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Linguistic Hooks:

Overcoming Adverse Cognitive Stock Structures in Statutory Interpretation

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Much has been written in recent years about the role of mental stock structures—or cognitive prototypes—in statutory interpretation.[1] As these works point out, many issues of statutory interpretation arise due to a cognitive collision between the facts of the case at hand and the mental stock structure implicated by a word or phrase in the applicable statute.[2] Consider, for example, a statute that regulates "chairs."[3] For most people, the stock structure for "chair" would be a mental image of an object with four legs and a backrest, designed for one person to sit on.[4] Would this statute apply to *benches*? How about *stools*? Or *couches*? Each of these words conjures up its own stock structure that is close to, yet inconsistent with, the stock structure for "chair."[5] As this simple example illustrates, then, many issues of statutory interpretation arise based on a collision of seemingly incompatible cognitive images.

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1 *E.g.* J. Gordon Christy, *A Prolegomena to Federal Statutory Interpretation: Identifying the Sources of Interpretative Problems*, 76 Miss. L.J. 55, 112–13 (2006); Jonnette Watson Hamilton, *Theories of Categorization: A Case Study of Cheques*, 17 Can. J.L. & Soc'y 115, 123–36 (No. 1, 2002); Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 Thomas Jefferson L. Rev. 167, 177–78, 186–89 (2002); Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?*, 73 Wash. U. L.Q. 1069, 1072–80 (1995) [hereinafter Solan, *Linguist in the Court*]; Lawrence M. Solan, *Law, Language, and Lenity*, 40 Wm. & Mary L. Rev. 57, 65–77 (1998) [hereinafter Solan, *Language and Lenity*]; Lawrence M. Solan, *Why Laws Work Pretty Well, But Not Great: Words and Rules in Legal Interpretation*, 26 L. & Soc. Inquiry 243, 256–59 (2001) [hereinafter Solan, *Words and Rules*]; Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 Tul. L. Rev. 431, 455, 463 (2001); Abby Wright, *For All Intents and Purposes: What Collective Intention Tells Us About Congress and Statutory Interpretation*, 154 U. Pa. L. Rev. 983, 993–96 (2006).

2 *See supra* n. 1. This is only one source of statutory ambiguity. For a general discussion of other sources, see generally Christy, *supra* note 1.

3 This illustration is adapted from Tiersma, *supra* n. 1, at 455, who, in turn, adapted it from Solan, *Linguist in the Court*, *supra* n. 1, at 1073.

4 *See* Tiersma, *supra* n. 1, at 455.

5 *See id.*

Statutory issues such as these are a consequence of cognitive linguistics. Based on its typical linguistic usage in American English, the word at issue in the statute (like "chair") conjures up a specific cognitive stock structure that is incompatible with the item or concept represented by the current case (like a couch).[6] These types of statutory issues present unique problems for legal advocates. Generally, legal advocates attempting to resolve issues of statutory ambiguity turn directly to standard tools of statutory interpretation such as legislative history, canons of statutory construction, persuasive judicial precedent, and policy.[7] A court, however, is unlikely to be persuaded by a nonbinding interpretive tool when it is faced with a linguistic and cognitive mismatch between the relevant statutory term and the present facts.[8] Thus, unlike with other types of statutory issues, with these, the legal advocate faces a threshold linguistic hurdle. That is, an advocate in this situation, as an initial matter, must offer a linguistic explanation—a linguistic hook, if you will—that plausibly reconciles the instinctive cognitive collision presented by the statutory issue at hand. Only after the statutory issue is at least plausibly resolved from a linguistic (and cognitive) standpoint can the advocate turn to the other, more conventional, tools of statutory argument.[9]

Of the numerous articles that identify the phenomenon of cognitive stock structures as a source of statutory ambiguity,[10] none explores what this phenomenon means for the legal advocate. That is where this article comes in. This article builds on the prior literature by exploring some relatively untapped and underappreciated advocacy techniques for overcoming adverse stock structures implicated by statutory language. Specifically, this article explores strategies that enable a legal advocate to evoke—consciously, and with design—an alternative and more favorable stock structure that is compatible with both the statutory language and the client's facts.[11] These strategies provide advocates with the very linguistic hook needed to open the issue up for other, more conventional, forms of

6 *See e.g.* George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind* 86–87 (U. Chi. Press 1987) (discussing the fact that "an enormous amount" of Idealized Cognitive Models (i.e., mental stock structures) for commonly used words are formed by repeated exposure to "typical examples" of items representing those words); Vyvyan Evans & Melanie Green, *Cognitive Linguistics: An Introduction* 272–74 (Edinburgh U. Press 2006) (discussing "typicality effects due to metonymy"); Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 Mich. L. Rev. 2225, 2233–35 (1989).

7 *See generally e.g.* William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation* (2d ed., Found. Press 2006); Linda D. Jellum & David Charles Hricik, *Modern Statutory Interpretation: Problems, Theories, and Lawyering Strategies* (2d ed., Carolina Acad. Press 2009).

8 In fact the law in most jurisdictions forbids advocates arguing extrinsic aids of statutory construction if the language of the provision in question appears to be unambiguous. *See infra* text accompanying n. 85, 113.

9 *See infra* text accompanying n. 85, 118–21.

10 *See supra* n. 1.

statutory analysis. The ultimate goal of this article is to provide legal advocates with potentially powerful new advocacy strategies in issues of statutory interpretation.

Part I of this article explains the theory underlying cognitive stock structures and identifies two distinct forms of statutory ambiguity that stem from stock structures implicated by statutory language. Only one of these forms of ambiguity presents advocates with the type of linguistic hurdle discussed here. Part II then explores specific strategies by which a legal advocate can attempt to overcome this linguistic hurdle. Part III wraps up the discussion by explaining the relevance and usefulness of these techniques in the general context of statutory advocacy.

I. Cognitive Stock Structures and Two Types of Statutory Ambiguity

According to cognitive psychology theory, one of the basic components of human cognition is the phenomenon of "stock structures"[12] (also called "idealized cognitive models,"[13] or mental "prototypes"[14]). "Stock structures are generic, idealized models that are formed in the mind and that represent common social situations, social phenomena, people, places, and objects."[15] These idealized models help people make sense of and respond to the world in an efficient manner by allowing us to encounter or to communicate about common objects or social situations without having to reevaluate them entirely anew.[16] Professor Steven Winter offers this example of a stock structure:

> Suppose, for example, we enter a restaurant, seat ourselves, and are then confronted by a human with pad and pencil. Does this stranger want to hear our life stories? Challenge our right to enter the premises? Take our bet on the afternoon race? Any of these are possible and, on

11 As this article will demonstrate, this strategy of offering an alternative stock structure for a statutory word or phrase has been used with success by some legal advocates. However, these uses have mostly been by intuition or accident on the part of the advocates, without full appreciation of their bases in human cognition. One of the main goals of this article is to help legal advocates more fully appreciate the cognitive dimensions of this strategy so that it can be used more consciously and, therefore, more effectively.

12 *E.g.* Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. Rev. 1, 5–6 (1984); Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 42–43 (2d ed., Aspen Pub. 2008).

13 *E.g.* Winter, *supra* n. 6, at 2233–36; Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. Pa. L. Rev. 1105, 1153–54 (1989); Lakoff, *supra* n. 6, at 68–90. Lakoff distinguishes between prototypes and ICMs. *Id.* at 40–46, 68–90. This distinction, however, is not important for our purposes, and this article uses these terms interchangeably.

14 *See supra* n. 1.

15 Smith, *supra* n. 12, at 42.

16 *E.g. id.*; Lopez, *supra* n. 12, at 3, 5–6.

> particular occasions, may in fact be the case. Yet, we "know" automatically that the person is asking for our order because we have unreflexively assumed a "restaurant scenario" which organizes our understanding of the events around us.[17]

Professor Gerald Lopez explains the role stock structures play in the way people process and interact with the world on a daily basis:[18]

> To understand . . . the world, [humans] depend heavily on "stock stories," "stock characters" and "stock theories"—knowledge of events, people, objects, and their characteristic relationships organized and represented by a variety of "stock structures." Some stock structures result from direct personal experiences; others are entirely vicarious. . . . Together these stock structures form an interpretive network: What goes on in [a given situation] is never approached *sui generis*, but rather is seen through these stock structures. Once the principal features of a given phenomenon suggest a particular stock structure, that structure shapes our expectations and responses. This use of stock structures resolves ambiguity and complements "given" information with much "assumed" information. [19]

Stock structures thus "help us carry out the routine activities of life without constantly having to analyze or question what we are doing."[20]

Prof. Winter's example and Prof. Lopez's discussion focus primarily on stock structures for social situations. But stock structures also exist for words. Based on both physical experience and linguistic usage, people form cognitive stock structures for commonly used words and phrases. In this context, then, a stock structure is an idealized mental picture that a person instinctively thinks of when he or she hears or reads a particular word or phrase.[21]

The articles about the role of stock structures in statutory interpretation explain that many legal disputes involving issues of statutory interpretation arise because the facts of the case at hand are not readily compatible with the stock structure evoked by the relevant word or phrase in the applicable statute.[22] A simple example of this phenomenon is the introduction's question whether a couch or stool would fit under a statute regulating "chairs."

Numerous other examples of these cognitive collisions in statutory interpretation are discussed in other articles, though these unwittingly

17 Winter, *supra* n. 6, at 2233; *accord* Smith, *supra* n. 12, at 42–43.

18 Lopez, *supra* n. 12, at 5–6.

19 *Id.* at 5–63. *accord see also* Smith, *supra* n. 12, at 43.

20 *Id.* at 3; *see also* Smith, *supra* n. 12, at 43.

21 *See e.g.* Lakoff, *supra* n. 6, at 86–87; Evans & Green, *supra* n. 6, at 272–74; Winter, *supra* n. 6, at 2233–35.

22 *See supra* n. 1.

significantly limit the inquiry in that they present these examples as manifestations of one general type of statutory ambiguity. But a close review of these types of statutory issues reveals that there are actually two separate and distinct forms of statutory ambiguity resulting from the stock structures implicated by statutory terms. Only one of these types of ambiguity is relevant to the discussion here, though, so distinguishing the two is important. In the absence of better terminology, I will refer to these two types of statutory ambiguity as *technically in* ambiguity and *technically out* ambiguity.

A. *Technically In* Statutory Ambiguity

Of the two forms of statutory ambiguity discussed here, *technically in* ambiguity has, by far, received the most attention in the existing literature (using different terminology, of course). *Technically in* ambiguity arises when the item or concept presented by the current fact scenario falls within the technical definition of a statutory term but does not fit within the stock structure evoked by that term. This type of statutory ambiguity stems from the cognitive complexities of categorization.[23]

Under the classical view of categories, "all members of a category have a set of common properties,"[24] and determining whether an object or entity fits into a category simply means ascertaining whether the item meets the defining properties.[25] Since the 1970s, however, studies in cognitive psychology have revealed that categorization is actually much more complex.[26] In fact, the most recent research suggests that people think about categories in two different, yet not entirely consistent, ways.[27] On the one hand, these studies reveal, consistent with the classical approach, that people do determine an object's inclusion into a category, at least in part, by considering the defining properties of the category.[28] On the other hand, however, people also think of categories in terms of prototypical members. That is, people also have a tendency to equate—or at least associate—a category with the standard stock structures for that category.[29] And these two approaches to categorization often lead to inconsistent results.[30]

23 *See e.g.* Schane, *supra* n. 1, at 177–78; Solan, *Words and Rules*, *supra* n. 1, at 257–58; Solan, *Language and Lenity*, *supra* n. 1, at 65–69.

24 Schane, *supra* n. 1, at 177.

25 *E.g. id.*; Solan, *Words and Rules*, *supra* n. 1, at 257.

26 *See e.g.* Solan, *Words and Rules*, *supra* n. 1, at 257–58.

27 *Id.; see also generally* Sharon Lee Armstrong, Lila R. Gleitman & Henry Gleitman, *What Some Concepts Might Not Be*, 13 Cognition 263 (1983) (presenting a "duel theory" of categorization).

28 *E.g.* Solan, *Words and Rules*, *supra* n. 1, at 257–58; Armstrong et al., *supra* n. 26, at 266–68, 285–95.

29 *E.g.* Solan, *Words and Rules*, *supra* n. 1, at 257–58; Armstrong et al., *supra* n. 26, at 269–95.

30 *See* Solan, *Words and Rules*, *supra* n. 1, at 258–59; Armstrong et al., *supra* n. 26, at 291–95.

Consider, for example, the category of objects represented by the word "bird."[31] Studies show that the two cognitive approaches to categorization lead to some uncertainty about the boundaries of this seemingly simple category.[32] Consistent with the stock structure–prototype approach to categorization, subjects tend to view a robin as a good example of a bird and an ostrich as a bad example of a bird.[33] These subjects tend to determine inclusion into the category based in part on the standard stock structure for "bird," which, for most people, would be birds of common experience such as robins, sparrows, and wrens.[34] Ostriches, on the other hand, are, for most people, not prototypical "birds," and thus are not instinctively included in the category.[35] This, however, is not the only approach to categorization. Consistent with the classical approach, subjects, when pushed, readily state that even nonprototypical species of birds—like ostriches—are, nevertheless, "birds."[36] Thus, as these studies illustrate, people generally have dual cognitive approaches to categorization.[37]

Technically in issues of statutory ambiguity reside in the gap created by these two cognitive approaches to categorization—that is, in the gap between the technical definition of a term (i.e., category) and the standard stock structure(s) evoked by the term. To extend the previous example, if a statute was enacted regulating "birds," the two cognitive approaches to categorization would likely lead to ambiguity as to whether the statute was intended to regulate all technical species of birds or whether it was intended to regulate only prototypical birds. Issues such as these arise because it is unclear—and debatable—whether the legislative body enacting the statute in question intended the broad definitional meaning of the statutory term or whether it intended the term's prototypical meaning.[38] I call this type of statutory ambiguity *technically in* ambiguity because in such cases, the item or concept at issue does "technically" fit

31 The "bird" example of cognitive prototypes is a popular one, as evidenced by its use in many articles. *See* Christy, *supra* n. 1, at 113; Hamilton, *supra* n. 1, at 123–24 (attributing the "bird" example to B. Tversky & K. Hemenway, *Objects, Parts, and Categories*, 113 J. Experimental Psychol. 169 (1984)); Schane, *supra* n. 1, at 178; Solan, *Words and Rules*, *supra* n. 1, at 257–58 (discussing Eleanor Rosch, *Cognitive Representations of Semantic Categories*, 104 J. of Experimental Psychol. 192 (1975)).

32 Solan, *Words and Rules*, *supra* n. 1, at 257.

33 *Id*.; Hamilton, *supra* n. 1, at 123–24; Christy, *supra* n. 1, at 113.

34 *See* Solan, *Words and Rules*, *supra* n. 1, at 257; Hamilton, *supra* n. 1, at 123–24; Schane, *supra* n. 1, at 177–78.

35 Solan, *Words and Rules*, *supra* n. 1, at 257; Hamilton, *supra* n. 1, at 123–24; Christy, *supra* n. 1, at 113.

36 Armstrong et al., *supra* n. 26, at 285, 285–91; *see also* Solan, *Words and Rules*, *supra* n. 1, at 258.

37 Solan, *Words and Rules*, *supra* n. 1, at 257–58; Armstrong *et al*., *supra* n. 26, at 291–95.

38 The terms "definitional" meaning and "prototypical" meaning are borrowed from Solan, *Linguist in the Court*, *supra* n. 1, at 1073–76.

within the definitional meaning of the statutory term; however, it does not fit within the prototypical meaning of the term. Formal examples of *technically in* statutory ambiguity abound in case law. I consider three rather famous United States Supreme Court examples here:

1. *Smith v. United States*[39]

John Angus Smith made an offer to an undercover police officer to trade his automatic weapon (a MAC-10) for a specified amount of cocaine.[40] Mr. Smith was arrested and subsequently convicted under federal law of, among other crimes, using a firearm "during and in relation to . . . [a] drug trafficking crime."[41] On appeal to the United States Supreme Court, the primary issue in the case was "whether the exchange of a gun for narcotics constitute[d] 'use' of a firearm . . . within the meaning of [the federal statute]."[42]

The majority of the Court answered the question in the affirmative.[43] Writing for the majority, Justice O'Connor stated the following:

> When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning. . . . Surely petitioner's treatment of his MAC-10 can be described as "use" within the everyday meaning of that term. Petitioner "used" his MAC-10 in an attempt to obtain drugs by offering to trade it for cocaine. *Webster's* defines "to use" as "[t]o convert to one's service" or "to employ." *Webster's New International Dictionary* 2806 (2d ed. 1939). *Black's Law Dictionary* contains a similar definition: "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." *Black's Law Dictionary* 1541 (6th ed. 1990). . . . Petitioner's handling of the MAC-10 in this case falls squarely within those definitions. By attempting to trade his MAC-10 for the drugs, he "used" or "employed" it as an item of barter to obtain cocaine; he "derived service" from it because it was going to bring him the very drugs he sought.[44]

39 508 U.S. 223 (1993). The *Smith* case has been discussed in a number of prior articles as an example of statutory ambiguity created by cognitive prototypes. *See* Solan, *Linguist in the Court*, *supra* n. 1, at 1074–76; Solan, *Language and Lenity*, *supra* n. 1, at 68; Solan, *Words and Rules*, *supra* n. 1, at 258; Christy, *supra* n. 1, at 113 n.143.

40 *Smith*, 508 U.S. at 225–26.

41 18 U.S.C. § 924 (c)(1)(A) (2006) (cited in *Smith*, 508 U.S. at 226).

42 *Smith*, 508 U.S. at 225.

43 *Id.* at 237.

44 *Id.* at 228–29.

Justice Scalia, in a dissent joined by Justices Stevens and Souter, reached the opposite conclusion:

> In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning. . . . To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, i.e., as a weapon. To be sure, "one can use a firearm in a number of ways" [*majority opinion*, at 230], including as an article of exchange, just as one can "use" a cane as a hall decoration—but that is not the ordinary meaning of "using" the one or the other. The Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily is* used. It would, indeed, be "both reasonable and normal to say that petitioner 'used' his MAC-10 in his drug trafficking offense by trading it for cocaine." *Ibid.* It would also be reasonable and normal to say that he "used" it to scratch his head. When one wishes to describe the action of employing the instrument of a firearm for such unusual purposes, "use" is assuredly a verb one could select. But that says nothing about whether the *ordinary* meaning of the phrase "uses a firearm" embraces such extraordinary employments. It is unquestionably *not* reasonable and normal, I think, to say simply "do not use firearms" when one means to prohibit selling or scratching with them.[45]

The *Smith* case provides a striking example of *technically in* statutory ambiguity. To answer the question whether the statutory term "using a firearm" includes using a gun for barter, the majority looked to the broad dictionary definition of the word "use" and held, consistent with that definition, that it did. The dissent, on the other hand, looked to the stock structure evoked by the term, arguing that the "ordinary" (i.e., prototypical) meaning of the phrase "using a firearm" is using a firearm for its intended purpose, as a weapon. The issue presented by *Smith* is an example of *technically in* statutory ambiguity because although using a gun for barter "technically" falls within the definitional meaning of "using" an instrumentality, it does not fall within the stock structure for "using a firearm," which for most people is a mental picture of someone using a gun in a violent or threatening manner. Thus, the issue in this case stemmed from a conflict created by the two cognitive approaches to categorization. The majority in *Smith* addressed the issue under the classical definitional

45 *Id.* at 242–43 (Scalia, J., joined by Stevens and Souter, JJ., dissenting).

approach to categorization, looking to the broad definition of the word "use" and evaluating the petitioner's behavior against the term's defining properties. The dissent, by contrast, employed the stock structure–prototype approach, equating the category to the standard stock structure evoked by the statutory term.[46] As the Court's 6–3 split decision shows, both approaches were not merely plausible; they were legitimately arguable. Ultimately, however, a majority of the Court chose the broad interpretation using a combination of the term's definitional meaning, various canons of statutory construction, and the provision's legislative history.[47]

As if she was aware of the cognitive principles underlying the dispute, Justice O'Connor included in her opinion an express rebuttal of the dissent's prototype approach to the issue:

> [P]etitioner and the dissent . . . contend that *the average person on the street would not think immediately of a guns-for-drugs trade as an example of "us[ing] a firearm*." Rather, *that phrase normally evokes an image of the most familiar use to which a firearm is put—use as a weapon*. Petitioner and the dissent therefore argue that the statute excludes uses where the weapon is not fired or otherwise employed for its destructive capacity. . . .
>
> There is a significant flaw to this argument. It is one thing to say that the ordinary meaning of "uses a firearm" **includes** using a firearm as a weapon, since that is the intended purpose of a firearm *and the example of "use" that most immediately comes to mind*. But it is quite another to conclude that, as a result, the phrase also **excludes** any other use. . . . As the dictionary definitions and experience make clear, one can use a firearm in a number of ways. *That one example of "use" is the first to come to mind when the phrase "uses . . . a firearm" is uttered* does not preclude us from recognizing that there are other "uses" that qualify as well.[48]

As indicated by the highlighted language in this quote—"average person on the street," "think immediately of," "phrase normally evokes an image," "most immediately comes to mind," and "first to come to mind," Justice O'Connor acknowledged that the phrase "using a firearm" may have a prototypical meaning that is inconsistent with the petitioner's charge. She and the majority concluded, however, that the term should not be limited to its prototypical meaning.

46 Lawrence M. Solan presented a similar analysis of *Smith* in Solan, *Words and Rules*, *supra* note 1, at 258.

47 *Smith*, 508 U.S. at 228–37.

48 *Id.* at 229–30 (*italicized* emphasis added; **bold** emphasis in original).

As a final comment on the *Smith* case, it is interesting to note that both the majority and the dissent claimed that their conclusions were supported by the "ordinary meaning" of the statutory term.[49] Upon closer analysis, however, this is not surprising because the two opinions viewed "ordinary meaning" in different ways. The majority viewed "ordinary meaning" as a meaning supported by the ordinary dictionary definition of the term in question.[50] The dissent, by contrast, viewed "ordinary meaning" as the meaning ordinarily and instinctively evoked in one's mind by the term.[51] Although the two approaches lead to conflicting results, they were both "ordinary" because they corresponded to the two innate cognitive approaches to categorization. And therein lies the source of *technically in* statutory ambiguity: Because humans approach categorization in two, often inconsistent, ways, disputes over whether a statutory term was intended to have its definitional meaning or its prototypical meaning are virtually inevitable.[52]

2. *McBoyle v. United States*[53]

In *McBoyle*, the petitioner flew from Illinois to Oklahoma in an airplane he knew to be stolen.[54] He was subsequently convicted under the National Motor Vehicle Theft Act, which prohibited transporting a stolen "vehicle" across state lines.[55] Not surprisingly, the issue on appeal to the United States Supreme Court was whether an airplane qualified as a "vehicle" for the purposes of the Act.[56]

The issue in *McBoyle* clearly can be classified as an issue of *technically in* statutory ambiguity. In fact, Justice Holmes, who wrote the opinion for the unanimous Court, specifically acknowledged the conflict that existed between the definitional and prototypical meanings of the term "vehicle":

> The question is the meaning of the word "vehicle" . . . . No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air . . . . But in everyday speech "vehicle" calls up the picture of a thing moving on land.[57]

49 *See supra* text accompanying nn. 43, 44.

50 *Smith*, 508 U.S. at 228–29 (relying on the definitions of "to use" in *Webster's Dictionary* and *Black's Law Dictionary*).

51 *Id.* at 242–43 (Scalia, J., joined by Stevens and Souter, JJ., dissenting).

52 *But see* Tiersma, *supra* n. 1, at 455–57, 464–71 (discussing as possible solutions to this problem (1) more-effectively drafted statutory definitions, (2) the use of "word lists" is statutes, and (3) the inclusion of statutory preambles that clearly state the statutes' goals); Schane, *supra* n. 1, at 191–92 (discussing Tiersma's proposals).

53 283 U.S. 25 (1931). Other articles that use the issue in *McBoyle* as an example of the interplay between cognition and statutory ambiguity include Solan, *Words and Rules*, *supra* note 1, at 244–45, and Lief H. Carter, *Law and Politics as Play*, 83 Chi.-Kent L. Rev. 1333, 1344 (2008).

54 *McBoyle*, 283 U.S. at 25.

55 *Id.* at 25–26.

56 *Id.*

57 *Id.* at 26.

58 *Id.* at 27.

In the end, the Court held that the National Motor Vehicle Act did not apply to airplanes.[58] The Court reached this conclusion based on the prototypical meaning of the term "vehicle," as well as a combination of legislative history and policy arguments.[59]

3. *Church of the Holy Trinity v. United States*[60]

The *Holy Trinity* case, decided by the Supreme Court in 1892, illustrates that issues of *technically in* statutory ambiguity are by no means a new phenomenon. In that case, a New York church hired a pastor from England to be the church's new religious leader.[61] The federal government then brought an action against the church to recover a penalty under a federal statute that prohibited any person or entity in the United States from importing a foreigner to perform labor in this country.[62] The issue before the Supreme Court was whether to work of a pastor qualified as "labor" under the statute.[63] Justice Brewer, writing for the unanimous Court, began his opinion by acknowledging that the work of a pastor would technically fall under the definitional meaning of the word "labor": "It must be conceded that the act of the [church] is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other."[64] The Court also pointed out, however, that the word "labor," in both the title and the body of the statute, instinctively evokes the mental image of manual labor as opposed to the work of a professional:

> Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the terms "labor" and "laborers" does not include preaching and preachers, and it is to be assumed that words and phrases are used in their ordinary meaning.[65]

Ultimately the Court held that the statute did not apply to the hiring of a foreign pastor and reversed the penalty imposed under the statute.[66]

59 *Id.* at 26–27.

60 143 U.S. 457 (1892). This example is adapted from Solan, *Words and Rules*, *supra* note 1, at 244. The *Holy Trinity* case is also used as a running example of statutory interpretation in Eskridge et al., *supra* note 7, at 221–55.

61 *Holy Trinity*, 143 U.S. at 457–58.

62 *Id.* at 458.

63 *See id.* at 458–59. The statute at issue in *Holy Trinity* referred to both "labor" and "service," *id.* at 458, but the Court focused primarily on the meaning of the word "labor," *id.* at 463–65. And it is this analysis that is most relevant to this discussion. *Accord* Solan, *Words and Rules*, *supra* n. 1, at 244.

64 *Holy Trinity*, 143 U.S. at 458.

65 *Id.* at 463.

66 *Id.* at 472.

The Court reached this conclusion based on a combination of the prototypical meaning of the term "labor" and various other arguments based on canons of construction, legislative history, and policy.[67]

Like the previous two cases, the *Holy Trinity* case had at its heart an issue of *technically in* statutory ambiguity. The definition of the word "labor," as acknowledged by the Court, was broad enough to encompass the work of professionals, including pastors. Thus, the facts of the case technically came within the definitional meaning of the statutory term. However, the term "labor," as also acknowledged by the Court, had a contrasting stock structure: that of manual labor. Thus, the real issue in the cases was whether Congress intended to use the word "labor" for its broad definitional meaning or whether it intended the word's prototypical meaning. In the end, the Court held in favor of the latter interpretation.

Two general observations about *technically in* statutory ambiguity can be made based on a review of the *Smith*, *McBoyle,* and *Holy Trinity* cases. First, both of the cognitive approaches to categorization that we have discussed can have persuasive force in issues of *technically in* statutory ambiguity. In the *Smith* case, the definitional meaning of the term "use" prevailed over the prototypical approach.[68] By contrast, in both the *McBoyle* and *Holy Trinity* cases, the prototypical meaning of the applicable statutory terms prevailed.[69] Thus, both approaches to defining statutory terms are rhetorically and legally valid, and it is possible for either to prevail in any given case.

The first general observation leads to the second: both approaches are linguistically plausible. Because the definitional approach to categorization is natural and innate, a legitimate linguistic argument can be made that the enacting body intended a statutory term to have its definitional meaning. Likewise, because the prototypical approach to categorization is natural and innate, a legitimate linguistic argument can be made that the enacting body intended a statutory term to have its prototypical meaning. Both of these arguments have persuasive force because both are plausible from a linguistic standpoint. As a consequence, *technically in* issues of statutory ambiguity do not pose significant linguistic problems for legal advocates. An advocate arguing in favor of the definitional meaning of a statutory term need only turn to the dictionary for linguistic support.[70] By the same token, an advocate arguing the prototypical meaning of a term need only

67 *Id.* at 458–72.

68 *See supra* text accompanying nn. 43–51.

69 *See supra* text accompanying nn. 56–58, 64–66.

70 *See e.g. supra* text accompanying n. 49 (discussing the Court's reliance on dictionary definitions in *Smith*, 508 U.S. at 228–29).

demonstrate the common usage of the term in everyday language in order to give the argument linguistic clout.[71] Moreover, because both sides of the issue are able, fairly easily, to find linguistic support for their positions, the ambiguity is readily apparent, and both sides are also able, fairly easily, to turn to other forms of persuasive argument such as legislative history and policy. We saw this in all three illustrative cases, in which the issues were ultimately resolved based on mix of linguistics, history, and policy.[72]

The purpose of this article is to offer legal advocates strategies for finding linguistic hooks for cases in which the linguistic and cognitive collision between a client's facts and the applicable statutory term is not easily resolved.[73] But *technically in* issues of statutory ambiguity have built-in, easy-to-evoke linguistic hooks for both sides of the issue. Thus, although *technically in* issues of statutory ambiguity stem from complications associated with cognitive stock structures, they are not the real focus of this article. That is the second type of statutory ambiguity that stems for cognitive stock structures: *technically out* ambiguity.

B. *Technically Out* Statutory Ambiguity

As the *Smith*, *McBoyle*, and *Holy Trinity* cases illustrate, *technically in* issues of statutory ambiguity form when the item or circumstance represented by the current fact scenario technically comes within the definitional meaning of the statutory term at issue, but does not match the standard stock structure (i.e., prototypical meaning) of the term. In contrast, *technically out* statutory ambiguity arises when the item or circumstance represented by the current fact scenario is conceptually close to the standard stock structure for the statutory term at issue, but technically falls outside of both the stock structure (prototypical meaning) and the dictionary definition (definitional meaning) of the term.

The "chair" example in the introduction is an example of *technically out* statutory ambiguity.[74] That example hypothesized a statute that regulated chairs in some way and asked whether the statutory term "chair" would include a couch.[75] This issue creates a cognitive collision because the stock structure for "couch"—a mental image of a long upholstered seat with a backrest and armrests designed to accommodate two or more people—is instinctively incompatible with the stock structure for "chair"—

71 *See e.g. supra* text accompanying nn. 44, 56, 64 (setting out quotes in which Justices of the Supreme Court evoked the everyday usage of the terms in question in an effort to support their interpretations of those terms).

72 *See supra* text accompanying nn. 46, 58, 66.

73 *See supra* text accompanying nn. 6–9.

74 *See supra* text accompanying nn. 3, 6.

75 *See id.*

a mental image of a seat with four legs and a backrest designed for one person.[76] Thus, the item at issue—couch—falls outside of the stock structure for the statutory term "chair." What's more, the definitional meaning of the word "chair" matches its stock structure. *Webster's Dictionary* defines "chair" as "a seat typically having four legs and a back for one person."[77] Thus, a couch falls outside of both the stock structure (prototypical meaning) and the technical definition (definitional meaning) of the term "chair."[78] All that notwithstanding, however, most people would readily admit that a couch is conceptually close to a chair. It is not as if we were pondering whether a completely unrelated item—like a toaster or candy bar—would be covered by a statute regulating chairs. It is well within the realm of possibility that a legal advocate would attempt to argue that the statutory term "chair" includes couches. And this is the essence of *technically out* statutory ambiguity: the item or circumstance of the present case falls outside of the definition and stock structure for the relevant statutory term, but is conceptually close enough for a lawyer to attempt to argue for its inclusion.

Oregon v. Rodriguez[79] provides a more formal example of *technically out* statutory ambiguity. *Rodriguez* involved an Oregon criminal statute that required a court to revoke a person's driver's license if the person was convicted of misdemeanor driving while under the influence of intoxicants (DUII) "for a third time."[80] Defendant Rodriguez was convicted of DUII for a fourth time, and the trial court revoked his license under this provision.[81] The issue on appeal to the Oregon Court of Appeals was whether the statutory language "convicted [of DUII] . . . for a third time" would apply to a fourth conviction.[82]

The issue in *Rodriguez* was one of t*echnically out* statutory ambiguity. The statutory phrase "convicted . . . for a third time" instinctively evokes the stock structure of a conviction representing the third in a series of convictions, with two, and only two, prior convictions. What's more, the dictionary definition of "third" reflects the term's stock structure. *Webster's Dictionary* defines "third" as "being next to second in place or

76 *See id.*

77 *Webster's New Collegiate Dictionary* 182 (G. & C. Merriam Co. 1981).

78 This is what distinguishes *technically out* statutory ambiguity from *technically in* statutory ambiguity.

79 175 P.3d 471 (Or. App. 2007) (en banc).

80 *Id.* at 472–73 (quoting Or. Rev. Stat. § 809.235(1)(b) (2003)).

81 *Id.* at 473. Rodriguez's driver's license was not revoked following his third DUII conviction because that conviction had taken place in California rather than in Oregon.

82 *Id.* at 472–73.

83 *Webster's New Collegiate Dictionary* 1204 (G. & C. Merriam Co. 1981).

time."[83] Rodriguez, however, had been convicted of DUII four times. Thus, the facts of the case—a fourth DUII conviction—technically fell outside of the dictionary definition, and the attendant stock structure, for the statutory term "third." Yet the two ideas are conceptually close. A colorable argument could be made that the word "third" in the statute meant, as a practical matter, *three or more times*. In fact, the trial court judge did revoke Rodriguez's license under the statute after his fourth conviction. Thus, the issue in *Rodriguez* presented a linguistic conundrum: the circumstances represented by the facts of the case were conceptually close to the statutory term, but were technically outside of it.[84]

Issues of *technically in* statutory ambiguity do not pose meaningful linguistic problems for legal advocates.[85] But issues of *technically out* statutory ambiguity such as those presented in *Rodriguez* and the "chair" example definitely do present legal advocates with a substantial linguistic hurdle. In these types of issues, the circumstance represented by the present facts is linguistically inconsistent with both the ordinary dictionary definition and the standard stock structure for the statutory term at issue. Indeed, in terms of these examples, it appears to be linguistically clear that a "couch" is not a "chair," and a "fourth conviction" is not a "third conviction." Thus, despite their name, issues of *technically out* statutory ambiguity appear to be *unambiguous*. Adding to the problem for the legal advocate on the wrong side of this equation is that courts in interpreting statutes are extremely reluctant to consider policy arguments or other aids of construction if the language of the statute at issue appears to be unambiguous on its face.[86] Consequently, a legal advocate facing *technically out* statutory ambiguity is unable to argue policy or canons of construction without first resolving, at least plausibly, the linguistic mismatch between the client's facts and the relevant statutory term. Thus, cases of *technically out* statutory ambiguity present legal advocates with a unique linguistic challenge, a challenge that legal advocates can address with two general strategies.

84 For a discussion of how the linguistic conundrum in *Rodriguez* was resolved, *see infra* part II(A).

85 *See supra* text accompanying nn. 69–71.

86 *E.g., Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)) ("The first step [in statutory construction] 'is to determine whether the language at issue has a plain and unambiguous meaning . . . . The inquiry ceases 'if the statutory language is unambiguous . . . .'"); *see generally e.g.* 82 C.J.S. *Statutes* § 396 (2009) ("If the language of a statute is clear and unambiguous, a court need not apply any rules of construction other than to require that words and phrases be given their plain, ordinary, and usual meanings."); 73 Am. Jur. 2d *Statutes* § 113 (2001) ("As a rule, where the language of a statute is clear and unambiguous, . . . there is no room for judicial interpretation, and the language should generally be given effect without resort to extrinsic guides to construction.").

II. New Strategies for *Technically Out* Statutory Ambiguity: Evoking Favorable Alterative Stock Structures

Issues of *technically out* statutory ambiguity present legal advocates with a threshold linguistic hurdle. As *Rodriguez* shows, this hurdle is a product of three contributing factors. First, in issues of this type, the item or circumstance represented by the client's facts, although conceptually close, falls outside of the statutory term, both linguistically and cognitively. Second, because of this linguistic mismatch, the statutory term appears to unambiguously exclude the client's situation from the statute's reach. Third, because the statutory language appears to be unambiguous, the disadvantaged advocate is prohibited, as a general matter, from arguing extrinsic aids of construction such as policy, legislative history, canons of construction, or persuasive judicial precedent.[87] Thus, an advocate in this situation must, as first matter, attempt to resolve the linguistic and cognitive collision evoked by the issue.[88]

The term at issue, because of its most typical linguistic usage, instinctively evokes a stock mental picture that is inconsistent with the circumstance presented by the factual scenario. What's more, the circumstance represented by the factual scenario is also outside of the dictionary definition of the statutory term. Because it is unlikely that an advocate would be successful at changing the dictionary itself, it stands to reason that the best way for a legal advocate to attempt to resolve this discordance is to focus on the stock structure. More specifically, the goal of an advocate facing adverse *technically out* statutory ambiguity is to evoke an alternative—albeit, less instinctive—stock structure that reconciles the client's facts and the statutory term.

Technically out statutory ambiguity—and the two strategies that can successfully address them—can be represented by the following formula:

(A) The statutory term (as represented by its stock structure and dictionary definition) $\neq$ (B) The item or circumstance of of present facts

This formula represents *technically out* statutory ambiguity because it declares that A (the stock structure and dictionary definition for the statutory term at issue) is not equal to—i.e., is inconsistent with—B (the

87 *See supra* text accompanying n. 85.

88 *See* Smith, *supra* n. 12, at 111–16.

item or circumstance represented by the fact scenario). The goal of a legal advocate facing a *technically out* statutory ambiguity is to solve this formula by making the two sides equal—that is, by somehow making B (the facts) fit into—i.e., be consistent with—A (the statutory term). Mathematically, a formula such as this can be reconciled in one of two ways: by addressing either the left side or the right side of the formula. The first strategy focuses on the left side of the equation—the statutory term—and explores methods by which an advocate can evoke an *alternative (perhaps secondary) stock structure* for that term that is consistent with the client's facts. The second strategy focuses on the right side of the equation—the item implicated by the facts—and explores methods by which an advocate can evoke *deep-seated stock experiences* that demonstrate that the item is, upon closer refection, consistent with the statutory term.

A. Strategy 1: Evoking an Alternative Stock Structure for the Statutory Term

The first strategy for resolving the cognitive collision presented by issues of *technically out* statutory ambiguity is to evoke an alternative, more favorable, stock structure for the statutory term itself. This strategy focuses on the left side of the formula by attempting to alter, or at least add to, the cognitive image instinctively evoked by the statutory term.

Whereas a word or phrase may evoke a standard stock structure based on its most common usage, a word or phrase may also have a subordinate stock structure based on a use that is less common. A subordinate stock structure would be an idealized, generic mental image a person thinks of once that person is reminded of an alternative, less common use of a word or phrase. Many words have multiple uses. Moreover, many, if not most, of a word's uses are reflected in the dictionary, as many dictionary entries contain multiple definitions.[89] But with *technically out* statutory issues, the item represented by the present case does not fall within any dictionary definition of the statutory term.[90] Consequently, the challenge for a legal advocate in this situation is to evoke an alternative use of the statutory term that is recognizable to most people (like judges) even though it is not included within any of the dictionary definitions for that word.

89 *See e.g. Webster's New Collegiate Dictionary* 17a (G. & C. Merriam Co. 1981) (explaining generally how the different definitions (or senses) of a word are organized within the dictionary entry for that word).

90 *See supra* pt. I(B). If the dictionary supports the alternative use of the word, a statutory issue based on that word would be one of *technically in* statutory ambiguity, not *technically out* statutory ambiguity. The issue would be one of *technically in* statutory ambiguity because although the statutory term is outside of the standard stock structure for the term, it would nevertheless be within the dictionary definition of the term.

The "chair" hypothetical once again provides an example of this strategy. Say an advocate was attempting to demonstrate that a couch falls under a statute regulating "chairs."[91] The word "chair," based on its most common usage, evokes the standard stock structure of a piece of furniture for a single person to sit on.[92] The entry for the word "chair" in the dictionary includes this most common use as well as a number of other less common uses.[93] None of the dictionary definitions for "chair," however, are broad enough to include a couch.[94] Thus, the only way for the advocate to resolve the linguistic mismatch between a couch and the word "chair" is to evoke a favorable subordinate stock structure from everyday language. Of course, the rub is that the alternative use of the term "chair" must be recognizable to the average person even though it is not common enough to have been included in the dictionary.

One strategy the advocate may be able to employ is to focus on the use of the word "chair" in casual conversation as a generic word for "seat." Along these lines, the advocate could evoke the typical family reunion or living-room meeting. Often in this setting, the advocate could point out, the person in charge will ask everyone to "have a chair," even though the room contains a limited number of chairs as well as a couple of couches.[95] (Are you picturing it? Yes? There's your stock structure for this use.)

Clearly in this context—an everyday context—the word "chair" includes couches. No one in this situation would think that the person making the announcement meant that only the chairs should be used and that the rest of the people should stand.[96] Yet, this use of "chair"—as a synonym for "seat"—is not reflected in the dictionary.[97] Thus, conjuring up this use of the word "chair" evokes an alternative stock structure for the word that is beyond the word's standard stock structure and dictionary definition, yet is recognizable and, most important, broad enough to include a couch. In the context of the chair hypothetical, then, an advocate could evoke this alternative use of the word "chair" in an effort to offer a plausible linguistic resolution to the initial cognitive collision between a couch and the statutory term. With this alternative stock structure, the

91 *See supra* text accompanying nn. 3, 73–77.

92 *See supra* text accompanying nn. 3, 75.

93 *See Webster's New Collegiate Dictionary* 182 (G. & C. Merriam Co. 1981).

94 *See id.*

95 This illustration is adapted from Tiersma, *supra* note 1, at 455.

96 *See id.*

97 *See Webster's New Collegiate Dictionary* 182 (G. & C. Merriam Co. 1981). The definition that most closely reflects this use defines "chair" as "any of the various devices that hold up or support." *Id.* However, this definition is too vague to clearly cover the use of the word "chair" as a synonym for "seat."

advocate could demonstrate that the term "chair," as it relates to a couch, is not so unambiguous as it first seemed. Thus, this alternative stock structure could serve as a linguistic hook that would enable the advocate to turn to other (more persuasive) forms of statutory argument, such as policy and legislative history.

I know what you are thinking: Referring to a word's usage in an informal context such as a living-room meeting is a bit too contrived to have any persuasive force in a formal legal matter.[98] But this *informal* strategy has had much success in many real cases. Here are three recent examples:

1. *Oregon v. Rodriguez*[99] revisited

Rodriguez, which challenged the revocation of the appellant's driver's license for his fourth DUII conviction under a statute that authorized revocation if the driver was convicted "for a *third* time,"[100] presented the issue whether the term "third" conviction would include a "fourth" conviction.[101]

The Oregon Court of Appeals heard the appeal en banc.[102] In the end, a majority of the judges (eight of ten) held that the statutory language "convicted of [DUII] for a third time" did apply to the defendant's fourth conviction and affirmed the revocation of his driver's license.[103] The two dissenting judges, Judge Sercombe and Judge Wollheim, took the more instinctive position on the issue (i.e., the position consistent with the standard stock structure and dictionary definition of the word "third"): "a . . . reference to the 'third conviction' of a person or a conviction for 'a third time' means the conviction that follows the first and second convictions in time."[104] Based primarily on this linguistic mismatch, the dissenting judges argued that the statutory language "convicted of [DUII] . . . for a third time" did not apply to the defendant's fourth DUII conviction.[105]

The majority, however, took a dramatically different approach:

> At the initial level of the analysis, we are to examine the words of the statute in context to determine whether the disputed provision is "ambiguous," that is, whether the provision is capable of more than one reasonable construction. If it is, we then proceed to the legislative

98 This concern will be addressed in much more detail later. *See infra* pt. III.

99 175 P.3d 471.

100 *Id.* at 472–73.

101 *Id.*

102 *Id.* at 471–72.

103 *Id.* at 478.

104 *Id.* at 481 (Sercombe, J., joined by Wollheim, J., dissenting).

105 *See id.* at 478–85 (Sercombe, J., joined by Wollheim, J., dissenting).

> history, and if the legislative history does not resolve that ambiguity, we resort to relevant canons of construction. . . . It is important to emphasize how little it takes to demonstrate that a statute is "ambiguous." As we explained in *Godfrey v. Fred Meyer Stores*, 202 Or. App. 673, 686, 124 P.3d 621 (2005), *rev. den.*, 340 Or. 672, 136 P.3d 742 (2006)[,] "[T]he threshold of ambiguity is a low one. It does not require that competing constructions be equally tenable. It requires only that a competing construction not be 'wholly implausible.' *Owens v. MVD*, 319 Or. 259, 268, 875 P.2d 463 (1994)[.]"
>
> * * * * *
>
> In this case, the question is what the legislature intended by the reference to a person having been convicted of misdemeanor DUII "for a third time." More precisely, the question is—at least initially—whether there is more than one construction of that provision that is not "wholly implausible." *Owens*, 319 Or. at 268, 875 P.2d 463.
>
> The answer to that question is straightforward. The statute is at least ambiguous. In ordinary speech, references to numeric sequences can mean a variety of things. . . . To pick a silly example, when you tell your child, "if you do that *one more time*, you are grounded," that admonition does not necessarily mean that grounding will follow one—and only one—offense. To cite another, to tell the child that he or she may have "seconds" does not necessarily mean that the child cannot have a third or fourth helping. The precise meaning of the numeric reference depends on the context in which it is employed.
>
> * * * * *
>
> So, to return to the wording of [this statute], there is nothing in the phrasing of the provision referring to a defendant having been convicted of misdemeanor DUII "for a third time" that necessarily means that the statute applies to a third—and only third—conviction. Reading the statute to apply to a third *and subsequent* convictions is, in other words, not wholly implausible.[106]

With this reasoning, the majority found enough ambiguity in the statutory provision to turn to other forms of statutory analysis. Specifically, the majority moved on to analyze the issue from three other perspectives: by looking to comparable Oregon statutes that contained similar numeric references,[107] by reviewing the provision's legislative history,[108] and by applying several canons of statutory construction.[109] The majority ultimately concluded as follows: "We conclude that the phrasing

106 *Id.* at 473–74 (quotation formatting modified).

107 *Id.* at 474–75.

108 *Id.* at 475–76.

109 *Id.* at 476–77.

of [the statute] is ambiguous but that resort to legislative history and other aids to construction make clear that the trial court did not err in interpreting the statute to require permanent revocation of defendant's driving privileges based on his three prior misdemeanor DUII convictions."[110]

The majority's approach to the issue in *Rodriguez* is as a textbook example of how an advocate facing a *technically out* statutory issue can successfully overcome the threshold cognitive and linguistic dilemma presented by the issue. In fact, several important observations can be gleaned from the majority's approach. In this context we will view the *Rodriguez* majority as an "advocate" who advocated its position on the issue through its published opinion.[111]

First, an issue of *technically out* statutory ambiguity poses a significant linguistic hurdle for an advocate because, on its face, the relevant statutory language appears to unambiguously exclude the item or circumstance represented by the client's facts. Furthermore, because the statutory language appears to be unambiguous, an advocate in most jurisdictions would be barred from arguing extrinsic aids of construction. We see this exact dilemma in *Rodriguez*. The statutory reference to a "third" conviction appeared on its face to unambiguously exclude a fourth conviction. Moreover, as the majority pointed out, Oregon law does not permit the use of extrinsic aids of construction when the provision in question is unambiguous.[112] Consequently, the majority (as an advocate for its position) was forced as an initial matter to find (or construct!) ambiguity where there appeared to be none.

Second, in its effort to find statutory ambiguity, the majority looked past the dictionary definition of the word "third"[113] (and its attendant stock structure) and evoked alternative uses of numeric references from everyday language. Specifically, the majority gave examples (self-described "silly" examples) of how a person, in an everyday situation, may use a specific numeric reference to mean that number *or more*.[114] These allusions force the reader of the majority's opinion to conjure up mental

110 *Id.* at 478.

111 Once a judge makes a decision in a case, the judge becomes an "advocate" for the purpose of selling his or her decision to the various audiences of that decision. Consequently, a judicial opinion is undoubtedly a form of persuasive writing. *See e.g.* Smith, *supra* n. 12, at 5–6 (discussing "Judicial Opinions as Examples of Persuasive Writing").

112 *See Rodriguez*, 175 P.3d at 473–74.

113 Interestingly, the majority claimed to find support for its position in the following dictionary definitions of the word "third": "being number three in a countable series" and "being the last in each group of three in a series." *Id.* at 474. However, I am unable to see how either of these definitions supports interpreting the word "third" to include a "fourth" of something. Thus, despite this contention by the majority, I do not think that the dictionary offered any support for the majority's decision. In my opinion, the issue in *Rodriguez* was a clear example of *technically out* statutory ambiguity.

114 *Id.*

stock structures for these alternative uses of numeric references. Once these alternative stock structures are evoked in the reader's mind, the reader is able to envision an alternative use of the word "third" that would mean three or more times. Thus, the majority was able to evoke an alternative use of the word "third" from everyday language that would be broad enough to include a fourth conviction.[115]

Third, by evoking favorable alternative stock structures for numeric references, the majority was able to establish at least a modicum of ambiguity in the relevant statutory provision. As the majority itself noted, "[T]he threshold of ambiguity is a low one."[116] Thus, all the majority needed was a linguistic hook—that is, an alternative use of the word "third" that would plausibly reconcile the instinctive linguistic and cognitive collision presented by the issue before it. The majority found this linguistic hook in its "silly" examples from common language.

Finally, because the majority was able to establish another use of the term "third" that was not "wholly implausible,"[117] and because this alterative use rendered the statute plausibly ambiguous, the majority was allowed to turn to other forms of statutory analysis in its effort to resolve this ambiguity.[118] With the door open, the majority turned to comparable statutes, legislative history, and canons of construction.[119] The majority was able to make a number of persuasive arguments based on these other sources of authority. In the end, the majority made a convincing case for its conclusion that the statutory requirement of a "third conviction" included the defendant's fourth conviction.[120] And it all started with majority's evocation of informal alternative stock structures that plausibly reconciled the initial cognitive collision posed by the statutory issue.

2. *The Work Connection, Inc., v. Bui* [121]

The *Bui* case involved a Minnesota unemployment-benefits statute that required all recipients of benefits to be "available for suitable employment."[122] The statute further stated that to be "available for suitable employment" meant that the person must, among other things, "have transportation *throughout* the labor market area."[123] Mr. Bui's employer contested Mr. Bui's right to benefits under this statute because Mr. Bui relied on public transportation. According to the employer, Mr. Bui was limited to those locations serviced by public transportation, and thus he

115 *See id.*

116 *Id.* (quoting *Godfrey*, 124 P.3d at 628).

117 *See id.*

118 *See id*. at 474–78.

119 *See id.*

120 *See id.*

121 749 N.W.2d 63 (Minn. App. 2008).

122 *Id.* at 67.

123 *Id.* (emphasis added).

124 *Id.* at 64–65.

did not have transportation "throughout" the labor-market area as required by the statute.[124] Despite the employer's argument, an unemployment-law judge found that Mr. Bui did qualify for unemployment benefits.[125] The employer appealed to the Minnesota Court of Appeals. The main issue on appeal was whether the Mr. Bui's transportation via public conveyances qualified as having transportation "throughout" the labor-market area.[126]

A majority of the court ultimately held in favor of Mr. Bui.[127] The case is more understandable, though, if we begin with the dissenting opinion. In a lone dissent on the main issue, Judge Schellhas argued the dictionary definition and standard stock structure for the word "throughout":

> The unemployment-benefits statutes are unambiguous. . . . [T]he plain meaning of "throughout" . . . is the dictionary definition, "[I]n, to, through, or during every part of; all through." *The American Heritage Dictionary of the English Language* 1436 (4th ed.2000). "Throughout" is not reasonably subject to more than one interpretation; therefore, it is not ambiguous . . . [A]pplying that definition in this case, the issue is whether Bui had transportation "in, to, through, or during every part of" or "all through" his labor market area. If reliance on public transportation does not provide access to "every part of" Bui's labor market area, or "all through" his labor market area, Bui does not have "transportation throughout the labor market area" and therefore is not "available for suitable employment" under [the statute].[128]

Based on this reasoning, Judge Schellhas concluded that Mr. Bui was not eligible for unemployment benefits.[129]

The majority took a different approach. After acknowledging that courts are limited to the plain meaning of statutory terms when there is no ambiguity,[130] the majority went on to *discover* ambiguity regarding the statute's use of the word "throughout."[131] More specifically, the majority pointed out that in informal contexts, the word "throughout" is often used to mean "various locales representative of the whole."[132] The majority proved this point with the following informal example: "[I]f someone states that she has traveled 'throughout' Wisconsin, it does not indicate

125 *Id.* at 65.

126 *Id.* at 65–67.

127 *Id.* at 72–73.

128 *Id.* at 74 (Schellhas, J., concurring in part and dissenting in part).

129 *Id.* at 75 (Schellhas, J., concurring in part and dissenting in part) ("Bui was required to have transportation throughout the labor market area, and Bui failed to satisfy that requirement. Therefore, he was not available for suitable employment and is not eligible for unemployment benefits.").

130 *Id.* at 68.

131 *See id.* at 68–69.

132 *Id.* at 69.

that she has visited every place within the state, but that she has been 'all around' the state or, restated, to locations that are representative of its various parts."[133]

Having proved that the word "throughout" was subject to more than one interpretation, the majority held that the term was at least ambiguous.[134] The majority then turned to other forms of statutory analysis in its effort to resolve the ambiguity.[135] After reviewing the provision's legislative and administrative history[136] and some canons of statutory construction,[137] the majority ultimately concluded that "[Bui's] reliance on public transit [was] adequate to satisfy the requirement of transportation throughout the labor market area, and that [Bui] [was] therefore eligible for unemployment compensation."[138]

Like *Rodriguez*, *Bui* illustrates how an advocate can overcome *technically out* statutory ambiguity by evoking from everyday language an informal alternative use of the statutory term in question that plausibly reconciles the apparent mismatch between the facts of the present case and the statutory term. As they did in both of these cases, alternative stock structures such as these can provide enough of a linguistic hook to open the analysis up to other, more persuasive forms of statutory argument.

3. *Pennsylvania v. McCoy*[139]

James McCoy entered a Philadelphia restaurant and, after arguing with the manager, fired five shots from a handgun in the direction of the manager.[140] Mr. McCoy fired all five shots while he was standing inside the restaurant.[141] Mr. McCoy was convicted of several crimes, including "discharge of a firearm into an occupied structure."[142] The primary issue

133 *Id.* It is important to note that the majority in *Bui* claimed to find support in the dictionary for this alternative use of "throughout." The majority pointed out that the dictionary defined "throughout" as "[i]n, to, through, or during every part of; all through." *Id.* (quoting *The American Heritage College Dictionary* 1436 (4th ed., Houghton Mifflin Harcourt 2002)). Building on the latter definition, "all through," the majority then went on to the definition of the word "through": "Here and there in; around." *Id.* (quoting *The American Heritage College Dictionary* 1436 (4th ed., Houghton Mifflin Harcourt 2002)). The majority claimed that a combination of the definitions of "throughout" and "through" supported interpreting the word "throughout" to mean "various locales representative of the whole." *Id.* This reasoning, however, is unconvincing. The majority relied heavily on the definition of the word "through" in isolation. But the definition of "throughout" does not use "through" in isolation; it uses the phrase "*all* through." *Id.* (quoting *The American Heritage College Dictionary* 1436 (4th ed., Houghton Mifflin Harcourt 2002)) (emphasis added). Though the word "through" may offer some flexibility, the phrase "all through" does not. Thus, while the majority claimed to find support in the dictionary, its real support was its reference to the informal use of the word "throughout" in everyday conversation, as illustrated by the majority's Wisconsin example. *See id.* This informal use in everyday language is real, undeniable, and familiar. Thus, it was the majority's allusion to this informal use—not the dictionary definition—that evokes in the reader's mind the plausible alternative stock structure for the word "throughout."

134 *Id.*

135 *See id.* at 69–72.

136 *Id.* at 70–71.

137 *Id.* at 71–72.

138 *Id.* at 72–73 (citation omitted).

139 962 A.2d 1160 (Pa. 2009).

140 *Id.* at 1161.

141 *Id.*

on appeal to the Pennsylvania Supreme Court was whether Mr. McCoy's conviction for shooting "*into* an occupied structure"[143] should be reversed because he had fired his gun while he was already inside the restaurant.[144]

The issue in *McCoy* was one of *technically out* statutory ambiguity. The statutory phrase "discharging a firearm into an occupied structure" immediately evokes the mental stock structure of a person situated outside of a building and shooting into it. What's more, the dictionary definition of the word "into" reflects this standard usage.[145] Mr. McCoy, however, fired his shots from *within* the structure. Thus, the facts of the case cognitively collided with the statutory provision.

Four of the six Pennsylvania Supreme Court justices relied on the standard stock structure and dictionary definition of the word "into":

> The plain meaning of "into" can be gleaned from its dictionary definition. The word "into" typically follows "a verb that carries the idea of motion . . . to indicate a place or thing . . . enterable or penetrable by or as if by a movement from the outside to the interior part." *Webster's Third New International Dictionary* 1184 (1986). It is also defined as describing action "from the outside to the inside of; toward and within." *Webster's New World Dictionary* 738 (2d ed. 1984). Based upon these definitions, in the context of spatial relations, the plain meaning of the term "into" requires that the original location is outside of the destination—one does not walk "into" a room one is already standing in; likewise, a gun is not fired "into" a building when the shooter is located inside the building. A projectile only travels "into" an occupied structure when the projectile begins its journey outside of the structure and either enters the structure through an opening or penetrates the outer wall.[146]

The majority built on this "plain meaning" argument by turning to several canons of statutory construction.[147] In the end, the majority concluded as follows:

> The language of [the statute], fairly interpreted in light of our principles of statutory construction, requires that an actor be located outside of an occupied structure in order to fire "into" that structure. Here, it was

142 *Id.* (quoting 18 PA. Consol. Stat. § 2707.1)

143 962 A.2d at 1161 (quoting 18 Pa. Consol. Stat. § 2707.1) (emphasis added).

144 *Id.*

145 *See Webster's New Collegiate Dictionary* 600 (G. & C. Merriam Co. 1981) (explaining in the relevant definition that the word "into" is "used as a function word to indicate entry, introduction, insertion, or inclusion 'came [into] the house'").

146 *McCoy*, 962 A.2d at 1166–67. Arguably, the majority could have found that McCoy shot "into" the structure if one or more of his bullets had embedded into an interior wall of the structure (i.e., had embedded "into" a wall in the restaurant). However, there was no evidence of this in the case. *Compare infra* text accompanying nn. 151–57 (discussing *North Carolina v. Canady*, 664 S.E.2d 380 (N.C. App. 2008)).

147 *See id.* at 1167–69.

> undisputed that appellant [McCoy] was inside the structure. According, we reverse appellant's conviction under [this statute].[148]

Of more interest to this discussion is the dissent in *McCoy*. Two dissenting justices—Justices Eakin and McCaffery—argued that the word "into" is sometimes used in everyday language in a way that goes beyond its standard use and dictionary definition. According to Justices Eakin and McCaffery,

> "Into" may denote moving from outside in, but one may move "into" a room even when one is within the room to start with. One moves into the night even when one was in the night to start with. One may proceed into the jungle despite being in the jungle already. One may introduce thoughts into the dialog that is ongoing. One need not be outside the room, night, jungle, or dialog to have the word "into" be descriptive, and one need not be outside the building to shoot "into" it.[149]

With this argument, the dissenting justices offered an informal alternative stock structure for the word "into" that would encompass McCoy's conduct of shooting from within the restaurant. Although the dissenting justices were unable to persuade enough of their colleagues to determine the result in the case, their efforts in the dissenting opinion nevertheless provide another compelling example of the first strategy for overcoming *technically out* statutory ambiguity.

It is interesting to compare the *McCoy* case to the factually similar case of *North Carolina v. Canady*.[150] *Canady* involved an issue of *technically in* rather than *technically out* ambiguity. The slight difference between the cases highlights the difference between these two types of statutory ambiguity.

In *Canady*, the defendant fired a handgun from outside an apartment building, and the bullet lodged in an exterior wall of the building.[151] The defendant was convicted of "discharging a firearm into occupied property."[152] On appeal to the North Carolina Court of Appeals, the defendant argued that "in order to be 'into' the [building], as the plain meaning of 'into' is commonly understood, the bullet must penetrate an interior wall of the apartment, or enter the apartment."[153] The court disagreed, relying on an alternative definition of "into" from the dictionary:

148 *Id.* at 1169.

149 *Id.* at 1170 (Eakin, J., joined by McCaffery, J., dissenting).

150 664 S.E.2d 380 (N.C. App. 2008).

151 *Id.* at 382.

152 *Id.* at 383.

153 *Id.* at 384.

> [T]he plain meaning of "into" includes "against" as in "crashed *into* a tree." *American Heritage College Dictionary* 712 (3d ed. 1997) (emphasis added). This sentence does not mean "crashed *through* a tree." Similarly, discharging a firearm "into" an enclosure does not have to mean "through" the wall of the enclosure. . . . The exterior wall is nonetheless a wall, which the bullet was fired against, thereby fulfilling the requirement of being fired "into" the enclosure.[154]

The issue in *Canady* was similar to the issue in *McCoy*; however, for purposes of linguistic ambiguity, the two cases are very different. Although the facts of the *Canady* case conflicted with the standard stock structure for the phrase "discharging a firearm into occupied property," the court in *Canady* was able nevertheless to turn to the dictionary to support its alternative interpretation of the word "into." Thus, the issue in *Canday* was one of *technically in* statutory ambiguity, and, as with all issues of *technically in* statutory ambiguity,[155] the dictionary itself provided the linguistic hook needed to open the issue up to extrinsic aids statutory construction.[156] By contrast, the dissenting justices in *McCoy* could not turn to the dictionary for support for their interpretation of the word "into" because their interpretation was not reflected in the dictionary. Thus, the issue in *McCoy* was one of *technically out* statutory ambiguity, and the dissenting judges had to create a linguistic hook from a less-common usage of the word "into" that was beyond the word's dictionary definition.

B. Strategy 2: Evoking Alternative Stock Experiences Regarding the Item or Circumstance Represented by Client's Facts

The first strategy for overcoming adverse cognitive stock structures implicated by statutory language focused on the left side of the mathematical formula[157] and explored the technique of an advocate evoking an alternative, more favorable stock structure for the statutory term itself. The second strategy, explored in this section, focuses of the right side of our formula. More specifically, the second strategy for overcoming adverse stock structures in issues of *technically out* statutory ambiguity involves evoking in the reader's mind favorable stock *experiences* regarding the item or concept represented by the present case. This strategy, too, is best explained through illustrations.

154 *Id.*

155 *See supra* pt. I(A).

156 *See Canady,* 664 S.E.2d at 384–85.

157 *See supra* introduction to pt. II.

1. *Covered Bridge, Inc. v. Town of Vail*[158]

A building owner in Vail, Colorado, appealed a district judge's determination that a unit in the owner's building was "street level" for the purposes of zoning classification.[159] Because of the slope of the fronting street, the unit in question was situated four feet above the surface of the street and was accessed by ascending a short flight of stairs.[160] The issue on appeal was whether the zoning classification "street level" applied to a real-estate unit four feet above the level of the street.[161]

The issue in *Covered Bridge* was one of *technically out* statutory ambiguity. The standard stock structure for "street level" is a mental picture of a real-estate unit abutting, and situated at the same elevation as, the street. The building owner's unit, however, was four feet above the street and thus did not fit the standard stock structure for the zoning term. The Colorado Court of Appeals ultimately held that the unit was "street level."[162] In reaching its conclusion, the court acknowledged and resolved the linguistic mismatch between the statutory term and the facts of the case:

> Plaintiff points out . . . that, in the dictionary, "street" is commonly defined as "a paved road" and "a public thoroughfare especially in a city, town, or village, including all areas within the right of way," *see Webster's Third New International Dictionary* 2259, and "level" is defined, as relevant here, as "an approximately horizontal line or surface" and "such a line or surface taken as an index of altitude," *id.* at 1300. From these definitions, "street level" would be that index of altitude approximately horizontal to the adjacent thoroughfare. Accepting such definitions, we agree that it would not be unreasonable to interpret the term "street level" as the building level that is exactly equal in elevation to the relevant street. . . .
>
> However, . . . we agree with the town that it also is reasonable to read the term "street level" to refer to a range of building levels that are approximately equal in elevation to the street, but slightly elevated by the presence of a curb or a small number of steps, that is, levels within reasonable horizontal proximity to, and having direct pedestrian access from, the street even though not situated at the exact same elevation as the adjacent street.

* * * * *

158 197 P.3d 281 (Colo. App. 2008).

159 *Id.* at 282–83.

160 *Id.* at 282.

161 *Id.*

162 *Id.* at 285.

> [I]t is undisputed that the town is located in mountainous terrain and the topography of the relevant section of Bridge Street varies considerably. Unless building levels slope in exact concert with the ever changing elevation of the adjacent street, there might be only one small spot, or perhaps none at all, where a building level would fit plaintiff's definition of "street level."[163]

Having by this discussion resolved the issue from a linguistic standpoint, the court went on to explain how a narrow approach to the term "street level" would undermine the statute's purpose and lead to absurd results.[164] The court concluded by affirming the district court judge's ruling that the owner's unit was to be zoned as "street level."[165]

The most important part of this discussion for linguistic purposes is the last quoted paragraph, in which the court explained that, in mountainous terrain, buildings rarely slope with the grade of the adjacent street. As the court explained, buildings in mountain towns remain level, and often only a small portion of any given building is at the same elevation as the adjacent street. The reason this discussion is important is that it cognitively triggers in the minds of the readers their past experiences with streets in mountain towns. This dispute arose in the mountain town of Vail, Colorado. The appeals court sat in Colorado as well. Thus, everyone involved in this matter—from the parties to the judges—were Coloradans. Most, if not all, people who live in Colorado are familiar with the unique architectural designs of buildings situated on streets with a substantial grade. Based on these experiences, these people have formed stock memories of this phenomenon. The court's discussion in *Covered Bridge* evokes these stock memories and allows the reader to remember and appreciate that in the case of a mountain town, a "street level" shop or store may mean a shop or store that is slightly above the street and thus serves to resolve in the reader's mind the apparent mismatch between the facts of the case and instinctive linguistic meaning of the relevant statutory term.

This strategy is significantly different from the first strategy, which focused on the left side of the mathematical formula: the statutory term. That strategy focused on the technique of evoking a favorable alternative meaning for the statutory term itself. This second strategy focuses on the right side of the formula: the item represented by the facts of the present case. In the *Covered Bridge* case, the court did not evoke alternative uses or meanings of the statutory term "street level." Rather, the court focused

163 *Id.* at 284–85.

164 *Id.*

165 *Id.* at 285.

on the plaintiff's building and buildings like it. The court resolved the apparent linguistic conflict by reminding the reader of the unique nature of buildings on sloped streets. The court thus resolved the linguistic conflict by explaining how the facts of the case, upon closer inspection, were actually consistent with the statutory term.

2. *Colorado v. Walters*[166] and *Grabler v. Allen*[167]

In *Colorado v. Walters*, three individuals entered the trailer part of a parked semitractor-trailer rig and stole several cases of beer.[168] The individuals were subsequently convicted of first-degree criminal trespass.[169] The relevant criminal statute made it unlawful to enter "any *motor vehicle* with the intent to steal anything of value."[170] The defendants appealed their conviction, arguing, among other things, that the trailer part of a semitractor-trailer was not a "motor vehicle."[171]

The *Walters* appeal presented an issue of *technically out* statutory ambiguity. The standard stock structure for "motor vehicle" is a mental picture of a generic stand-alone, self-propelled vehicle without an attached trailer. Furthermore, the Colorado statutory definition of "motor vehicle" was consistent with this stock structure. It defined "motor vehicle" for the purpose of the criminal code as "any self-propelled device by which persons or property may be moved, carried, or transported from one place to another."[172] The facts of the case, however, were inconsistent with the stock structure and the statutory definition. The defendants had entered the trailer part of the rig, not the "self-propelled"–tractor part. Thus, the real issue in *Walters* was whether the term "motor vehicle" included an attached trailer.

The State's primary argument on this issue was that the two parts of a semitractor-trailer represent a single entity and thus overall should be treated as a single motor vehicle.[173] The Colorado Court of Appeals agreed with the State: "We agree with the People's argument that the subject vehicle, although composed of two separable parts, represent[ed] one commercial unit."[174] And with this rather brief line of reasoning, the court held that the semitrailer, which at the time of the crime was attached to a tractor, qualified as a "motor vehicle" for the purposes of the first-degree criminal-trespass statute.[175]

Although the State's argument on this issue was rather brief and simplistic, it contained (perhaps unbeknownst to the State) a powerful

166 568 P.2d 61 (Colo. App. 1977).

167 109 P.3d 1047 (Colo. App. 2005).

168 568 P.2d at 63.

169 *Id.*

170 *Id.* at 64 (quoting Colo. Rev. Stat. § 18-4-502 (1973)).

171 *Id.*

172 *Id.* (quoting Colo. Rev. Stat. § 18-1-901(3)(k) (1973)).

173 *See id.*

174 *Id.*

175 *Id.*

cognitive persuasive strategy. When the State argued that the two parts of a tractor-trailer are really one unit, the State automatically triggered in the minds of the judges generic memories of their experiences with these types of vehicles. First, it is safe to assume that the judges knew, like most people, that the tractor part of a semirig is designed and built specifically to tow the trailer part. Thus, like the rest of us, the judges had a generic understanding and picture of the relationship between the two parts of a semirig. Second, assuming again that the judges were like most of us, their real-life experiences with tractor-trailers were probably limited to seeing them on the highway. Thus, the State's reference had the effect of evoking in the judges' minds stock memories of tractor-trailers driving down the road. More important, the reference also evoked in the judges' minds stock memories of seeing just the tractor part of a tractor-trailer rig driving down the highway. We have all seen it: a tractor driving down the highway without its trailer. Admit it: they look funny; front-heavy; "naked" even. Most people would agree that the tractor part of a semirig looks incomplete without an attached trailer. Thus, when the State argued that a tractor and trailer are one unit, the State, whether it knew it or not, evoked potent stock memories that confirmed that assertion. In the end, those stock memories were powerful enough to resolve in the judges' minds the initial linguistic and cognitive disconnect posed by the issue on appeal.

More than twenty-five years after *Walters*, the Colorado Court Appeals, in *Grabler v. Allen*, again faced the *technically out* statutory issue of whether a trailer attached to a motor vehicle qualified as a "motor vehicle" for the purposes of a Colorado statute. In *Grabler*, a student volunteer, who was driving a private pickup truck that was towing a trailer owned by Colorado State University, collided with the plaintiff's automobile.[176] The plaintiff sued the university (and the student) for negligence.[177] The university moved to dismiss the suit, contending that it was immune from liability under the Colorado Governmental Immunity Act (GIA).[178] The plaintiff argued that the university's immunity was waived because the student was operating a university "motor vehicle" at the time of the accident.[179] The GIA waived a public entity's immunity from tort actions "for injuries resulting from . . . [t]he operation of a *motor vehicle* owned or leased by such public entity."[180] (The GIA did not define the term "motor vehicle."[181]) The trial court agreed with the plaintiff and

176 *Grabler*, 109 P.3d at 1048.

177 *Id.*

178 *Id.*

179 *Id.* at 1049.

180 *Id.* (quoting Colo. Rev. Stat. § 24-10-106(1)(a) (2004) (emphasis added)).

181 *Id.*

denied the motion to dismiss.[182] The defendants appealed.[183] The issue on appeal was whether, for the purposes of the GIA, the student was driving a "motor vehicle owned by [the university]" when she was driving a private pickup truck towing a university-owned trailer.[184]

The plaintiff relied heavily on the *Walters* case. Specifically, the plaintiff argued that just like a semitractor-trailer, which was held to be a single commercial unit and thus a motor vehicle in *Walters*, the truck–trailer combination in this case was "one motor vehicle unit of which CSU was an owner."[185] The appellate court, however, was not persuaded by this argument.[186] Although the court did not expressly state why it rejected this argument, we can surmise the reason for ourselves. The plaintiff's argument based on *Walters* was unconvincing because the reference to a truck–trailer combination does not evoke the same stock memories as a reference to a tractor-trailer combination. The latter reference evokes stock memories of both the combined unit and the incomplete nature of a lone tractor. A reference to a truck–trailer combination does not have the same effect. Unlike semitractors, pickup trucks often appear without trailers. Moreover, while pickup trucks *can* tow trailers, they still serve common functions (transporting people or hauling materials) when they are not towing trailers. Perhaps most important, a pickup truck does not look incomplete without a trailer. Thus, a truck–trailer combination is not instinctively viewed as a single unit in the manner that a tractor-trailer combination is.

Even though the court did not see a parallel to *Walters*, it did nevertheless rule in favor of the plaintiff. It did so in large part by evoking on its own accord different stock experiences that were favorable to the plaintiff. Despite the length of its opinion, the *Grabler* court's reasoning boils down to a single paragraph.[187] At the heart of its opinion, the court stated the following:

> Here the trailer was being used in the manner that was intended because it was being towed by a motor vehicle. . . . [O]nce the trailer was attached to the motor vehicle, it is reasonable to assume the trailer affected the operation and handling of the motor vehicle towing it. Additionally, when, as here, a motor vehicle and trailer are joined

182 *Id.*

183 *Id.*

184 *See id.*

185 Appellee's Answer Brief, *Grabler v. Allen*, 2004 WL 5259584 at *8 (Mar. 24, 2004) (No. 03CA1246, 109 P.3d 1047).

186 The court discusses *Walters* in passing, but does not apply it. *See Grabler*, 109 P.3d at 1050.

187 Most of the court's opinion in *Grabler* involves the court summarizing similar cases from Colorado and a number of other jurisdictions. *See Grabler*, 109 P.3d at 1049–50. However, in the end, the court does not use any of these cases as the basis for its conclusion. *See id.* at 1050–51.

> together and are traveling down a highway, the combined vehicle is perceived by others as one vehicle because the combined vehicle accelerates, turns, and slows down as one unit.[188]

That's it. That is the sum total of the court's reasoning on the issue. With this reasoning, the court colluded that the truck–trailer combination was a "motor vehicle" under the GIA.[189] The court held that the defendants were not immune from liability and remanded the case for trial.[190]

A close reading of the above quote reveals that the court relied on two primary rationales in reaching its conclusion. First, the court pointed out that the trailer likely affected the operation of the pickup truck. This is a policy argument: Because the trailer affected the operation of the vehicle, and because the vehicle, with its operation so affected, hit another motorist, it is only reasonable to treat the truck–trailer combination as a single unit.

The second rationale is of more interest. In the final sentence of the quote, the court noted that the truck–trailer combination moved as one and would be perceived by others as one vehicle. Simple? Yes. Trivial? No. With this sentence, the court (as an advocate for its conclusion) triggers stock experiences in the mind of the reader that reconcile the cognitive and linguistic mismatch posed by the issue. With this sentence, the court evokes in the mind of the reader stock memories of seeing truck–trailer combinations moving down the road. We have all seen this: the two parts moving smoothly as one—changing lanes together; slowing down together; turning corners together. The court's comment causes us to conjure up these experiences, and these experiences and the stock memories they generate cause us the view truck–trailer combinations as single units. Thus, with this simple sentence, the court persuades its readers to view a truck–trailer combination as a single "motor vehicle."

Walters and *Grabler* are illustrations of the second strategy for overcoming adverse issues of *technically out* statutory ambiguity. They are not examples of the first strategy because in neither case did the advocate look to alternative meanings of the statutory term in question. In *Walters*, the State did not look to the English language and attempt to point out instances where people use the term "motor vehicle" to refer to a tractor–trailer combination. Likewise, in *Grabler*, the court did not look to alternative linguistic uses of the term "motor vehicle" in its attempt to argue that the term includes a truck–trailer combination. Rather, in both

188 *Id.* at 1050.

189 *Id.* at 1051.

190 *Id.*

cases, the advocates (the State in *Walters* and the court in *Grabler*) focused on the right side of the *technically out* formula and sought to evoke stock experiences and memories with the items in question that would reconcile the instinctive collisions posed by the issues before the courts.

III. Alternative Stock Structures in Statutory Advocacy: More Than a Contrivance

The previous section explored two rather informal strategies for overcoming adverse stock structures in the context of *technically out* statutory issues. The first strategy called for an advocate to evoke *informal uses of words* from everyday language. The second strategy called for an advocate to evoke *informal stock memories* regarding common objects or situations. What probably stands out for both of these strategies is how "nonlegal" they appear to be. Arguing, as the court did in *Oregon v. Rodriguez*, that parents often say "one more time" to their children when, in fact, they mean "one or more additional times" hardly seems like a "legal" argument.[191] The same can be said for arguing, as the court did in *Covered Bridge, Inc. v. Town of Vail*, that "street level" in a mountain town includes shops above street level because of the nature of the architecture abutting sloped streets.[192] Admittedly, one hardly needs legal training to make such arguments.

But informality should not be confused with triviality. Granted, these arguments may appear, upon first glance, to be somewhat contrived, especially compared to more formal legal arguments, such as those based on legal rules, analogous precedents, or public policy. However, these strategies can be powerful for cases in which they are applicable. The source of this power stems from a combination of four important features of these arguments:

First, a *technically out* statutory issue presents a unique problem for a legal advocate because the language of the statute in question (as reflected in both its dictionary definition and stock structure) appears to unambiguously exclude the present item or circumstance.[193] Moreover, as a general rule, a court will not allow a legal advocate to argue extrinsic aids of statutory interpretation when the language of the relevant statute appears to be unambiguous on its face.[194] Thus, for the advocate on the

191 *See supra* text accompanying n. 107 (quoting *Oregon v. Rodriguez*, 175 P.3d 471, 473–74 (Or. App. 2007)).

192 *See supra* text accompanying n. 164 (discussing *Covered Bridge, Inc. v. Town of Vail*, 197 P.3d 281, 284–85 (Colo. App. 2008)).

193 *See supra* pt. I(B).

194 *See supra* text accompanying nn. 85, 107 (quoting *Oregon v. Rodriguez*, 175 P.3d at 473–74).

wrong side of this linguistic mismatch, the issue appears to be a nonstarter.

Second, despite the rule prohibiting advocates from arguing the interpretation of unambiguous statutes, courts also generally hold that the threshold for finding ambiguity in any given statutory provision is a low one.[195] Thus, in situations such as this, an advocate need only give a court a plausible linguistic argument for ambiguity.

Third, these two strategies are designed to provide at least a plausible alternative linguistic interpretation of the statutory term in question—that is, to establish plausible ambiguity in cases of *technically out* statutory interpretation.

Fourth, if a court finds that a statutory provision is plausibly subject to more than one interpretation and is therefore plausibly ambiguous, the court will allow attorneys on both sides of the issue to argue other aids of statutory construction in their efforts to resolve the ambiguity.[196] Because the strategies we have discussed establish plausible ambiguity in the statutory provision in question, they open the door for an advocate to offer other interpretative arguments. Once the door is opened, the advocate is free to argue more formal (and hopefully more persuasive) arguments of statutory interpretation.

In the end, the true power of the two strategies we have explored comes from their bootstrapping nature.[197] Arguments based on these strategies, although seemingly contrived, are plausible enough to open the analysis up for other forms of statutory argument. Once an advocate is freed up to argue more compelling legal arguments such as policy and legislative history, the advocate is in a better position to persuade the court to accept to his or her ultimate position on the statutory issue. And the more persuasive the advocate is regarding his or her ultimate conclusion, the more persuaded the court will be to accept the initial "merely plausible" linguistic argument. Thus, what may start off as merely a legally plausible linguistic interpretation of the statutory language can end up looking like the preferred interpretation because the court is motivated by the other, more formal legal arguments to interpret the language that way. In other words, the weaker linguistic argument can prevail because the other arguments can motivate the court to accept that argument. And the whole process begins with a merely plausible linguistic hook.

195 *See e.g. supra* text accompanying n. 117 (quoting *Oregon v. Rodriguez*, 175 P.3d at 474).

196 *See e.g. supra* text accompanying nn. 119–20 (discussing *Oregon v. Rodriguez*, 175 P.3d at 474–78).

197 For a similar discussion in a different context, see Smith, *supra* note 12, at 111–12.

Finally, the success of these strategies in real-life cases should not be overlooked or underappreciated. In all of the examples reviewed in the previous section (except for the dissent in *Pennsylvania v McCoy*[198]), the "informal" linguistic hook prevailed. And many other cases like these exist.[199] Thus, there is substantial evidence that these "informal" strategies work.

IV. Conclusion

These two strategies have already been employed with success by some legal writers in real-life cases such as those illustrated in this article. The strategies explored here are not so much new as they are underappreciated. Though it is true that some legal writers may have employed these strategies in these and other cases, it is unlikely that the writers were fully aware of the cognitive implications of their efforts. The primary goal of this article was to explain the cognitive processes underlying these strategies so that legal advocates—even those who have used them already, unwittingly—can apply them more consciously and more effectively.

198 *See supra* text accompanying n. 140–50 (discussing *Pennsylvania v. McCoy*, 962 A.2d 1160 (Pa. 2009)).

199 *See, e.g. Duarte-Ceri v. Holder*, 2010 WL 4968689 at *8 & n. 1 (2d Cir. Dec. 6, 2010) (Livingston, J., dissenting) (arguing that the phrase "under the age of eighteen years" should be interpreted to mean "before one's eighteenth birthday" by referring to the interchangeable use of those phrases in everyday speech); *Jeffers v. Clinton*, 730 F. Supp. 196, 204 (E.D. Ark. 1989) (interpreting the word "and" beyond its dictionary definition by evoking an alternative stock structure of that word from everyday usage: "An example from a less exalted field of human endeavor will illustrate the point. Suppose you say that I have less ability to chip and putt than you do. If I am just as good a chipper as you are, but not so good at putting, this statement, as matter of ordinary speech, is still a true one. It is a combination of qualities (play around the green) that we are discussing, and the comparison is between our respective totals or aggregates of the qualities."); *Michigan v. Tennyson*, 790 N.W.2d 354, 359 n. 5 (Mich. 2010) (interpreting the word "tend" beyond its dictionary definition by evoking an alternative stock structure of that word from everyday usage: "The term ['tend'] implies a level of certainty greater that 50 percent. . . . This common understanding of 'tend' is taken for granted in everyday speech. Thus, the statement 'I tend to be an early riser' conveys that I tend *not* to be a late riser; and the statement 'My son tends to be a well-behaved child' conveys that he tends *not* to be a poorly behaved child. From these statements, it can be said that, more likely than not, I will get up early and my son will behave well."); *Lee v. Oregon Racing Comm.*, 920 P.2d 554, 557 (Or. App. 1996) (interpreting the word "or" beyond its dictionary definition by evoking an alternative stock structure of that word from everyday usage: "In ordinary speech, the term 'or' may or may not be used to signify alternatives that are mutually exclusive. For example, the sentence 'Issuance of a passport permits the traveler to visit France or Italy' does not mean that the traveler may visit France or Italy, but not both.").