations motivate the research programme outlined in Section 3 above.

Viewed in this way, work by other AI researchers on legal argument can be seen as complementary to

my own research: For example, Kevin Ashley's use of *dimensions* in *HYPO* [1] resembles my use of deformations in *TAXMAN II*, but Ashley treats these dimensions as fixed at the time of argument rather than constructible. Karl Branting, in his work on *GREBE* [5], integrates rule-based and case-based reasoning, and generates arguments about the open-textured predicates that appear in the legal rules, but these arguments are based on rough similarity metrics. Taken together, the work of Ashley and Branting seems likely to lead to useful techniques for organizing legal data bases, but not likely to lead to genuine insights into the nature of legal argument. Seth Goldman's work on *STARE* [12] uses an *episodic memory* to index contract cases in a way that resembles my use of prototypes and deformations to index corporate tax cases, but Goldman emphasizes (in his published papers) the analysis of new cases rather than the construction of new arguments. Goldman's work also seems likely to lead to useful techniques for organizing legal data bases. Finally, Keith Bellairs, in his work on *BRAMBLE* [2], proposes a sophisticated theory of analogical reasoning, in which the strength of an analogy, and hence the persuasiveness of an argument, is a function of the conceptual context in which the analogy occurs. Out of all this recent work, I find Bellairs' emphasis on the construction of a deep conceptual model of the relevant legal domain to be most congruent with my own approach.

Recently, several articles have appeared in the American law review literature that are consistent with the research programme outlined in Section 3. Most closely related are a series of papers by Steven Winter [48, 49], who specifically applies George Lakoff's theory of prototypes [17] to a variety of legal issues. Winter's general approach is explained in [49], and the law of "standing" is analyzed and criticized within this framework in [48]. Also closely related is Clark Cunningham's linguistic analysis of "search" under the Fourth Amendment [8]. Both of these authors emphasize the role of coherence in legal argument, although their examples are primarily negative, that is, they use linguistic and cognitive theories to show that "standing" and "search" as expounded by the courts are *incoherent* concepts. Even the Critical Legal Studies movement, which often seems interested only in "trashing" legal doctrine, has explained some of its positions in cognitive terms: See, for example, Mark Kelman's concluding chapter in [14], entitled "Toward a Cognitive Theory of Legitimation."

There are hints, in these papers and elsewhere, that the next successor to "Law and Sociology", "Law and Economics", "Law and Literature", etc., will be a field called: "Law and Cognition". If so, the work of AI researchers will be in demand. We will be needed to keep this new field on a rigorous (and computationally sound) path.

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