
Why Grammar Matters: Conjugating Verbs in Modern Legal Opinions

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I. INTRODUCTION

Does it matter that the editors of thirty-three law journals, including those at Yale and Michigan, think that there is a “passive tense”?¹ Does it matter that the United States Courts of Appeals for the Sixth² and Eleventh³ Circuits think that there is a “passive mood”? Does it matter that the editors of fourteen law reviews think that there is a “subjunctive tense”?⁴ Does it matter that the United States Court of Appeals for the District of Columbia Circuit thinks that there is a “subjunctive voice”?⁵

There is, in fact, no “passive tense” or “passive mood.” The passive is a voice.⁶ There is no “subjunctive voice” or “subjunctive tense.” The subjunctive is a mood.⁷ The examples in the first paragraph suggest that there is widespread unfamiliarity among lawyers and law students

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1. A Westlaw search of the Journals and Law Reviews Database, as of August 17, 2007, reveals thirty-four journals using the phrase “passive tense.” Of these, thirty-three, including the Yale Law Journal and the Michigan Law Review, assume that there is a passive tense. One correctly notes that “there is no passive tense.” Mary Barnard Ray, *Legal Writing: Transitions Enable Readers to Follow the Writer’s Thinking*, WIS. LAW., Oct. 1999, at 35, 35.

2. *Stearn v. Superior Distrib. Co.*, 674 F.2d 539, 546 (6th Cir. 1982) (“[T]he significance of the word ‘be’ in the phrase ‘to be rotated’ is that it changes ‘rotated’ from the active to the passive mood.”).

3. *Armenia v. Dugger*, 867 F.2d 1370, 1375 (11th Cir. 1989) (“Armenia contends that the court’s continued adherence to this interpretation . . . supports his argument that a change from the passive mood . . . to the active mood of the verb ‘to cause’ . . . was not a major change.”).

4. A Westlaw search of the Journals and Law Reviews Database, as of August 17, 2007, reveals fourteen uses of the phrase “subjunctive tense.”

5. *Ameren Servs. Co. v. F.E.R.C.*, 330 F.3d 494, 499 (D.C. Cir. 2003) (“As the Commission emphasizes on review, its interpretation relies primarily on Section A.2’s combined use of the subjunctive voice and present tense.”).

6. See *infra* Part II.B (discussing the voice of verbs).

7. See *infra* Part II.A (discussing the mood of verbs).

with the terminology that describes verb forms.⁸ Fortunately, in most cases, it does not matter. In general, it is possible for a lawyer to speak and write well even if that lawyer is not familiar with the grammatical terminology that describes the structure of the English language. A person who has spent a lifetime reading good English and conversing with speakers of good English will have internalized the rhythms and sounds of the language and thus can speak and write well, even without a formal understanding of grammatical principles and terminology.⁹ Such a person will usually be able to use the passive and the subjunctive correctly, even while not being able to explain that the first is a voice and the second a mood. In most cases, then, the ability to distinguish a tense from a voice from a mood is not particularly important.

However, in a small percentage of cases, including some important ones, courts explicitly rely on grammatical terminology¹⁰ to explain their decisions. In these cases, a lawyer or law student unfamiliar with the categories and labels of grammar will be at a great disadvantage if he is unable to make or respond to arguments based on grammatical principles. This article responds to that problem in two ways. First, it summarizes the basic grammar of verb forms, and second, it gives explicit examples of cases where the form of a verb has determined, in whole or in part, the result in a legal case.¹¹ This article will not undertake the arduous task of reviewing all of English grammar but will limit itself to the study of verbs, as verbs are probably the most important words in the English language and are most likely to affect the outcome of a legal case.

The use of grammar to decide legal cases is not a novelty. The United States Supreme Court has stated that it “naturally does not review congressional enactments as a panel of grammarians; but neither [does it] regard ordinary principles of English prose as irrelevant to a

8. Cf. BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* 135 (2002) (“There seems to be a wave of incapacity for grammar, comparable to the phenomenon of a crime wave.” (quoting Edward N. Teall)).

9. In fact, there is a view that “the teaching of formal grammar has a negligible or . . . even a harmful effect on the improvement in writing.” RICHARD BRADDOCK, RICHARD LLOYD-JONES & LOWELL SCHOER, *RESEARCH IN WRITTEN COMPOSITION* 37–38 (1963).

10. The term “grammar” can be given different meanings, but here it is used in the sense of “the internalized system of rules that the speakers of a language share.” Martha Kolln, *Closing the Books on Alchemy*, 32 *C. COMPOSITION & COMM.* 139, 141 (1981). The goal of grammar instruction is thus “to help [students] understand consciously the system they know subconsciously as native speakers, to teach them the necessary categories and labels that will enable them to think about and talk about their language.” *Id.* at 150.

11. See *infra* Part II (summarizing the grammar of the various verb forms and discussing cases where a verb form has influenced the result).

construction of those enactments.”¹² Further, the Court has noted that “Congress’ use of verb tense is considered significant in construing statutes.”¹³ This article will attempt to demonstrate that a basic familiarity with the terminology of verb forms is not simply the pretentiousness of a pompous pedant but is rather a very useful tool in the arsenal of legal argumentation.

II. VERB FORMS¹⁴

Verbs are action or linking words.¹⁵ They are essential to a sentence, and they tend to be the most important words in a sentence. For example, the action verbs “run” and “carry” can be used to form the simple sentences “John runs fast” or “John carries the water.” “Is” and “seem” are common linking verbs, and each can be used to form the sentences “John is tall” and “The water seems hot.” Verbs generally can be characterized by five properties: person¹⁶ (first person, second person, or third person), number¹⁷ (singular or plural), tense¹⁸ (present, past, future, present perfect, past perfect, or future perfect), voice¹⁹ (active or passive), and mood²⁰ (indicative, subjunctive, or imperative). A particular form of any verb can be identified by reference to these five properties. Thus, the verb phrase “he carries” is in the third person, singular number, present tense, active voice, and indicative mood of the verb “to carry.” In addition to these forms, there are also verbals, consisting of gerunds, infinitives, and participles;²¹ these are verb forms that function as nouns, adjectives, or adverbs. Traditionally, the correct

12. *Flora v. United States*, 362 U.S. 145, 150 (1960).

13. *United States v. Wilson*, 503 U.S. 329, 333 (1992).

14. The following reference works will be used as sources of authority on grammatical principles: MARCELLA FRANK, *MODERN ENGLISH: A PRACTICAL REFERENCE GUIDE* (1972); GARNER, *supra* note 8; ANDREA A. LUNSFORD, *THE ST. MARTIN’S HANDBOOK* (5th ed. 2003); J. MARTYN WALSH & ANNA KATHLEEN WALSH, *PLAIN ENGLISH HANDBOOK, A COMPLETE GUIDE TO GOOD ENGLISH* (rev. ed. 1959).

15. See LUNSFORD, *supra* note 14, at 616–44 (discussing the proper use of verbs).

16. See *infra* Part II.D (discussing the person of a verb in three cases in which the person of the verb affected the outcome).

17. See *infra* Part II.E (discussing the properties of the number of a verb and three cases which depended on the number).

18. See *infra* Part II.C (discussing the verb tense and five cases in which the verb tense was crucial in resolving legal arguments).

19. See *infra* Part II.B (discussing the elements of voice and four cases in which the voice of the verb determined the courts’ actions).

20. See *infra* Part II.A (discussing the properties of mood and six cases in which the outcomes were determined by the mood of a verb).

21. See *infra* Part II.F (discussing verbals and properties of gerunds, infinitives, and participles and six cases determined by verbals).

arrangement of a verb form through its voice, mood, tense, person, and number is called the “conjugation” of the verb.²² In order to keep these concepts clear and separate, it is helpful to see a sample of a fully conjugated verb in one place, with all of its permutations. The full conjugation of the verb “to sue” is provided in an appendix to this article and can be used as a basic reference as the individual forms of the verb are introduced.²³

The mistaken references in the opening paragraph of this article involved confusion as to these various properties of verbs. This section will examine each of the five properties of verbs—mood, voice, tense, person, and number—and then give examples where the differences among the properties made a difference in a legal decision.²⁴ It will then examine instances where the use of a gerund, infinitive, or participle influenced the result in a case.²⁵ It will begin with mood and voice, as these are the most common forms of the verb to have legal consequences.²⁶

A. Mood

It is difficult to convey a sense of the concept of verb mood in the abstract. As an introduction, “mood” is generally defined as indicating “the attitude of the writer toward what he or she is saying.”²⁷ The indicative mood, by far the most widely used of the moods, “express[es] a fact, opinion, or inquiry,”²⁸ such as “The sun *rises* in the east” or “*Does* the sun *rise* in the east?” The subjunctive mood expresses “a wish, suggestion, requirement, or condition contrary to fact.”²⁹ With the exception of the verb “to be,” the form of the subjunctive differs from the indicative only in the third person singular (e.g., “I insist that he *come* to class on time”). The subjunctive form of the verb “to be” in the present tense is “be” for all persons and numbers (e.g., “If this *be* treason, make the most of it”) and “were” for all persons and numbers in the past tense (e.g., “If I *were* a king, I would be rich”). The imperative mood expresses a command, such as “*Open* the door.” This

22. WALSH & WALSH, *supra* note 14, at 32.

23. See Appendix (conjugating the verb “to sue”).

24. See *infra* Parts II.A–E (looking at the five properties of verbs).

25. See *infra* Part II.F (examining gerunds, infinitives, and participles).

26. See *infra* Parts II.A–B (discussing the properties of mood and voice).

27. LUNSFORD, *supra* note 14, at 633.

28. *Id.*

29. *Id.*

section examines cases where the mood of a verb determined the interpretation of a statute, beginning with the indicative mood.³⁰

In *Sutton v. United Air Lines, Inc.*,³¹ the United States Supreme Court interpreted the Americans with Disabilities Act³² (ADA) and determined that Congress's choice of verb mood was significant. In *Sutton*, twin sisters with very poor eyesight applied to United Airlines for positions as commercial airline pilots and were rejected because they did not meet the airline's minimum vision requirement.³³ The sisters then sued the airline under the ADA, claiming that they had been the victims of unlawful discrimination because of their disabilities.³⁴ The specific legal issue in *Sutton* was whether the sisters were "disabled" within the terms of the statute, because, with corrective lenses, each had vision that was "20/20 or better."³⁵ More generally, the question was whether "the determination [of] whether an individual is disabled should be made with reference to measures . . . that mitigate the individual's impairment,"³⁶ including eyeglasses and contact lenses.

The Court looked to the language of the statute, which defined disability as "a physical or mental impairment that *substantially limits* one or more of the major life activities of such individual."³⁷ The Equal Employment Opportunity Commission had earlier interpreted this statutory language as requiring case-by-case determinations, "without regard to mitigating measures such as medicines, or assistive or prosthetic devices."³⁸ The Court disagreed.³⁹ Looking at the statutory language "*substantially limits*," the Court noted that that phrase "appears in the Act in the present indicative verb form,"⁴⁰ and therefore requires that "a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability."⁴¹ It was not sufficient that a person have an impairment that "'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not

30. See *infra* Part II.A (discussing the properties of mood and six cases in which the outcomes were determined by the mood of a verb).

31. 527 U.S. 471 (1999).

32. 42 U.S.C. § 12101 (1990).

33. *Sutton*, 527 U.S. at 475–76.

34. *Id.* at 476.

35. *Id.* at 475.

36. *Id.* at 472.

37. 42 U.S.C. § 12102(2) (1990) (emphasis added).

38. *Sutton*, 527 U.S. at 480 (citing 29 C.F.R. § 1630.2(j) (1998)).

39. *Id.* at 482.

40. *Id.*

41. *Id.*

taken.”⁴² Unfortunately for the sisters, their corrected vision was within the normal range so that their impairment did not in fact limit a major life activity.⁴³ Thus, they did not even satisfy the first requirement of the ADA—that they be “disabled.”⁴⁴ Further, even if they had satisfied that requirement, they could not ultimately have prevailed against United Air Lines unless they also showed that, “with or without reasonable accommodation[s],” they could “perform the essential functions of the employment position.”⁴⁵

If the language of the ADA had been written in the subjunctive mood, defining disability as an impairment that “would limit” or “might limit” one or more major life activities, then the Court might have reached a different result. Thus, the Court made reference to certain modals (“might,” “could,” and “would”) that might have referred to a “hypothetical uncorrected state.”⁴⁶ However, because the statute was written in the indicative mood, this hypothetical state of uncorrected vision was not relevant. Instead, the Court focused on the actual facts of the claimants’ impairments and their actual use of corrective lenses.⁴⁷ The majority opinion in *Sutton* is open to the criticism that it invites opportunistic behavior by those who might intentionally refrain from correcting an impairment so that they might qualify, at least at the initial stages of litigation, for the protection of the ADA.⁴⁸ Nevertheless, the point here is that a reader of the majority opinion who does not understand the different functions of the indicative and subjunctive moods would be missing a significant underpinning to the Court’s ultimate decision in favor of the airline.

The *Sutton* case dealt with the situation where claimants had in fact mitigated their disabilities with corrective devices and yet wanted their disabilities measured without regard to those corrective devices.⁴⁹ It did not address the reverse situation of those whose disabilities could be mitigated by surgery or medical treatment but who were unwilling to

42. *Id.*

43. *Id.* at 481.

44. *Id.* at 482.

45. 42 U.S.C. § 12111(8) (1990).

46. *Sutton*, 527 U.S. at 482.

47. *Id.* at 488.

48. See, e.g., Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act*, 103 MICH. L. REV. 217, 233 (2004) (suggesting that if a court adopts a no-mitigation standard, then “the *Sutton* plaintiffs [would] have rationally acted to discard their corrective lenses before applying to United Airlines”).

49. *Sutton*, 527 U.S. at 475–76.

undergo such treatment.⁵⁰ Were such persons disabled under the terms of the ADA? In answering this question, once again the mood of the verb “limits” was significant. In *Capizzi v. County of Placer*,⁵¹ the court considered the case of a woman who had elbow tendinitis that prevented her from lifting more than five pounds but who was unwilling to receive cortisone shots or undergo surgery that would very likely cure her disability.⁵² The defendant, her employer, argued that the employee was not disabled because she had “failed to avail herself of effective corrective treatments.”⁵³ In analyzing this issue, the court concluded that a failure to treat does not defeat an ADA cause of action.⁵⁴ The court cited *Sutton* and its reference to the “present indicative,” requiring that a person be *presently* disabled.⁵⁵ Thus “the fact that a particular procedure *would mitigate* the condition cannot prevent a finding that the plaintiff is presently disabled.”⁵⁶

In contrast to the disability cases that emphasized the indicative mood and its basis in reality and fact, several other cases have focused on the subjunctive mood with its hypothetical, or contra-factual, perspective. In *Kelsey v. Dollarsaver Food Warehouse*,⁵⁷ the Oklahoma Supreme Court considered the timeliness of an appeal that, under the rules of the court, had to be filed within thirty days of an appealable order.⁵⁸ At the trial, the plaintiff had won a substantial jury verdict and the defendant had moved for a new trial and for a judgment notwithstanding the verdict.⁵⁹ In response, the trial judge issued two documents.⁶⁰ The first, on May 18, stated, “the motions should be overruled.”⁶¹ The second, on June 2, stated that the motions “are hereby overruled.”⁶² The defendant filed his appeal on June 30,⁶³ which was within thirty days of the June 2 order but more than thirty days after the May 18 order. The question before the court was which document was the

50. *Id.*

51. 135 F. Supp. 2d 1105 (E.D. Cal. 2001).

52. *Id.* at 1105.

53. *Id.* at 1112.

54. *Id.* at 1113.

55. *Id.*

56. *Id.* (emphasis added).

57. 885 P.2d 1353 (Okla. 1994).

58. *Id.* at 1353.

59. *Id.* at 1354.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

appealable order that started the thirty-day calendar.⁶⁴ The court determined that it was the June 2 document and allowed the appeal to proceed.⁶⁵ The basis for this decision was that the verb form in the first document was in the subjunctive mood and thus did not constitute an “order.”⁶⁶

As the court explained, the word “should” “places [the] statement in the subjunctive mood.”⁶⁷ Technically, this construction of “should” as a subjunctive is rather broad by modern grammatical standards, which consider words like “should” and “would” to be “modal auxiliaries” that are used with the base form of the verb to create a form of the indicative mood.⁶⁸ However, there is no question that older versions of English grammar considered “should” and “would” to be part of the subjunctive mood,⁶⁹ and legions of former Latin students know that these forms are treated as subjunctives when translated into Latin.⁷⁰ Even today, these modal auxiliaries do the work of the subjunctive mood even if they are not technically considered to be the subjunctive.⁷¹ In any case, the *Kelsey* court, having taken a broader view of what constitutes the subjunctive, went on to explain that “[t]he subjunctive mood is a verb form representing an act or state, not as a fact, but as contingent or possible.”⁷² Thus, the trial judge in his May 18 order “set his statement in the subjunctive mood, here a representation that the motions were going to be, but had not yet been, overruled.”⁷³ The court found that the June 2 order, which stated that the motions “are hereby, overruled,” in fact overruled the motions because it was in the indicative mood.⁷⁴

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. See LUNSFORD, *supra* note 14, at 842 (identifying the nine basic modal auxiliaries as *can*, *could*, *will*, *would*, *shall*, *should*, *may*, *might*, and *must*).

69. See E.B. Setzler, *Why Not a Future Subjunctive*, 23 MOD. LANGUAGE NOTES 243, 244 (1908) (“[A]ll of the functions of the auxiliary forms *would* and *should* are properly subjunctive functions—they are functions that belong to the subjunctive mood in languages generally, and that go to make up the very concept of the mood itself.”).

70. See, e.g., JOSEPH HENRY ALLEN & JAMES BRADSTREET GREENOUGH, ALLEN AND GREENOUGH’S NEW LATIN GRAMMAR 282 (J.B. Greenough et al. eds., 1931) (identifying the verb phrases “I would say” and “I should incline” as subjunctives).

71. FRANK, *supra* note 14, at 95 (indicating that the modal auxiliaries “add to the verb a special semantic component such as ability, obligation, possibility. Some of the modal auxiliaries express the same kinds of semantic coloring as verbs in the subjunctive mood (note the relationship between *modal* and *mood*).”).

72. *Kelsey*, 885 P.2d at 1354 (citing MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1172 (10th ed. 1993)).

73. *Id.*

74. *Id.* at 1355 (internal quotation marks omitted).

Therefore, the June 2 order started the appellate clock running, and the defendant's appeal within thirty days was timely.⁷⁵

Three dissenting justices strongly disagreed with the majority's emphasis on grammar.⁷⁶ They argued that the meaning of the May 18 order ought "not to be divined from the rules of grammar," but rather from "the age-old practice culture of legal professionals and its immemorial language usage."⁷⁷ For the dissenters, the majority should have read the order as a whole to determine the judge's intent.⁷⁸ The dissenters were of the view that on May 18 the trial judge intended to issue an "*in praesenti*" ruling that resolved the matter.⁷⁹ Further, on the grammatical point itself, the dissenters pointed out that, according to modern English grammar books, the term "should" does not always operate as a subjunctive at all but rather is capable of being "employed as, virtually, a present indicative synonymous with *ought*."⁸⁰ For the dissenters, the majority had exalted form over substance by giving effect to a grammatical technicality over the trial judge's intent.⁸¹ The dissenters may have been right about this, but the fact that they were the dissenters suggests the importance of understanding grammatical technicalities.

*Nelson v. Maryland*⁸² is another case where a court explained a procedural decision on the basis of the subjunctive mood of the verb.⁸³ In that case, the attorney for a criminal defendant, who initially objected at trial to the admission of a report that may have been inadmissible under the hearsay rule, later declined to pursue the objection.⁸⁴ When the defendant (now the appellant) attempted to challenge the admissibility of this evidence on appeal, the appellate court would not hear the argument because "the admissibility of evidence admitted without objection cannot be reviewed on appeal."⁸⁵ The court explained that "[a]ppellate review . . . is concerned with actual trials that take place in the real world, to wit, with rulings that trial judges make in

75. *Id.*

76. *Id.* at 1356 (Opala, J., dissenting).

77. *Id.* at 1357.

78. *Id.*

79. *Id.*

80. *Id.* at 1357 n.15 (internal quotation marks omitted) (quoting E. PARTRIDGE, USAGE AND ABUSAGE 376 (1963)).

81. *Id.* at 1357.

82. 768 A.2d 738 (Md. 2001).

83. *Id.* at 738.

84. *Id.* at 749.

85. *Id.* at 749–50 (internal quotation marks omitted) (quoting *Hall v. State*, 705 A.2d 50, 56 (Md. 1998)).

the *indicative mood*.”⁸⁶ On the other hand, the appellant was trying to take the court “[t]hrough the Looking Glass into a world where events are in the *subjunctive mood*.”⁸⁷ The appellant’s brief argued that “**IF** defense counsel **HAD MAINTAINED** his original objection, **HE WOULD HAVE BEEN** overruled,”⁸⁸ and thus he would have had an appealable issue. The court responded by asking whether the appellant would have been satisfied “by a holding in the subjunctive mood: ‘**And IF THAT HAD HAPPENED, WE WOULD HAVE REVERSED** the convictions’?”⁸⁹ Unfortunately for the appellant, the court was unwilling to “make holdings that might have been in response to rulings that might have been.”⁹⁰

*In re Bading*⁹¹ is a bankruptcy case in which the court explained its decision by reference to the subjunctive mood. *Bading* considered the extent to which the bankruptcy trustee was entitled to a refund of federal taxes that the debtor received after her bankruptcy proceeding had begun but which was attributable to income earned earlier.⁹² The debtor had married shortly after filing her bankruptcy petition and then filed a joint return with her new husband for the relevant tax year.⁹³ As a result of her marriage and the filing of the joint return, the debtor and her husband received a refund of \$2,167, and the trustee wanted eighty-five percent of the debtor’s half of that refund.⁹⁴ The debtor argued that the trustee was only entitled to eighty-five percent of \$178, which was the amount her refund would have been had she not married and had she not filed a joint return.⁹⁵ The debtor claimed that her marriage, which occurred after her petition in bankruptcy, should not have affected the size of the trustee’s claim to her tax refund.⁹⁶

The bankruptcy court rejected the debtor’s argument.⁹⁷ First, as a matter of federal tax law, one’s marital status is determined at the close of the tax year.⁹⁸ Moreover, and perhaps more importantly, “the

86. *Id.* at 750 n.6 (emphasis added).

87. *Id.* (internal quotation marks omitted) (emphasis added).

88. *Id.* (internal quotation marks omitted).

89. *Id.*

90. *Id.*

91. 154 B.R. 687 (Bankr. W.D. Tex. 1993).

92. *Id.* at 688.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

Bankruptcy Code is not a statute written in the *subjunctive mood*; it is written in the *indicative mood*.”⁹⁹ Up to a point, the court agreed with the debtor:

Had she indeed not married in the tax year that generated the larger refund, she would only in fact have received the smaller refund, and would only owe the Trustee the very amount she now proposes he receive. But she did marry and that fact has consequences under the Internal Revenue Code.¹⁰⁰

The court explained that it was better to “stick with the indicative mood,” and thus to “parse tax refunds based not on ‘what ifs’ but what is.”¹⁰¹

The last of the three moods is the imperative, which is used to express a command. In *Perkins v. Maryland*,¹⁰² a criminal defendant’s conviction was set aside because of the imperative mood.¹⁰³ Perkins had been convicted of possession of narcotics paraphernalia, and, on appeal, he challenged the constitutionality of the search of his motel room.¹⁰⁴ The police claimed that the search was lawful because, even though they did not have a warrant, the defendant had consented to the search.¹⁰⁵ The court reviewed the evidence surrounding the search and summarized the relevant facts as follows.¹⁰⁶ At 2:30 a.m., the police, having obtained a passkey from the motel clerk, knocked on the defendant’s door.¹⁰⁷ When the defendant responded, “Who is it?” the police replied, “Howard County Police. Open the door.”¹⁰⁸ The defendant then opened the door, and the police found the drug paraphernalia.¹⁰⁹ The appellate court found that no consent had been given and that the search had violated the Fourth Amendment.¹¹⁰

In explaining its decision, the court said that the statement, “Howard County Police. Open the door,” was in the imperative mood.¹¹¹ The court further reasoned that “[t]hose are words of command, not of

99. *Id.* at 689 (emphasis added).

100. *Id.*

101. *Id.*

102. 574 A.2d 356 (Md. 1990).

103. *Id.* at 356.

104. *Id.* at 357.

105. *Id.* at 358.

106. *Id.*

107. *Id.* at 359.

108. *Id.* at 359–60 (internal quotation marks omitted).

109. *Id.* at 360.

110. *Id.* at 359.

111. *Id.* at 360 (internal quotation marks omitted).

request.”¹¹² In these circumstances, “even ostensible consent is not voluntary when it is ‘no more than acquiescence to a claim of lawful authority.’”¹¹³ The defendant’s own explanation of events confirmed this understanding of the facts.¹¹⁴ He said, “I had to open it, he ordered me.”¹¹⁵ Thus, the search was set aside and the criminal conviction overturned because of the mood of a verb.¹¹⁶

Finally, before concluding this examination of the mood of verbs and their influence on legal conclusions, it is prudent to sound a cautionary note. Even if grammar is ordinarily a very helpful and important tool for interpreting statutes, it does not trump legislative intent when that intent is clearly to the contrary. *Goldman v. Standard Insurance Co.*¹¹⁷ is an example of a case favoring legislative intent over grammatical construction. In *Goldman*, the United States Court of Appeals for the Ninth Circuit examined the term “disability” under the California Unruh Civil Rights Act,¹¹⁸ a state statute similar to the federal ADA. The plaintiff had applied for disability insurance based on anxiety and depression, and Standard Insurance Company refused to insure her.¹¹⁹ The plaintiff claimed that the refusal violated the Unruh Act.¹²⁰ The problem with Goldman’s claim was that, as a result of therapy, she functioned effectively in her daily life¹²¹ and was thus not “presently” limited in any major life activity. The insurer was unwilling to insure her not because she was presently disabled, but because she “may someday be entirely prohibited from working given her diagnosis of adjustment disorder.”¹²²

If the Supreme Court’s *Sutton* opinion had been controlling, it seems that Goldman’s claim should have failed because she was not *presently* disabled.¹²³ However, the *Goldman* court was construing a state statute that, though possibly similar to the federal ADA, had a different

112. *Id.*

113. *Id.* (quoting *Bumper v. N.C.*, 391 U.S. 543 (1968)).

114. *Id.*

115. *Id.*

116. *Id.* at 362.

117. 341 F.3d 1023 (9th Cir. 2003).

118. CAL. CIV. CODE § 51 (West 2003).

119. *Goldman*, 341 F.3d at 1025.

120. *Id.*

121. *Id.* at 1028.

122. *Id.*

123. *See supra* text accompanying notes 38–42 (discussing the interpretation of statutory language in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)); *Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1028 (9th Cir. 2003).

legislative history.¹²⁴ The Unruh Act itself did not define the term “disability,” but the *Goldman* court assumed for the sake of argument that, if there had been a statutory definition of “disability,” it “would also have been expressed using ‘limits’ in the present indicative.”¹²⁵ However, that assumption was not determinative in interpreting the term “disabled.”¹²⁶ The legislation that amended the Unruh Act made it clear that the newly enacted statutory term “physical disability” was to be given the same meaning that had been given to the term “physical handicap” in an earlier opinion of the California Supreme Court.¹²⁷ In that earlier opinion, the California Supreme Court interpreted the term “physical handicap” to include conditions that “*may handicap in the future but have no presently disabling effect.*”¹²⁸ Following this precedent, the federal appellate court did not construe the term “limits” “to imply a requirement of present disability.”¹²⁹ It was enough if Goldman “was regarded as having a disability that might limit a major life activity in the future.”¹³⁰ The intent of the California legislature, as evidenced by its adoption of an earlier court interpretation, had trumped the assumed grammatical mood of the verb “limits.”¹³¹

The cases cited in this section, with the exception of *Goldman*, demonstrate that the different moods of the verb have clearly made a difference to the judges writing the opinions. The attorneys litigating these cases would have been unable to argue persuasively to the court if they had not understood the indicative, subjunctive, and imperative moods. An attorney citing these cases today as precedent could not do so intelligently without an understanding of the moods of the verbs. Mood matters.

B. Voice

The “voice” of a verb indicates “whether the subject of the sentence is acting . . . or being acted upon.”¹³² In the active voice, the subject performs the action, as in, “The man carries the water.” In the passive voice, the subject is being acted upon or receives the action, as in “The

124. *Goldman*, 341 F.3d at 1029.

125. *Id.* at 1030–31.

126. *Id.*

127. *Id.* at 1031 (citing *Am. Nat’l Ins. Co. v. Fair Employment & Hous. Comm’n*, 651 P.2d 1151, 1155 (Cal. 1982)).

128. *Am. Nat’l Ins. Co.*, 651 P.2d at 1155.

129. *Goldman*, 341 F.3d at 1031.

130. *Id.* at 1032.

131. *Id.* at 1031.

132. LUNSFORD, *supra* note 14, at 631; *see also id.* at 631–33 (discussing voice).

water is carried by the man.” Although the use of the passive voice is not, without more, grammatically incorrect, many style books insist that the use of the passive should be minimized because it is weaker than the active voice¹³³ and can be “generally hard to understand and remember.”¹³⁴ It also tends to be the voice used by a person seeking to avoid responsibility for his actions, as in the popular politician pseudo-apology, “mistakes were made.”¹³⁵ Nevertheless, the use of the passive is approved by stylists in two situations: “(1) where the actor is unknown or unimportant [e.g., ‘My wallet was stolen.’], and (2) where the emphasis is on the recipient of the action instead of the actor [e.g., ‘President Kennedy was assassinated.’].”¹³⁶ The use of the passive voice has had significant consequences in the following cases.

In *United States v. Zavalza-Rodriguez*,¹³⁷ the defendant was convicted, pursuant to a plea agreement, of possessing heroin with intent to distribute. The issue before the court was the proper interpretation of the Federal Sentencing Guidelines.¹³⁸ As part of his plea agreement, the defendant agreed to a two-level *increase* in his sentence because of the presence of a handgun in the bedroom where he was staying.¹³⁹ The defendant, however, also asked for a *reduction* of his sentence on the ground that he had not used violence or possessed a weapon in connection with the offense.¹⁴⁰ The interpretive issue turned on two competing provisions of the sentencing guidelines. The first provision increased the sentence “if a dangerous weapon . . . was possessed.”¹⁴¹ The second reduced the sentence if “the defendant did not . . . possess a firearm or other dangerous weapon . . . in connection with the offense.”¹⁴² The government argued that because the defendant stipulated that a weapon was “possessed” under the first of these provisions, he could not assert that he had not “possessed” a weapon under the second.¹⁴³

133. GARNER, *supra* note 8, at 144.

134. LUNSFORD, *supra* note 14, at 632.

135. E.g., John M. Broder, *Familiar Fallback for Officials: “Mistakes Were Made,”* N.Y. TIMES, Mar. 14, 2007, at A18 (characterizing Attorney General Alberto Gonzales’s admission that “mistakes were made” as the “classic Washington linguistic construct”).

136. GARNER, *supra* note 8, at 144.

137. 379 F.3d 1182 (10th Cir. 2004).

138. *Id.* at 1184.

139. *Id.*

140. *Id.* at 1183.

141. *Id.* at 1184 (citing U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (2007)).

142. *Id.* at 1185 n.1 (citing U.S. SENTENCING GUIDELINES MANUAL § 5C1.2(a)(2) (2007)).

143. *Id.* at 1183.

The court rejected the government's argument, in large part because of the different voices used in the Sentencing Guidelines.¹⁴⁴ Under the first enhancing provision, the verb was "written in the passive voice, requiring a sentence enhancement 'if a dangerous weapon (including a firearm) was possessed.'"¹⁴⁵ This verb form did not identify *who* was doing the possessing and thus was broad enough to cover situations of "mere proximity" to a weapon by a defendant, without a showing of "active possession."¹⁴⁶ In order to enhance a defendant's sentence under this provision, the government needed only show that "the weapon was found in the same location where drugs or drug paraphernalia are stored."¹⁴⁷ Possession therefore meant "possession by proximity—constructive possession."¹⁴⁸

On the other hand, the verb form in the second, mitigating section, "did not possess . . . a firearm,"¹⁴⁹ is in "the active voice[,] requiring the defendant to do the possessing,"¹⁵⁰ or more accurately, requiring the defendant *not* to do the possessing. This provision "focus[es] on the defendant's own conduct"¹⁵¹ and recognizes "a distinction between constructive and actual possession."¹⁵² The government had not introduced evidence that the defendant himself had possessed the gun, so there was no contradiction in the district court's finding that the defendant himself had never "possessed" the gun for purposes of the sentence reduction provision of the guidelines.¹⁵³ The distinction between the active and passive voices meant that the defendant was sentenced to sixty months imprisonment, without regard to the statutory minimum.¹⁵⁴

In *State v. Roberts*,¹⁵⁵ the passive voice was at least part of a reason for a court's invalidation of a death sentence. The jury had convicted the defendant of both aggravated premeditated first-degree murder and first-degree felony murder, and had sentenced him to death.¹⁵⁶ Two

144. *Id.* at 1186.

145. *Id.*

146. *Id.* at 1187.

147. *Id.* at 1186–87 (citing *United States v. Roederer*, 11 F.3d 973, 983 (10th Cir. 1993)).

148. *Id.* at 1187.

149. *Id.* at 1186 (citing U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (2007)).

150. *Id.* (citing *In re Sealed Case*, 105 F.3d 1460, 1463 (D.C. Cir. 1997)).

151. *Id.*

152. *Id.*

153. *Id.* at 1188.

154. *Id.* at 1184 (noting that a sentence of sixty months was imposed).

155. 14 P.3d 713 (Wash. 2001).

156. *Id.* at 719.

men, the defendant Roberts and his accomplice Cronin, had committed the crime but there was a dispute as to which of the two men actually committed the murder.¹⁵⁷ One of the issues on appeal was whether the jury instructions had wrongfully authorized the jury to convict Roberts of aggravated first-degree murder, which subjected him to the death penalty, if Roberts had been merely an accomplice, rather than the one who had actually performed the murder.¹⁵⁸

The relevant statute defined “aggravated first-degree murder” as first-degree murder plus one or more aggravating circumstances.¹⁵⁹ The jury instructions identified one of the “aggravating circumstances” as when “[t]he murder *was committed* in the course of, in furtherance of, or in immediate flight from, a robbery . . . or a kidnapping.”¹⁶⁰ The problem with this instruction was that the “was committed” language was “worded entirely in the passive voice, [and] require[d] no finding of any actus reus on behalf of the defendant.”¹⁶¹ This meant that the jury could have imposed the death penalty on Roberts “even if he did not personally cause the victim’s death or if he was only a minor participant in the underlying events.”¹⁶² The court held that “major participation by a defendant in the acts giving rise to the homicide is required in order to execute a defendant convicted solely as an accomplice to premeditated first degree murder.”¹⁶³ Because the jury had not been properly instructed along these lines, the conviction of premeditated first-degree murder, and the death penalty that went with it, were reversed.¹⁶⁴

In *Zavalza-Rodriguez* and *Roberts*, the use of the passive voice in Sentencing Guidelines and a jury instruction worked to the benefit of criminal defendants, but the passive voice can also cut in the other direction and lengthen a sentence. In *United States v. Farmer*,¹⁶⁵ the defendant was prepared to enter a plea of guilty to the charge of violating a federal child pornography law. The question before the court was whether the maximum term of punishment was five or ten

157. *Id.* at 719–21.

158. *Id.* at 732.

159. *Id.* at 730–31 (citing WASH. REV. CODE ANN. § 9A.32.030(1)(c) (West 2008); WASH. REV. CODE ANN. § 10.95.020 (West 2008)).

160. *Id.* at 732 (emphasis added).

161. *Id.*

162. *Id.*

163. *Id.* at 733.

164. *Id.* at 734. However, the court affirmed Roberts’ first degree felony murder conviction. *Id.* at 747. But this conviction did not include the death penalty. *Id.*

165. No. CR-05-88-B-W, 2006 WL 378164 (D. Me. Feb. 15, 2006).

years.¹⁶⁶ At the time, if the pornography had been transmitted in interstate commerce, the penalty for violating the federal statute was five years.¹⁶⁷ However, the defendant's possession of the pornography occurred after Congress had amended the statute to increase the maximum penalty to ten years.¹⁶⁸ In determining which was the proper punishment, the court looked at the language of the statute which provided that "any person who . . . knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or other material that contains an image of child pornography that *has been mailed, or shipped, or transported* in interstate or foreign commerce by any means . . . shall be punished."¹⁶⁹

The court explained that "the statutory requirement of transmission in interstate or foreign commerce is a jurisdictional element and does not require scienter on the part of the defendant."¹⁷⁰ On the other hand, the substance of the crime was "the knowing possession of child pornography."¹⁷¹ The court noted that this part of the statute was written "in the active voice" ("knowingly possesses") while "the interstate or foreign commerce phrase [was] in the passive voice [*has been mailed, or shipped, or transported*'] and [did] not require actual knowledge" by the defendant.¹⁷² As the court pointed out, the statute did *not* say, "Any person who knowingly receives or distributes any child pornography that he *knowingly* transported in interstate or foreign commerce."¹⁷³ Had Congress drafted the jurisdictional transmission requirement in the active voice and thus required the defendant himself to have done the interstate transmitting, then that act by the defendant would have been a material element of the crime. If that had been the case, then imposing the ten-year sentence might well have been a violation of the *ex post facto* clause of the Constitution. However, in the actual statute adopted by Congress, "[t]he gravamen of [the] crime is the knowing *possession* of child pornography—not the act of moving it in interstate commerce."¹⁷⁴ Thus, the maximum term was ten, not five, years.¹⁷⁵

166. *Id.* at *1.

167. *Id.*

168. *Id.*

169. *Id.* (emphasis added) (citing 18 U.S.C. § 2252A(a)(5)(B)).

170. *Id.* at *2.

171. *Id.*

172. *Id.*

173. *Id.* at *2 n.3.

174. *Id.* at *3.

175. *Id.* at *4.

In *Weaver v. New York City Employees' Retirement System*,¹⁷⁶ the voice of the verb also affected the result. The Retirement System had sent a letter to a retiree indicating that his benefits would be terminated due to perceived incompetency, at least until a conservator was appointed.¹⁷⁷ The letter to the retiree stated that an in-home visit by a department investigator had raised the issue of the retiree's competence.¹⁷⁸ The letter then continued, "[h]is/[h]er observation *could be negated* by a certification of a medically qualified psychiatrist."¹⁷⁹ The court examined this letter to determine whether or not it complied with the minimum requirement of the Due Process Clause—"notice of the case against him and an opportunity to meet it."¹⁸⁰

The court found that the plaintiff had not received constitutionally adequate notice of his right to challenge the department's termination of benefits.¹⁸¹ Specifically, the court found that "[t]he notice here does not clearly state that claimant had an opportunity to be heard; rather, it states, in the *passive voice*, that 'His/her observation could be negated by a certification of a medically qualified psychiatrist.' It is thus not clear who must provide this evidence."¹⁸² The court suggested that this language by itself might not be fatal, but, because it followed a sentence that was supposed to include that claimant's name, "it sounds as if it refers to the claimant declaring himself incompetent."¹⁸³ Such an interpretation would be "nonsensical," and therefore the court found that the letter did not provide claimant with "notice reasonably calculated to apprise him . . . that he had an opportunity to rebut defendants' finding that he was incompetent."¹⁸⁴ Had the letter writer for the department used the active, rather than the passive, voice (e.g., "You may challenge this finding of incompetence by filing the following papers:"), the letter would probably have met the minimum requirements of the Due Process Clause.

In the cases cited in this section, the voice of the verb affected court decisions on criminal sentencing and the appropriate notice under the

176. 717 F. Supp. 1039 (S.D.N.Y. 1989).

177. *Id.* at 1042.

178. *Id.*

179. *Id.* (emphasis added).

180. *Id.* at 1045 (citations and internal quotation marks omitted).

181. *See id.* ("[D]efendants' notice of October 6, 1987 is so confusing that a reasonable lay person would not have known that he had an *opportunity* in fact to contest defendants' finding of incapacity.").

182. *Id.* at 1045–46 (emphasis added).

183. *Id.* at 1046.

184. *Id.*

Due Process Clause. Because of the active or passive voice, a death sentence was set aside, a sentence was reduced, another sentence was increased, and a retirement benefit was saved. Voice matters.

C. Tense

“Tense” refers to the time of the action of a verb.¹⁸⁵ There are six tenses: three simple and three perfect. The simple present tense refers to action going on at the present time or habitually occurring, e.g., “John *sees* the train,” or “John *eats* cereal every morning.” The progressive form of the present tense represents continuing action, e.g., “John *is running*.” The emphatic form of the present tense gives emphasis to the verb form, e.g., “John *does* run.” The simple past tense refers to action completed at a definite time in the past, e.g., “John *wrote* the letter yesterday.” The simple future tense refers to action that will take place in the future, e.g., “John *will write* the letter tomorrow.” The present perfect tense refers to action already completed or continuing in the present, e.g., “John *has written* the letter” or “John *has lived* here for many years.” The past perfect tense refers to action completed before some other past action began, e.g., “John *had written* the letter by the time he went to bed.” The future perfect tense refers to action that will be completed before a certain time in the future, e.g., “John *will have written* the letter when we arrive tomorrow.” The Supreme Court has noted that “Congress’ use of a verb tense is significant in construing statutes.”¹⁸⁶ The following are cases where the verb tense was significant to courts’ decisions.

In *United States v. Wilson*, the Supreme Court considered the case of a man who had been convicted of a federal crime but who was hoping to receive credit for time already served.¹⁸⁷ The question was whether the calculation of credit was to be made by the district court at the time of sentencing or by the Attorney General at a later time when the defendant had already begun to serve his sentence.¹⁸⁸ The defendant, Richard Wilson, had pleaded guilty to various state and federal crimes and had been in state prison since October 1988.¹⁸⁹ In November 1989, the federal district court sentenced Wilson to ninety-six months imprisonment but denied Wilson credit for the time he had served in

185. See LUNSFORD, *supra* note 14, at 625–31 (discussing verb tense).

186. *United States v. Wilson*, 503 U.S. 329, 333 (1992).

187. *Id.* at 331–32.

188. *Id.* at 332–33.

189. *Id.* at 331.

state prison.¹⁹⁰ Wilson appealed the district court's refusal to give him credit for time served in state custody, and the court of appeals reversed.¹⁹¹ The Supreme Court reinstated the district court's decision, at least in part because of the tense of the verb in the Sentencing Reform Act, which governed the granting of credit.¹⁹² That statute provided, "[a] defendant shall be given credit . . . for any time he has spent in official detention prior to the date the sentence commences . . . as a result of the offense for which the sentence was imposed [or as a result of certain other charges]."¹⁹³ In interpreting this language, the Court focused on the tense of the two verbs "has spent" and "was imposed."¹⁹⁴ According to the Court, "By using these verbs in the past and present perfect tenses, Congress has indicated that computation of the credit must occur after the defendant begins his sentence. A district court, therefore, cannot apply [the imprisonment credit statute] at sentencing."¹⁹⁵ This meant that the authority to grant credit was not in the district court but, by default, in the Attorney General in his role as overseer of the Bureau of Prisons.¹⁹⁶ Therefore, the defendant, having no right to receive credit from the district court, would receive a sentence fourteen months longer than otherwise.¹⁹⁷

Justice Stevens, dissenting in *Wilson*, would have interpreted the statute differently.¹⁹⁸ Justice Stevens emphasized that the Court should look "not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."¹⁹⁹ For Stevens, the tense of a verb in the statute could not outweigh the design and policy of the statute.²⁰⁰ Stevens conceded that the credit decision must be made "after 'the sentence was imposed' and that the credit shall include time spent in official detention 'prior to the date the sentence commences.'"²⁰¹ Nevertheless, Stevens emphasized not the tense, but the voice of the verb.²⁰² The statutory language "[a] defendant shall be

190. *Id.* One month later, in December 1989, a state court sentenced Wilson to prison and gave him credit for the 429 days he had already spent in state prison. *Id.*

191. *United States v. Wilson*, 916 F.2d 1115 (6th Cir. 1990), *rev'd*, 503 U.S. 329 (1992).

192. *Wilson*, 503 U.S. at 333.

193. *Id.* at 332 (citing 18 U.S.C. § 3585(b) (2000)).

194. *Id.* at 333.

195. *Id.*

196. *Id.* at 334–35.

197. *Id.* at 335.

198. *See id.* at 337–46 (Stevens, J., dissenting).

199. *Id.* at 337 (citing *Crandon v. United States*, 494 U.S. 152, 158 (1990)).

200. *Id.* at 337–38.

201. *Id.* at 342.

202. *Id.* at 341–42.

given credit” was in the passive voice, so it did not “specify who will make the decision about jail credit.”²⁰³ For Stevens, this meant that “the appropriate decisionmaker may be *either* the judge or the Attorney General depending on the circumstances.”²⁰⁴ As to the temporal element that seemed to limit the discretion of the district court, Stevens suggested that the court could make the credit determination “at the conclusion of the sentencing hearing,”²⁰⁵ at which time one could say that the sentence had already been imposed. Unfortunately for Richard Wilson, the majority opinion emphasized the tense, rather than the voice, of the verbs in the statute, and the result was an extra fourteen months in prison.²⁰⁶

In *Barrett v. United States*,²⁰⁷ the Supreme Court construed the tense of a verb to interpret the federal Gun Control Act.²⁰⁸ The defendant was a resident of Kentucky who had been convicted of housebreaking and sentenced to a two-year prison term.²⁰⁹ He subsequently purchased, in a Kentucky store, a gun that had been manufactured in Massachusetts and shipped through North Carolina to Kentucky.²¹⁰ The defendant was convicted of violating the Gun Control Act,²¹¹ which made it unlawful for any person who had been convicted of a crime punishable by imprisonment for more than one year “to *receive* any firearm or ammunition which *has been shipped or transported* in interstate or foreign commerce.”²¹² The defendant appealed on the ground that Congress, in the exercise of its power under the Commerce Clause, intended only to regulate the business of interstate gun trafficking and was not concerned with the sale of an individual gun by a local merchant to a local resident.²¹³

The Court rejected that argument, insisting that if “Congress intended to confine [the statute] to direct interstate receipt, it would have so provided.”²¹⁴ Rather, Congress drafted the statute so that “while the

203. *Id.*

204. *Id.* at 342.

205. *Id.*

206. *Id.* at 339.

207. 423 U.S. 212 (1976) (interpreting the federal Gun Control Act, 18 U.S.C. § 922(h) (1968)).

208. 18 U.S.C. § 922(h) (1968).

209. *Barrett*, 423 U.S. at 213.

210. *Id.* at 213–14.

211. *Id.* at 212–13.

212. 18 U.S.C. § 922(h)(4) (1968) (emphasis added).

213. *Barrett*, 423 U.S. at 215–16.

214. *Id.* at 217.

proscribed act, ‘to receive any firearm,’ is in the present tense, the interstate commerce reference [‘has been shipped or transported’] is in the present perfect tense, denoting an act that has been completed.”²¹⁵ Thus, it was not stretching the language of the statute to apply it to “a firearm that already has completed its interstate journey and has come to rest in the dealer’s showcase at the time of its purchase and receipt by the felon.”²¹⁶ The Court noted that the structure and pattern of the entire statute provided additional support for its grammatical interpretation of the Gun Control Act, in that the statute was designed “broadly to keep firearms away” from dangerous persons.²¹⁷ For the defendant Barrett, it was unfortunate that Congress had chosen to use the present perfect tense.

In *United States v. Jackson*,²¹⁸ the Court of Appeals for the Ninth Circuit, construing the language of a federal statute that criminalized certain forms of illicit sexual conduct by Americans traveling abroad, focused on the tense of a statutory verb to save the accused from conviction.²¹⁹ In *Jackson*, the defendant had traveled to Cambodia in 2002, the statute had been enacted in April of 2003, and the defendant committed “illicit sexual” acts with minors in Cambodia in June of 2003.²²⁰ The defendant was arrested by Cambodian authorities and turned over to the officials of the United States who prosecuted him under the federal statute.²²¹ The issue before the court was the temporal reach of the statute, which covered “[a]ny United States citizen . . . who *travels* in foreign commerce and *engages* in any illicit sexual conduct.”²²² Citing *Wilson*, the court confirmed that “Congress’ use of a verb tense is significant in construing statutes.”²²³ The verbs in the statute that criminalized certain conduct were both in the present tense, and “the use of the present tense in [the statute] indicate[d] that Congress desired only to cover individuals traveling after the enactment of the statute; one would not refer in the present tense to something that had already happened.”²²⁴ As further authority, the court cited the Supreme Court for the proposition that “the undeviating use of the

215. *Id.* at 216–17.

216. *Id.* at 217.

217. *Id.* at 218.

218. 480 F.3d 1014 (9th Cir. 2007).

219. *Id.* at 1016–21.

220. *Id.* at 1015–16.

221. *Id.* at 1016.

222. *Id.* at 1018 (emphasis added) (discussing 18 U.S.C. § 2423(c) (2006)).

223. *Id.* (quoting *United States v. Wilson*, 503 U.S. 329, 333 (1992)).

224. *Id.* at 1019.

present tense strongly suggests [that] the harm sought to be addressed . . . lies in the present or the future, not in the past.”²²⁵

If the rules of grammar were not sufficient authority for this interpretation of the present tense, the federal Dictionary Act confirmed it.²²⁶ That statute provides: “In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words used in the present tense include the future as well as the present.”²²⁷ Significantly, under the terms of the Act, “Congress did *not* say that its usage of the present tense applies to past actions, an omission that . . . could not have been an oversight.”²²⁸ Further confirmation of this interpretation of the present-tense “travels” as not applying to pre-Act conduct was the companion statutory word “engages.”²²⁹ The government had conceded that this part of the statute could be violated only by post-enactment “engaging” in prohibited conduct because to interpret the language otherwise might create a violation of the Constitution’s *ex post facto* provision.²³⁰ Therefore, the court explained that “because Congress used the *same* tense in both elements, we give both the same temporal reach.”²³¹ Thus, the language of the statute covered “only travel that occurred after the statute’s enactment.”²³² The court then determined that Jackson’s travel had been completed before the statute was enacted, and thus it was correct to dismiss his indictment.²³³

The use of the future tense also has legal consequences. In *In re Brookshire Bros., Ltd.*,²³⁴ the court considered the applicability of an arbitration provision in a contract.²³⁵ Mayfield, an employee of Brookshire Brothers, had been injured in the course of her employment in 2004.²³⁶ More than a year later, her employer enacted a policy requiring arbitration of claims by employees.²³⁷ When Mayfield filed a suit alleging that her employer’s negligence had proximately caused her

225. *Id.* (quoting *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987)).

226. *See* 1 U.S.C. § 1 (2000) (setting forth rules of construction).

227. *Id.*

228. *Jackson*, 480 F.3d at 1019.

229. *Id.* at 1020.

230. *Id.*

231. *Id.*

232. *Id.* at 1021.

233. *Id.* at 1022–24.

234. 198 S.W.3d 381 (Tex. App. 2006).

235. *Id.* at 381.

236. *Id.* at 384.

237. *Id.*

injuries, the employer sought to compel her to arbitrate the dispute.²³⁸ The issue before the court was the retroactive application of the arbitration policy to an event that occurred before the policy was adopted.²³⁹ The court explained that the rule it was following was that “[a]n arbitration provision will cover disputes under prior contracts where the clause contains retroactive, time-specific language mandating its application to previously executed contracts.”²⁴⁰

The court examined that language of the arbitration clause, which provided, “[t]he policy *will cover* all disputes *arising out of* your relationship with [your employer].”²⁴¹ Interpreting this language, the court emphasized the tense of the verb:

The verb “will” when used as an auxiliary verb indicates a future tense action to be performed by the main verb. Thus, the verb phrase “will cover” indicates future action, as distinguished from the phrase’s present tense counterpart “covers.” The structure of the sentence does not suggest that past events are subject to this arbitration provision Since the structure of the provision indicates that this language was meant to apply only to future events, it is proper to conclude with assurance that [the parties] did not intend to arbitrate disputes occurring before the effective date of the arbitration policy.²⁴²

Because of the future tense, Mayfield would have her day in court.

The future perfect tense has also played a determinative role. The case of *Anderson v. Emerson Electric Co.*²⁴³ also involved a contractual dispute between an employer and employee, concerning eligibility for a disability pension.²⁴⁴ In this case, Anderson, the employee, had worked for Emerson for fourteen years when, at the age of thirty-three, she became disabled and her employment with Emerson was terminated.²⁴⁵ The company’s disability plan provided that, in order to qualify for a disability pension, the person must be “[a]n active Participant who *shall have attained* at least age 40, who has at least 10 years of Pension Credited Service, and who becomes permanently and totally disabled.”²⁴⁶ About eight years after leaving the company, after

238. *Id.* at 383.

239. *Id.* at 384.

240. *Id.* at 385 n.2 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kirton*, 719 So. 2d 201, 203 (Ala. 1998)).

241. *Id.* at 386.

242. *Id.* (citations omitted).

243. 161 F. App’x 504 (6th Cir. 2005).

244. *Id.* at 505.

245. *Id.*

246. *Id.* at 506 (emphasis added).

Anderson turned forty, she applied for a disability pension.²⁴⁷ Her request was denied because she had not met “the age requirement at the time of [her] disability.”²⁴⁸

Anderson disputed that interpretation of the policy, and the question for the court was “*when* the age requirement . . . must be satisfied.”²⁴⁹ The court’s analysis emphasized the grammatical structure of the plan, which established the age requirement as a “condition precedent to the disability requirement.”²⁵⁰ The eligible claimant is one who “*shall have attained* at least age 40 . . . and who *becomes* permanently and totally disabled.”²⁵¹ According to the court, “Use of the future perfect tense (‘shall have attained’) expresses the idea that one event will occur before another in the future.”²⁵² The court then affirmed the reasonableness of the employer’s interpretation of the contract language—that, in order to be eligible, “Anderson must have attained the age of 40 before she becomes disabled.”²⁵³ Unfortunately for Anderson, the use of the future perfect tense in her contract with her employer meant that she was not eligible for a disability pension.

The cases in this section illustrate the importance of verb tense to the resolution or avoidance of legal arguments. The tense of the verb in these cases increased a prison sentence, provided the basis for a conviction, saved a defendant from a conviction, gave one disgruntled employee her day in court, and denied another employee a pension. Tense matters.

D. Person

The “person” of a verb is a concept that identifies whether the subject of the verb is the speaker, one spoken to, or one spoken about.²⁵⁴ First person refers to the person speaking, e.g., “I *am* a professor.” Second person refers to the person or thing spoken to, e.g., “You *are* a student.” Third person refers to the person or thing spoken about, e.g., “John *is* a student.” As these examples illustrate, the first, second, and third person verbs are inextricably connected with the first, second, and third person pronouns of I, we, you, he, she, it, and they. In the following

247. *Id.* at 505.

248. *Id.* at 505–06.

249. *Id.* at 506.

250. *Id.* at 506–07.

251. *Id.* at 507.

252. *Id.*

253. *Id.*

254. See generally LUNSFORD, *supra* note 14, at 977 (describing the relationship between subjects and verbs).

three cases, the use of a particular grammatical person had a significant effect on the outcome of a case.

In *Suntrust Bank v. Houghton Mifflin Co.*, the owners of the copyright to *Gone With the Wind* (*GWTW*) sued the publishers of an allegedly infringing book, *The Wind Done Gone* (*TWDG*).²⁵⁵ *GWTW* is Margaret Mitchell's very successful novel of plantation life, the Confederacy, and the Civil War.²⁵⁶ *TWDG* is a parody of Mitchell's work, told from the perspective of the slaves rather than of the plantation owners, and it subverts much of the heroic majesty portrayed in *GWTW*.²⁵⁷ In analyzing the claim of copyright infringement, the court conceded that the second work had used substantial portions of the first and had "appropriat[ed] numerous characters, settings, and plot twists from *GWTW*."²⁵⁸ However, the copyright statute provides an exception for the "fair use" of copyrighted material.²⁵⁹ The court noted that parody "is a form of comment and criticism that may constitute a fair use of the copyrighted work being parodied."²⁶⁰ One important part of the test for treating a parody as fair use of copyrighted material is whether the second work is "transformative," that is, "whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."²⁶¹

The court then found that *TWDG* was "transformative."²⁶² Specifically, it recognized that *TWDG* "is principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of *GWTW*."²⁶³ *TWDG*'s "literary goal is to explode the romantic, idealized portrait of the antebellum South during and after the Civil War."²⁶⁴ One important part of the "transformative" nature of *TWDG* was the perspective from which it was told.²⁶⁵ The court stated that *GWTW*

is a third-person epic, whereas the new work is told in the first-person as an intimate diary of Cynara [a slave]. Thematically, the new work

255. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001).

256. *Id.* at 1259, 1267.

257. *Id.* at 1259, 1270.

258. *Id.* at 1267.

259. *Id.* at 1267-68.

260. *Id.* at 1268.

261. *Id.* at 1269 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

262. *Id.* at 1270-71.

263. *Id.* at 1270.

264. *Id.*

265. *Id.*

provides a different viewpoint of the antebellum world. . . . While told from a different perspective, more critically, the story is transformed into a very different tale.²⁶⁶

The concurring judge was quite explicit on the importance of the change in grammatical person to the “transformative” nature of the parody.²⁶⁷ He explained:

The Wind Done Gone takes diary form: its chronology is disjunctive and its language often earthy. It is told from an introspective *first-person* point of view. Mitchell’s story, by comparison, is a linear *third-person* narrative, epic in scope and staid in tone. Perhaps [the author] based her story on the perceptions of a single character to underscore the inherent subjectivity of storytelling, in contrast to Mitchell’s disembodied, “objective” narrator.²⁶⁸

The bottom line was that, at least in part because of the switch from third person to first person narration, *TWDG* was the kind of parody of *GWTW* that was protected by the fair use doctrine, and the district court’s issuance of a preliminary injunction preventing its publication was wrong.²⁶⁹

*CICCorp Inc. v. AIMTech Corp.*²⁷⁰ is another case in which the use of the first person form of the verb was critical to the result. *CICCorp* involved two former business partners, Hickson and Collins, who had owned *CICCorp*, a corporation that developed and marketed software used for the maintenance of hospital equipment.²⁷¹ After a serious falling out, the partners split up and Hickson became the owner of *CICCorp*.²⁷² Collins started a rival company that attempted to do business with the same customers.²⁷³ At issue in the case was the use of a service mark relating to the word “AIM,” which had been used by *CICCorp* in its advertising and promotions.²⁷⁴ Collins, in promoting his new business and trying to suggest a history of providing quality service to customers, announced, “[S]ince *we* launched the AIM concept in 1996, *we* increased the level of savings several times, with each discount passed along to both new and existing customers.”²⁷⁵

266. *Id.*

267. *Id.* at 1279 (Marcus, J., specially concurring).

268. *Id.* (emphasis added).

269. *Id.* at 1270, 1277 (majority opinion).

270. 32 F. Supp. 2d 425, 441–42 (S.D. Tex. 1998).

271. *Id.* at 428.

272. *Id.*

273. *Id.*

274. *Id.* at 428, 441.

275. *Id.* at 441.

Hickson contended that this language constituted false advertising in violation of the federal Lanham Act.²⁷⁶ Collins argued that his claim was not deceptive because he himself had developed the AIM concept while he was working at CIC.²⁷⁷ The court conceded that, if that were all that Collins had claimed, his statement would be accurate and not actionable.²⁷⁸ However, as the court explained, Collins's claim went beyond that.²⁷⁹ The "statement appeared in an AIMTech proposal and used the plural first-person pronoun 'we,' not the singular third-person pronoun 'he' that one would expect to see if the author of the statement intended to refer only to Collins."²⁸⁰ The court referenced first and third person "pronouns" rather than first and third person verb forms, but, as noted above, these usages are inseparable.²⁸¹ The use of "we" implied that AIMTech, the new corporation, had developed the AIM concept, when in fact Collins developed it while working for CIC.²⁸² Because this use of the first person rather than the third person was likely to deceive customers, the court found that, at this summary judgment stage of the case, a factfinder could conclude that there had been deception and thus refused to grant summary judgment for Collins's new company.²⁸³

*United States v. Davis*²⁸⁴ was a criminal case in which the validity of an affidavit for a search warrant turned on the improper use of the first person form of the verb.²⁸⁵ In *Davis*, the defendant was convicted on multiple counts of narcotics violations.²⁸⁶ Davis had asked the district court for "an evidentiary hearing to traverse the search warrant affidavits and attack their veracity,"²⁸⁷ a request that the court would grant if Davis made a "sufficient offer of proof of deliberate falsehood or reckless disregard for the truth by the affiant."²⁸⁸ The district court denied such a hearing but was reversed on appeal.²⁸⁹ Two warrants had

276. *Id.* at 440.

277. *Id.* at 441.

278. *Id.*

279. *Id.*

280. *Id.* (emphasis added).

281. *See supra* Part II.D (describing first and third person verbs and first and third person pronouns as "inextricably connected").

282. *CICCorp.*, 32 F. Supp. 2d at 441-42.

283. *Id.*

284. 663 F.2d 824 (9th Cir. 1981).

285. *Id.* at 827, 829-30.

286. *Id.* at 826-27.

287. *Id.* at 829.

288. *Id.* (citing *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978)).

289. *Id.* at 829-30.

been prepared in the case, and Officer Thompson, the affiant whose warrant was being contested, had simply copied much of the information received from informants from the first affidavit into his affidavit.²⁹⁰ In doing so, Officer Thompson failed to change the person of the verb forms, which resulted in the affidavit's being in the first person singular.²⁹¹ This implied Thompson had personally met with the informants, while in actuality Thompson was only repeating the contents of the first affidavit prepared by Officer Epstein.²⁹² Thus, contrary to the language in the affidavit, Officer Thompson had not communicated directly with any of the informants.²⁹³ The appellate court decided that this discrepancy entitled Davis to an evidentiary hearing to assess the validity of the affidavit because "the conversations discussed in the affidavit were not 'within the personal knowledge of the affiant[s].'"²⁹⁴ The hearing was to be "on the limited issue pertaining to Officer Thompson's incorrect use of the first-person singular in his affidavit."²⁹⁵ For the court, a police officer's sworn statement that "I have met with an informant," was quite different from the claim that "he [a fellow officer] has met with an informant."²⁹⁶

In each of the cases in this section, the person of the verb affected the outcome: a parody did not violate the copyright laws, an ad constituted false advertising, and a police officer's affidavit in a criminal matter may have been inadequate. Person matters.

E. Number

"Number" refers to whether a verb is singular or plural.²⁹⁷ The number of the verb was determinative in the following cases. In *United States v. Midwest Suspension & Brake*,²⁹⁸ Midwest, a company that supplied parts for truck suspensions, steering systems, and brakes, had been found in the trial court to have violated the National Emissions Standards for Hazardous Air Pollutants for Asbestos (the Asbestos

290. *Id.* at 829.

291. *Id.*

292. *Id.* at 829–30.

293. *Id.*

294. *Id.* at 830 (citing *Franks v. Delaware*, 438 U.S. 154, 164 (1978)).

295. *Id.*

296. *Id.* at 829–30.

297. See LUNSFORD, *supra* note 14, at 976 (noting "number" refers to the "form of a noun or pronoun that indicates whether it is singular (*book, I, he, her, it*) or plural (*books, we, they, them, their*)").

298. 49 F.3d 1197 (6th Cir. 1995).

NESHAP) and had been ordered to pay a \$50,000 penalty.²⁹⁹ The Asbestos NESHAP prohibited certain visible emissions of asbestos,³⁰⁰ defining “visible emissions” as “any emissions containing particulate asbestos material that are visually detectable without the aid of instruments.”³⁰¹ On appeal, Midwest argued that, although the EPA inspectors had seen dust emissions on site, these dust emissions were not sufficient proof of a violation “because the inspectors did not see, with the naked eye, asbestos particles floating in the dust.”³⁰² The court responded by looking closely at the definition of “visible emissions.”³⁰³ The disagreement between the parties concerned “which word the phrase ‘that are visually detectable without the aid of instruments’ modifies.”³⁰⁴ Midwest argued that it modified “particulate asbestos material.”³⁰⁵ Under this reading, the asbestos material itself must be visible to the naked eye.³⁰⁶ The government argued that the phrase modified “any emissions.”³⁰⁷ Under this reading, the definition did not require that the asbestos particles themselves be visible “but only require[d] visual observation of the dust emissions which contain the invisible particles.”³⁰⁸

The court resolved this dispute by reference to the number of the verb: “[T]he verb in the sentence (are) is in the plural form, indicating that the subject of the verb is the plural word ‘emissions,’ not the singular word-phrase ‘particulate asbestos material.’”³⁰⁹ The court held that the Asbestos NESHAP standard required visible observation only of the emissions, not a visible observation of the asbestos itself.³¹⁰ Accordingly, it affirmed the district court’s conclusion that Midwest had violated the Asbestos NESHAP.³¹¹ The plural form of the verb made the difference.

In *Davis v. Pletcher*,³¹² the buyer and seller had entered into a contract for the sale of a piece of property under which the seller’s deed

299. *Id.* at 1200–01.

300. *Id.* at 1200 (citing 40 C.F.R. § 61.144, 61.150 (2007)).

301. *Id.* at 1204 (citing 40 C.F.R. § 61.141 (2007)).

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. 727 S.W.2d 29 (Tex. App. 1987).

covenanted that the property conveyed was at least 670 acres.³¹³ The deed provided that the covenant would be considered broken if, within five years of the closing, the buyer provided the seller with “the results of a subsequent survey . . . which discloses by certified field notes and plat that there are fewer than six hundred seventy (670) acres under fence.”³¹⁴ It turned out that the property was only 628 acres, and the buyer made a claim as the five-year period was expiring.³¹⁵ On the last day of the period, the buyer delivered to the seller a mailgram that gave the seller notice of a survey of the property that showed the shortage.³¹⁶ Shortly after the deadline, the buyer provided the seller with a copy of the survey plat and field notes prepared by the surveyor.³¹⁷ The seller rejected the buyer’s claim and refused to pay the compensation that would be owed for the shortage on the ground that the buyer’s claim was not timely.³¹⁸ Specifically, the seller argued that the deed covenant required the buyer to provide, within the five-year period, the survey itself, with field notes and plats.³¹⁹

The Texas Court of Appeals reversed the district court’s ruling in favor of the seller based on the number of the verb “discloses.”³²⁰ The Court of Appeals explained:

It is fundamental to the rules of English grammar that a verb must agree in number (singular or plural) with its subject. . . . These grammatical axioms clearly show that the singular phrase “which discloses by certified field notes and plat . . .” modifies the singular antecedent “survey” rather than the plural antecedent “results.” Thus the grammatical construction of the covenant clearly reveals that it is *the subsequent survey* which must disclose by certified field notes and plat that an acreage deficiency exists, not the “results” which must do so.³²¹

This was good news for the buyer: because he had provided “the results” of the survey within the required time, he had satisfied his contractual obligation.³²² It did not matter that he had not provided “the

313. *Id.* at 30–31.

314. *Id.* at 33.

315. *Id.* at 31.

316. *Id.* It was not clear whether the five-year period expired on June 30, the date of the mailgram, or on July 6, but because the June 30 mailgram turned out to be adequate notice to the seller, it did not matter. *Id.* at 31, 33.

317. *Id.* at 31.

318. *Id.*

319. *Id.* at 31, 33.

320. *Id.* at 33–34.

321. *Id.*

322. *Id.* at 34.

survey” itself, with its accompanying field notes and plat.³²³ The singular form of the verb made that clear.

*State v. Sample*³²⁴ was a criminal case in which the singular form of the verb helped to convict the defendant Sample.³²⁵ In that case, Sample, a prison guard, was trapped in a sting operation in which he received cocaine from a woman who Sample thought was an inmate’s girlfriend but who was actually an undercover detective.³²⁶ When Sample was later charged with conspiracy to possess a controlled substance, he argued that there could not be a conspiracy unless there were two people conspiring.³²⁷ The court responded to this defense by looking at the language of the conspiracy statute.³²⁸ The statute provided that “whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may . . . be fined or imprisoned.”³²⁹ The court explained that there are two different understandings of the crime of conspiracy—the unilateral and the bilateral.³³⁰ Under the unilateral approach, “the subjective, individual behavior of a defendant”³³¹ determines guilt, and a “conspiracy will lie even where one of two alleged ‘co-conspirators’ is, unknown to the defendant, an undercover police agent.”³³² Under the bilateral theory, a conspiracy exists only “where two or more persons agree, with criminal intent, to commit a crime.”³³³

In deciding which of the two understandings of conspiracy the statute supported, the court looked at the singular number of the verbs “agrees,” and “combines.”³³⁴ The court noted that the indefinite pronoun “whoever,” the subject of the sentence, could, by itself, be singular or plural.³³⁵ The defendant, turning grammatical rules upside down, argued that the terms “agrees” and “combines” “imply plurality.”³³⁶ The court rejected that claim.³³⁷ The court did not “read

323. *Id.*

324. 573 N.W.2d 187 (Wis. 1998).

325. *Id.* at 188, 191–93, 195–96.

326. *Id.* at 189.

327. *Id.*

328. *Id.* at 191.

329. WIS. STAT. ANN. § 939.31 (West 2005).

330. *Sample*, 573 N.W.2d at 191.

331. *Id.*

332. *Id.*

333. *Id.* at 188.

334. *Id.* at 191–93.

335. *Id.* at 192.

336. *Id.* at 191.

337. *Id.* at 192.

the terms ‘agrees’ or ‘combines’ strictly to require application to a unilateral conspiracy,”³³⁸ but did conclude that “the singular form of ‘agrees’ and ‘combines’ when used with the indefinite pronoun ‘whoever’ represents subject-verb agreement within the language of the statute.”³³⁹ The court then found that the language of the statute criminalized unilateral as well as bilateral conspiracies and affirmed Sample’s conviction.³⁴⁰ The singular form of the verbs in the statute may not have required the court to adopt the unilateral theory of conspiracy, but the form certainly helped to justify that result.

In the cases in this section, courts used the number of the verb to find a violation of an air pollution standard, to determine satisfaction of a contract obligation, and to convict a defendant of conspiracy. Number matters.

F. Verbals: Gerunds, Infinitives, and Participles

Verbals are verb forms that function as other parts of speech.³⁴¹ A gerund is a verbal noun typically formed by adding *ing* to the base form of the verb.³⁴² Because a gerund is used as a noun, it can be the subject of a sentence, e.g., “*Walking* is good exercise,” or the direct object of a sentence, e.g., “I enjoy *walking*.” In addition, because a gerund is a verb form, it can take a direct object, e.g., “I enjoy reading *books*.” The gerund also has a perfect form, e.g., “I do not like to write but I enjoy *having written*,” and a passive form, e.g., “I enjoy *being loved*,” but these forms are rarely used.

An infinitive is the base form of the verb introduced by “to,” e.g., “to run,” and it has a variety of uses.³⁴³ The infinitive serves as a noun, e.g., “To win is not easy,” or “I like to win.” Additionally, it can be used in an adverbial phrase, e.g., “She came to see us.” The infinitive also has perfect (“to have loved”) and passive (“to be loved”) forms.

The participle is a verbal adjective.³⁴⁴ The present participle is formed by adding *ing* to the base form of the verb, e.g., “the *running* water.” The participle also has a perfect form, with active (“*Having won* the race, the champion rejoiced”) and passive (“*Having been*”) forms.

338. *Id.*

339. *Id.* at 192–93.

340. *Id.* at 195–96.

341. WALSH & WALSH, *supra* note 14, at 31.

342. *Id.*

343. See LUNSFORD, *supra* note 14, at 974 (defining an infinitive as “the base form of a verb preceded by *to* (*to go, to run, to hit*)”).

344. *Id.* at 976.

defeated at cards, John left the table”) meanings. Because the participle does the work of an adjective, ordinarily it must modify a noun. A freestanding participle, with no noun to modify, is called “dangling.”³⁴⁵ Such a construction is to be avoided, e.g., “Sweating fiercely, the work was finished quickly.” In the following cases, the court interpreted a gerund, infinitive, or participle to explain its decision.

In *Doe v. Bridgeport Police Department*,³⁴⁶ the court interpreted the language of a Connecticut statute that provided an exemption from the criminalization of certain drug paraphernalia. In order to encourage certain remedial substance abuse programs, the statute exempted certain “hypodermic syringes, needles, and other objects used, intended for use or designed for use in parenterally *injecting* controlled substances into the human body.”³⁴⁷ The question before the court was whether this exemption covered “cookers and cottons,” products used in the preparation of cocaine for injection but not part of the injection itself.³⁴⁸ The court concluded that the exemption covered cookers and cotton, at least in part because the Connecticut legislature had defined the exemption with a gerund—*injecting*.³⁴⁹

The court considered two possible interpretations of the statutory language.³⁵⁰ The exemption might extend to “objects, such as cookers and cottons, often used *in the process* of injecting drugs,”³⁵¹ or it might be limited to “objects *directly* used to inject drugs parenterally into a person’s body.”³⁵² The first, broader interpretation of the statute would include cookers and cottons within the exemption while the second definition would not.³⁵³ The court chose the first interpretation.³⁵⁴ The

345. GARNER, *supra* note 8, at 145.

346. 434 F. Supp. 2d 107 (D. Conn. 2006).

347. CONN. GEN. STAT. § 21a-240(20)(A)(ix) (1958) (emphasis added), *amended by* Act Concerning Revisions to Department of Public Health Statutes, 2006 Conn. Acts 06-195, § 15 (Reg. Sess.). The specific definition cited in the text here was deleted and replaced with the phrase, “objects used, intended for use or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body.” Act Concerning Revisions to Department of Public Health Statutes § 15. This amendment also deleted the word “injecting” from the introductory paragraph of section 20(A) of the statute. *Id.* The *Doe* court defined “parenterally” as meaning “[b]y some other means than through the gastrointestinal tract.” *Doe*, 434 F. Supp. 2d at 116 n.7 (citing STEDMAN’S MEDICAL DICTIONARY 1316 (27th ed. 2000)).

348. *Doe*, 434 F. Supp. 2d at 109, 114.

349. *Id.* at 116–18.

350. *Id.* at 114–15.

351. *Id.* at 116.

352. *Id.*

353. *Id.*

354. *Id.*

court explained its choice: “First, the gerund ‘injecting,’ . . . connotes ‘the process of injection,’ in contrast to ‘to inject’ [an infinitive], which connotes, to a greater degree, the specific and direct act of introducing a substance into the human body parenterally.”³⁵⁵ The court compared the gerund form of the verb in the statute under consideration with the infinitive form in a companion statute, which provided that “no person shall use . . . drug paraphernalia . . . to plant, propagate, cultivate . . . or to inject, ingest, inhale . . . any controlled substance.”³⁵⁶ The court explained that the lists of verbs in the two statutes were identical, but the *forms* of the verbs were different.³⁵⁷ The legislature used the *gerund* construction when defining the exemption and the *infinitive* construction when defining the crime.³⁵⁸ The court concluded that the legislature’s use of the gerund construction “entail[ed] the broader meaning that the gerund verb construction connotes.”³⁵⁹ The court then interpreted this “broader meaning” to include any materials “used as part of the process of injecting controlled substances, such as cookers and cottons.”³⁶⁰ Thus, these materials were included within the statute’s exemption from criminality.

The court did not cite any authority for its assertion that the gerund construction has a “broader meaning” than does the infinitive.³⁶¹ Grammarians have distinguished the two forms but not typically on these grounds. It is more common to distinguish the two on the ground that “infinitives tend to represent intentions, desires, or expectations, and gerunds tend to represent facts.”³⁶² Thus, in the sentence, “The boy enjoys going to school,” the gerund “going” indicates the fact of going. In the sentence, “He expects to win,” the infinitive “to win” indicates an intention. This common grammatical distinction between fact and intention does not explain the *Doe* court’s distinction between process and direct act. The court may have been viewing the *ing* ending of the gerund as analogous to the *ing* ending of the progressive forms of certain tenses, e.g., “he is running,” a form that indicates a continuing action. However, even though these progressive tenses are formed with the *ing* ending that also forms the gerund, the progressive tense is in fact

355. *Id.*

356. *Id.* (citing CONN. GEN. STAT. § 21a-267(a) (1958)).

357. *Id.* at 116–17.

358. *Id.* at 116.

359. *Id.* at 116–17.

360. *Id.* at 117.

361. *Id.*

362. LUNSFORD, *supra* note 14, at 854.

formed with a participle, not a gerund.³⁶³ Even if the grammatical authority for the court's distinction is not entirely clear, the end result of the case was quite definite—the injecting drug users had not violated the Connecticut statute.³⁶⁴

*United States v. McDonald*³⁶⁵ is another case in which the gerund form of a verb helped to explain the reach of a criminal statute. In that case, the defendant McDonald had been convicted of possessing cocaine with intent to distribute.³⁶⁶ The apartment where he had been arrested with the cocaine was across the street from an elementary school.³⁶⁷ The question was whether McDonald's sentence should have been enhanced because of his proximity to the school.³⁶⁸ A federal statute doubled the punishment for “distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school.”³⁶⁹ The question was whether, in order to prove a violation of the statute, the government had to prove not only that the defendant had possessed, with intent to distribute somewhere, a controlled substance within one thousand feet of a school, but also had to prove that the defendant intended to distribute that substance within one thousand feet of a school.³⁷⁰

In answering this question, the court explained that “the geographic element [the ‘within one thousand feet’ language] appears to be aimed, not at any verbs [in the statute], but at the section's verbal nouns, its gerunds.”³⁷¹ The gerunds the court was referring to were “distributing,” “possessing,” and “manufacturing.”³⁷² The court noted that with regard to distributing and manufacturing, it was clear that the statute doubled the punishment for those activities within one thousand feet of a school.³⁷³ Thus, to give the statute “an internally consistent reading, its other verbal noun—‘possessing’—must be treated in the same manner.”³⁷⁴ Thus, “when the ‘possessing’ is done near the school, [the

363. WALSH & WALSH, *supra* note 14, at 36.

364. *Doe*, 434 F. Supp. 2d at 118.

365. 991 F.2d 866 (D.C. Cir. 1993).

366. *Id.* at 868.

367. *Id.*

368. *Id.*

369. 21 U.S.C. § 860(a) (1994).

370. *McDonald*, 991 F.2d at 868.

371. *Id.* at 869.

372. *Id.* at 868–69.

373. *Id.* at 869.

374. *Id.*

statute] also renders the crime twice as serious.”³⁷⁵ It does not matter whether the defendant intended to distribute the drugs near the school or not.³⁷⁶ The defendant earned the double punishment by simply possessing the drugs within one thousand feet of the school.³⁷⁷ Unfortunately for McDonald, the internally consistent interpretation of the three gerunds in the statute meant that he would serve more time in prison.

The difference between a gerund and a participle determined the outcome of a \$139,000 insurance claim in *Transcontinental Insurance Co. v. RBMW, Inc.*³⁷⁸ In that case, the insured sought coverage for damage to his piers, wharves, docks, and boathouse caused by a hurricane.³⁷⁹ The insurance policy at issue excluded from coverage any loss caused directly or indirectly by “[f]lood, surface water, waves, tides, tidal waves, overflowing of any body of water, or their spray, all whether driven by wind or not.”³⁸⁰ The trial judge, bending over backward to find coverage, found that the exclusion did not apply because neither the waves nor the tides nor any water “overflowed” the banks of the James River, where the property was damaged.³⁸¹ The trial judge interpreted the phrase “overflowing of any body of water” as modifying, and thus limiting, the previous words “[f]lood, surface water, waves, tides, tidal waves.”³⁸² Because all the damage took place within the boundaries of the river, the trial judge found that the exclusion did not apply.³⁸³ Although the court did not use the word “participle,” it was in fact interpreting the word “overflowing” as a participle that limited the previous nouns.

The Supreme Court of Virginia reversed, “disagree[ing] with the trial court’s grammatical reading of the exclusion.”³⁸⁴ The placement of the commas in the exclusion indicated that “each subject matter must be separately considered, including ‘overflowing of any body of water.’ In this context, the phrase, ‘overflowing of any body of water,’ is a verbal noun known as a gerund.”³⁸⁵ The “overflowing” exclusion did not

375. *Id.*

376. *Id.*

377. *Id.*

378. 551 S.E.2d 313, 319–20 (Va. 2001).

379. *Id.* at 315.

380. *Id.*

381. *Id.* at 316.

382. *Id.*

383. *Id.*

384. *Id.* at 318.

385. *Id.* at 319.

modify and limit the previous grounds for exclusion, as a participle would have done, but was its own independent source of exclusion. Therefore, in interpreting the policy, the trial court should have examined each of the exclusions separately. It turned out that most of the damage was caused by a “wave.”³⁸⁶ This causal factor was not limited by a requirement that the wave have overflowed its banks, so the exclusion did apply and the court reversed the trial court.³⁸⁷

The proper interpretation of a participle determined the outcome of the court’s decision in *Management Council of the Wyoming Legislature v. Geringer*.³⁸⁸ In that case, the legislature and the governor of Wyoming disagreed over the governor’s power to veto individual parts of a bill.³⁸⁹ The state constitutional provision that authorized the governor’s veto provided “[t]he governor shall have power to disapprove of any item or items or part or parts of any bill making appropriations of money or property.”³⁹⁰ The problem arose when the governor vetoed non-appropriations portions of an appropriations bill.³⁹¹ The issue before the court was whether the governor’s veto authority was limited to appropriations only or whether it extended to any portion of an appropriations bill.³⁹²

The Wyoming Supreme Court resolved this issue on the basis of a grammatical reading of the statute.³⁹³ Specifically, the question was what word the participial phrase, “making appropriations of money or property,” modified.³⁹⁴ The court noted that, as a basic rule, one ought to “place all modifiers, whether words, phrases, or clauses, as close as possible to the words they modify,”³⁹⁵ so that the meaning of a sentence would be clear. In the case before it, the court noted that “[t]he participial phrase ‘making appropriations . . .’ immediately follows and modifies ‘any bill.’”³⁹⁶ This meant that, if *the bill* made appropriations, the governor could veto any part of it. It was not necessary that the vetoed part itself be an appropriation. If the constitutional provision were to have the effect argued by the Legislative Council, the court

386. *Id.*

387. *Id.*

388. 953 P.2d 839 (Wyo. 1998).

389. *Id.* at 840.

390. WYO. CONST. art. IV, § 9.

391. *Geringer*, 953 P.2d at 841.

392. *Id.*

393. *Id.* at 843–46.

394. *Id.* at 844.

395. *Id.*

396. *Id.*

noted that it should have read, “In any bill, the governor shall have power to disapprove of any item or items or part or parts making appropriations of money or property.”³⁹⁷ In such a statute, the participle “making” would be modifying, and thus limiting, the nouns “items” and “parts.” However, that was not the actual language of the Wyoming Constitution.³⁹⁸ In that constitution, the placement of the participle “making” after the word “bill” gave the governor the power to veto non-appropriations portions of appropriations bills.³⁹⁹

In *Baker v. City of Lakeside*,⁴⁰⁰ a plaintiff’s personal injury claim against the city was preserved by a very technical reading of a procedural statute that turned on the placement of a participle. The plaintiff in that case had been injured on August 31, 2002 and had filed her complaint against the city on August 27, 2004, just days before the expiration of the two-year statute of limitations.⁴⁰¹ However, the plaintiff did not serve the summons on the city until four weeks later.⁴⁰² According to one Oregon statute (ORS 12.020(1)),⁴⁰³ an action is considered commenced only when the plaintiff has both filed the complaint and served the summons on the defendant. Under this rule, the plaintiff’s case would have been time-barred. However, another Oregon statute (ORS 12.020(2))⁴⁰⁴ created a sixty-day exception to this rule, so that an action was considered commenced on the date the plaintiff filed the complaint if the plaintiff also served the summons on the defendant within sixty days. Under this rule, the plaintiff’s personal injury suit had been filed in a timely fashion.

The question for the court in *Baker* was the effect of a third statute on these two filing statutes.⁴⁰⁵ When the Oregon Legislature had amended the Oregon Torts Claim Act in 1981, it provided that “notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action [against a public body or public official] shall be commenced within two years after the alleged loss or injury.”⁴⁰⁶ The city argued that “the participial phrase ‘providing a limitation on the commencement of an action’

397. *Id.*

398. WYO. CONST. art. IV, § 9.

399. *Geringer*, 953 P.2d at 844.

400. 164 P.3d 259 (Or. 2007).

401. *Id.* at 260.

402. *Id.*

403. OR. REV. STAT. § 12.020(1) (2007).

404. OR. REV. STAT. § 12.020(2) (2007).

405. *Baker*, 164 P.3d at 260.

406. OR. REV. STAT. § 30.275(9) (2007).

modifie[d] only the phrase ‘other statute.’”⁴⁰⁷ Under this reading, the limiting participial phrase “providing a limitation on the commencement of an action” did not limit the noun phrase “other provision of ORS chapter 12.” Thus, the “notwithstanding” language excluded consideration of *all* provisions of chapter 12. This meant that the plaintiff would not be able to rely on ORS 12.020(2) and claim the benefit of the sixty-day window. On the other hand, the plaintiff claimed that “the participial phrase ‘providing a limitation on the commencement of an action’ modifie[d] both ‘any other provision of ORS chapter 12’ and ‘other statute.’”⁴⁰⁸ Under this interpretation, only those provisions of chapter 12 that limited the commencement of actions would be excluded from consideration. Because ORS 12.020(2) expanded, rather than limited, the commencement of an action, the “notwithstanding” clause would not exclude it from consideration. Thus, the plaintiff would have the benefit of the sixty-day look-back provision, and her claim would not be time barred.

“Grammatically, both interpretations are permissible,”⁴⁰⁹ the court reasoned, in contemplating these two different interpretations of the participle “providing.” The city’s claim was initially bolstered by “the rule of the last antecedent,” under which “[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.”⁴¹⁰ The city argued that, under this rule, the participle “providing” referred only to the last antecedent, “other statute,” and did not in any way qualify the earlier phrase, “any other provision.”⁴¹¹ The court noted however, that the last antecedent rule applied only where “no contrary intention appears.”⁴¹² The court then went on to point out that, based on the text, the context, and the legislative history of the statute, there was contrary evidence that indicated that the participle “providing” was intended to modify, and thus to limit, both “other statute” and “any other provision.”⁴¹³ Therefore, the plaintiff could claim the benefit of the sixty-day look-back provision and her complaint was timely filed.

407. *Baker*, 164 P.3d at 261.

408. *Id.*

409. *Id.*

410. *Id.* (internal quotation marks omitted) (quoting *State v. Webb*, 927 P.2d 79, 82 (Or. 1996)).

411. *Id.*

412. *Id.* (internal quotation marks omitted) (quoting *Webb*, 927 P.2d at 82).

413. *Id.* at 261–63.

In *Ramirez-Ramos v. Immigration and Naturalization Service*,⁴¹⁴ the interpretation of a perfect passive participle determined whether or not the petitioner was to be deported. The INS had ordered Ramirez-Ramos deported in light of his conviction for selling heroin.⁴¹⁵ Ramirez-Ramos petitioned for relief on the basis of a statute that would withhold deportation if an alien's life or freedom would be threatened in the country to which he would be deported.⁴¹⁶ However, that relief was not available to any alien if the Attorney General determined that "the alien, *having been convicted* by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."⁴¹⁷

Ramirez-Ramos argued that the Board of Immigration Appeals, in denying him relief, had not followed the statute properly.⁴¹⁸ According to Ramirez-Ramos, the statute required two findings: that he had been convicted of a serious crime *and* that he was a danger to the community.⁴¹⁹ The Board considered the conviction alone to be sufficient to withhold relief as there was no "statutory requirement of a separate determination of dangerousness."⁴²⁰ The court agreed with the Board's interpretation.⁴²¹ The court explained, "[t]he participial phrase, 'having been convicted of a particularly serious crime,' modifies the word 'alien' and thus limits those aliens who may be determined to constitute a danger to the community to those who have been finally convicted of serious crimes."⁴²² The statutory language was not written "with two coordinate clauses joined by a conjunction, e.g. 'the alien has been convicted . . . *and* constitutes a danger to the community of the United States.'"⁴²³ The use of participle modifying "alien" creates a "cause and effect relationship: the fact that the alien has committed a particularly serious crime makes the alien dangerous within the meaning of the statute."⁴²⁴ Unfortunately for Ramirez-Ramos, *having been convicted* of a serious crime, he was, without more, a danger to the community and thus deportable.

414. 814 F.2d 1394 (9th Cir. 1987).

415. *Id.* at 1395.

416. 8 U.S.C. § 1253(h)(1) (1994), *amended by* Omnibus Appropriations Act of 1997, Pub. L. No. 104-208 §307(a).

417. 8 U.S.C. § 1253(h)(2)(B) (1994), *amended by* Omnibus Appropriations Act of 1997, Pub. L. No. 104-208 §307(a) (emphasis added).

418. *Ramirez-Ramos*, 814 F.2d at 1396.

419. *Id.*

420. *Id.* at 1397.

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.* (quoting *Crespo-Gomez v. Richard*, 780 F.2d 932, 934 (11th Cir. 1986)).

The importance of the infinitive form of the verb was made clear in *State v. Scott*.⁴²⁵ In that case, the defendant had been convicted under a statute that made it a crime knowingly to “sell or offer to sell a controlled substance.”⁴²⁶ On appeal, the defendant argued that he had not committed the crime because the tablets he sold to an undercover agent had not in fact been a controlled substance.⁴²⁷ Notwithstanding that fact, the Ohio Supreme Court affirmed his conviction.⁴²⁸ Citing Webster’s New Collegiate Dictionary, the court defined the term “offer” as “‘to declare one’s readiness or willingness’ when it is used with an infinitive object.”⁴²⁹ In the statute that defined the crime, “the infinitive object is ‘to sell a controlled substance.’”⁴³⁰ It followed then that “[t]he proscribed conduct is offering to sell a controlled substance, not offering the controlled substance.”⁴³¹ Thus, the fact that the defendant transferred tablets that turned out not to be a controlled substance was not a defense to the prosecution of the crime. This result is consistent with the grammatical description of infinitives as tending to represent “intentions, desires, or expectations,” rather than facts.⁴³² The defendant’s conviction was affirmed.⁴³³

In cases discussed in this section, courts construed gerunds to exempt certain drug paraphernalia from criminalization, increase the penalty for drug possession near a school, and deny coverage under an insurance policy. Courts construed participles to expand a governor’s veto power, to preserve a personal injury claim against a city, and to deport an alien. A court explained the proper use of the infinitive construction in order to affirm a criminal conviction for offering to sell a controlled substance. Gerunds, participles, and infinitives matter.

III. CONCLUSION

So then, for lawyers, judges, and law students, does grammar matter? Yes, it does. Even if infrequently, the proper use of grammatical terms has sometimes determined the outcome of a case. Verb forms do not

425. *State v. Scott*, 432 N.E.2d 798 (Ohio 1982), *superseded by statute*, Am.Sub.S.B.No.2, 146 Ohio Laws, Part IV, 7136 (1996), *as recognized in State v. Chandler*, 846 N.E.2d 1234 (Ohio 2006).

426. OHIO REV. CODE ANN. § 2925.03 (West 1996).

427. *Scott*, 432 N.E.2d at 799.

428. *Id.* at 800.

429. *Id.* at 799 (citing WEBSTER’S NEW COLLEGIATE DICTIONARY (9th ed. 1976)).

430. *Id.*

431. *Id.*

432. LUNSFORD, *supra* note 14, at 854.

433. *Scott*, 432 N.E.2d at 801.

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have the complexity of the Rule against Perpetuities nor the labyrinthine intricacy of UCC § 2-207. They are just a small part of basic English grammar. Nevertheless, legal cases have turned on the person, number, tense, voice, or mood of a verb, and on the use of a gerund, infinitive, or participle. In these cases, to be minimally competent, a lawyer needs to know the language of verbs.

APPENDIX

Conjugation of the verb "to sue"

ACTIVE VOICE**Indicative Mood**

	<i>Singular</i>	<i>Plural</i>
Present Tense	1. I sue	1. We sue
	2. You sue	2. You sue
	3. He sues	3. They sue
Past Tense	1. I sued	1. We sued
	2. You sued	2. You sued
	3. He sued	3. They sued
Future Tense	1. I shall sue	1. We shall sue
	2. You will sue	2. You will sue
	3. He will sue	3. They will sue
Present Perfect Tense	1. I have sued	1. We have sued
	2. You have sued	2. You have sued
	3. He has sued	3. They have sued
Past Perfect Tense	1. I had sued	1. We had sued
	2. You had sued	2. You had sued
	3. He had sued	3. They had sued
Future Perfect Tense	1. I shall have sued	1. We shall have sued
	2. You will have sued	2. You will have sued
	3. He will have sued	3. They will have sued

Subjunctive Mood

	<i>Singular</i>	<i>Plural</i>
Present Tense	1. I sue	1. We sue
	2. You sue	2. You sue
	3. He sue	3. They sue

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Past Tense

- | | |
|------------------|-------------------|
| 1. (If) I sued | 1. (If) we sued |
| 2. (If) you sued | 2. (If) you sued |
| 3. (If) he sued | 3. (If) they sued |

Present Perfect Tense

- | | |
|-----------------------|------------------------|
| 1. (If) I have sued | 1. (If) we have sued |
| 2. (If) you have sued | 2. (If) you have sued |
| 3. (If) he have sued | 3. (If) they have sued |

Past Perfect Tense

- | | |
|----------------------|-----------------------|
| 1. (If) I had sued | 1. (If) we had sued |
| 2. (If) you had sued | 2. (If) you had sued |
| 3. (If) he had sued | 3. (If) they had sued |

Imperative Mood

- | | |
|-----------------|---------------|
| <i>Singular</i> | <i>Plural</i> |
| Sue | Sue |

Infinitive

- | | |
|----------------|----------------|
| <i>Present</i> | <i>Perfect</i> |
| To sue | To have sued |

Participle

- | | | |
|----------------|-------------|----------------|
| <i>Present</i> | <i>Past</i> | <i>Perfect</i> |
| Suing | Sued | Having sued |

Gerund

- | | |
|----------------|----------------|
| <i>Present</i> | <i>Perfect</i> |
| Suing | Having sued |

PASSIVE VOICE

Indicative Mood

Present Tense

- | | |
|-----------------|------------------|
| <i>Singular</i> | <i>Plural</i> |
| 1. I am sued | 1. We are sued |
| 2. You are sued | 2. You are sued |
| 3. He is sued | 3. They are sued |

Past Tense	1. I was sued 2. You were sued 3. He was sued	1. We were sued 2. You were sued 3. They were sued
Future Tense	1. I shall be sued 2. You will be sued 3. He will be sued	1. We shall be sued 2. You will be sued 3. They will be sued
Present Perfect Tense	1. I have been sued 2. You have been sued 3. He has been sued	1. We have been sued 2. You have been sued 3. They have been sued
Past Perfect Tense	1. I had been sued 2. You had been sued 3. He had been sued	1. We had been sued 2. You had been sued 3. They had been sued
Future Perfect Tense	1. I shall have been sued 2. You will have been sued 3. He will have been sued	1. We shall have been sued 2. You will have been sued 3. They will have been sued
Subjunctive Mood		
	<i>Singular</i>	<i>Plural</i>
Present Tense	1. I be sued 2. You be sued 3. He be sued	1. We be sued 2. You be sued 3. They be sued
Past Tense	1. (If) I were sued 2. (If) you were sued 3. (If) he were sued	1. (If) we were sued 2. (If) you were sued 3. (If) they were sued
Present Perfect Tense	1. (If) I have been sued 2. (If) you have been sued 3. (If) he have been sued	1. (If) we have been sued 2. (If) you have been sued 3. (If) they have been sued

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Past Perfect Tense

- | | |
|---------------------------|----------------------------|
| 1. (If) I had been sued | 1. (If) we had been sued |
| 2. (If) you had been sued | 2. (If) you had been sued |
| 3. (If) he had been sued | 3. (If) they had been sued |

Imperative Mood*Singular**Plural*

Be sued

Be sued

Infinitive*Present**Perfect*

To be sued

To have been sued

Participle*Present**Past**Perfect*

Being sued

Sued

Having been sued

Gerund*Present**Perfect*

Being sued

Having been sued