The Many Misuses of *Shall*

Joseph Kimble

> [W]hen such a rule says that something "shall" be done, the Court jolly-well means for it to be done; the direction is a "mandatory" one and must be obeyed. . . . But the rule does not specify or mandate any particular sanction . . . . [W]e do not believe that [dismissal] is a mandatory sanction required to be applied indiscriminately in all cases. The trial court, we think, had some discretion in the matter.
>
> *People's Counsel v. Public Serv. Comm'n*, 451 A.2d 945, 948 (Md. Ct. Spec. App. 1982)

Let me offer a summary up front, where it belongs.

First, *shall* is the most important word in the world of legal drafting — contracts, wills, trusts, and the many forms of public and private legislation (from statutes to court rules to corporate bylaws). *Shall* is the very word that is supposed to create a legal duty.

Second, *shall* is the most misused word in the legal vocabulary.

Third, this perpetual misuse reflects the sickening failure of most law schools to teach legal drafting.

Fourth, a good case can be made for abandoning *shall* entirely. That would at least end the misuses. And it would take us another step closer to plain language.

Finally, though, the best solution may not always be that neat. In some documents, the best solution may be to define *shall* and *must* and *may* — the terms of authority. That way, drafters can make clear the degree of duty they intend and the possible consequences of a breach.

The Grammar of *Shall*

Shall is a modal auxiliary verb. The modal auxiliaries (*shall, will, must, can, may*) are so called because, unlike the other auxiliaries (*be, do, have*), they express modal meanings such as

possibility, volition, and obligation.[1] These meanings involve human judgment about what is likely to happen, or some kind of human control over events.

Shall originally meant obligation or compulsion, from Old English and Germanic words meaning "to owe."[2] It was a finite verb that gradually, over centuries, developed into an auxiliary.[3] So did the modal *will*, which originally carried the sense of volition.[4] Because obligations and intentions concern future conduct, and because English verbs lack a true future form, *shall* and *will* came naturally to be used with future time.[5] In short, through evolution, they can now work in two ways: to express modal meanings or to mark future time.

To distinguish these two uses, a set of rules developed, or were prescribed, or both. Use *shall* to express plain future in the first person: "I shall die someday." Use *will* to express plain future in the second and third persons: "Time will tell." Do just the reverse to convey modal meanings.

We do not have to worry about these rules for several reasons. For one thing, they are so shot-through with variations, borderline cases, and exceptions as to be practically unmanageable. The great H.W. Fowler, a believer in the rules, needed 21 pages in *The King's English* to explain them — and even then despaired that "those who are not to the manner born can hardly acquire [the idiomatic use]."[6] Wilson Follett, another believer, spent 23 pages in *Modern*

---

1. RANDOLPH QUIRK ET AL., A COMPREHENSIVE GRAMMAR OF THE ENGLISH LANGUAGE §§ 3.21, 3.31, 4.49 (1985).
2. OTTO JESPERSEN, ESSENTIALS OF ENGLISH GRAMMAR § 25.5(1) (1933; repr. 1939); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1657 (*shall*), 2124 (*skel-*[2]) (3d ed. 1992).
3. WEBSTER'S DICTIONARY OF ENGLISH USAGE 841 (1989).
4. *Id.*
5. JESPERSEN, *supra* note 2, §§ 25.3(1), 25.5(1).
6. H.W. FOWLER & F.G. FOWLER, THE KING'S ENGLISH 142 (3d ed. 1931).

American Usage, and he called the section "Confusion and Conflict in Usage."[7] Language will not suffer such difficulty for long.

For another thing, the rules are alien to American idiom, as Fowler himself acknowledged.[8] Every authority on American usage says that *will* is far more common, especially to mark plain future.[9] To American ears, *shall* is "somewhat mannered"[10] or "flossy."[11] Or as James Thurber put it, "Men who use *shall* west of the Appalachians are the kind who twirl canes and eat ladyfingers."[12]

Still another reason to forget the "rules" is that legal drafters primarily use third person. At most, we should only have to get right the modal use of *shall* in the third person to express an obligation, a command, a legal duty: "The landlord shall maintain the common areas."

So here is the current state of usage, as described in the leading contemporary grammar. *Shall* is "infrequent" to indicate plain future; even in British English, the prescription to use *shall* with *I* and *we* "is old-fashioned and is nowadays widely ignored."[13]

As for modal use, *shall* survives, barely, in questions: "Shall we dance?" (Most Americans would not say it like that.) And it survives in one of the many exceptions to the old rules: *shall* with the first person to express intense determination, as in "I shall return" and "We shall overcome." This use is formal.

---

7. WILSON FOLLETT, MODERN AMERICAN USAGE 369 (1966).

8. H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 713 (Ernest Gowers 2d ed. 1965).

9. *E.g.*, AMERICAN HERITAGE DICTIONARY, *supra* note 2, at 1657; MARGARET M. BRYANT, CURRENT AMERICAN USAGE 182–83 (1962) (citing studies that show that *will* is used more than 90% of the time); ROY H. COPPERUD, AMERICAN USAGE AND STYLE: THE CONSENSUS 345 (1980).

10. AMERICAN HERITAGE DICTIONARY, *supra* note 2, at 1657.

11. COPPERUD, *supra* note 9, at 345.

12. Quoted in WILLIAM MORRIS & MARY MORRIS, HARPER DICTIONARY OF CONTEMPORARY USAGE 541 (2d ed. 1985).

13. QUIRK et al., *supra* note 1, §§ 4.42, 4.58.

What's left? Legal usage — the only place where *shall* thrives. And in legal usage "*shall* is close in meaning to *must*."[14]

There you have it: a legacy of confusion from the interplay between modal meaning and future time; uses that are, outside the law, "infrequent," "old-fashioned," "flossy," and "formal"; a country uncomfortable with *shall*; and a profession that overuses it, misuses it, and arguably could as well replace it with *must*.

Lawyers' Misuses

Every single authority on legal drafting, from George Coode,[15] to Reed Dickerson,[16] to Barbara Child,[17] insists that *shall* must be used for modal meaning only. It must be used to recite an obligation in a contract, or to give a command in a statute. You have used it correctly if you can substitute *has a duty to* for *shall*:

- The landlord shall [= has a duty to] maintain the common areas.
- A driver shall not [= has a duty not to] drive more than 45 miles an hour in a construction zone.

But lawyers wrongly tend to think that, because contracts and statutes apply into the future, they should be written in the future tense. This thinking produces two kinds of false imperatives. First, a drafter may wrongly use *shall* to declare a legal result:

- The law of Michigan *shall govern* [*governs*] this contract.
- It *shall be* [*is*] unlawful to commit murder.

---

14. *Id.* § 4.58 n.[c].

15. GEORGE COODE, ON LEGISLATIVE EXPRESSION (2d ed. 1852), *reprinted in* ELMER A. DRIEDGER, THE COMPOSITION OF LEGISLATION app. I at 317, 371–72 (2d ed. 1976); *see also* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 516–17 (1987) (updating COODE).

16. REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING §§ 6.7, 9.4 (2d ed. 1986).

17. BARBARA CHILD, DRAFTING LEGAL DOCUMENTS 204–06, 383–84 (2d ed. 1992).

Second, the drafter may misuse *shall* in a conditional clause or relative clause:

- If the tenant *shall* [*does*] not pay the rent on time, the landlord may charge a late fee.
- I give to Chuck Berry all the property that I *shall* [omit *shall*] have at my death.

Ironically for the future-looking drafter, in the first two examples the *shall* seems more modal than temporal. And in the conditional clause, *should* — not *shall* — is correct in formal contexts. The *shall* in the last two examples is a precious old literary usage.[18]

At any rate, drafting convention and modern idiom require the normal present tense in all four examples. A legal document speaks constantly; it applies throughout its operation, and not just to the situations that exist when it's drafted. So once again, we can relax and write simply.

Another misuse produces an ambiguity that may or may not involve a false imperative:

> There *shall be* [*is*?] created a Department of Plain English.

If this is self-executing — if the statute creates the department — then use the present tense. If the statute imposes a duty on someone to create the department, then name that someone, keep *shall*, and use the active voice.

Two other misuses are less common. First, like the second possible meaning of the last example, a sentence with *shall* may leave unclear where the duty falls:

> All dogs shall be kept on a leash.

If I let you walk my dog without a leash, who can be cited? Second, a sentence with *shall* may impose a duty on the wrong person:

---

18. JESPERSEN, *supra* note 2, § 25.7(2).

- A child shall undergo vaccination before age six.
- The employee *shall receive* [*shall be paid* or *is entitled to*] $40,000 a year.

In the first example, the parents, not the child, should have the duty — and the drafter should know better. In the second example as corrected, the passive *shall be paid* is tolerable, because it's implicitly clear that the employer has the duty. (In this instance, though, testing with *has a duty to* does not work.) Even better would be the active voice: "The employer shall pay the employee $40,000 a year."

But having said all this, I should alert you that these misuses, rampant as they are, have not caused the main problem in the volumes of litigation over *shall*. No, the courts are befuddled instead by what degree or form of duty *shall* imposes and what the consequences are for a violation. More on that in a moment.

What About *Must*?

Reed Dickerson, our late patriarch of modern-day drafting, set out the following conventions for using terms of authority:

(1) To create a right, say *is entitled to*.

(2) To create discretionary authority, say *may*.

(3) To create a duty, say *shall*.

(4) To create a mere condition precedent, say *must* (e.g., "To be eligible to occupy the office of mayor, a person must . . .").[19]

Professor Dickerson's counterpart in Canada, Elmer Driedger, agrees: use *must* with a provision that is "directory only."[20] For example:

> The owner must sign the application.

---

19. DICKERSON, *supra* note 16, § 9.4.

20. DRIEDGER, *supra* note 15, at 14.

According to Driedger, the owner is not being compelled to sign, even though the application will not be considered unless it is signed.

Reserving *must* for a "mere condition precedent" or similar meaning would indeed promote clarity and economy. Think of the contractual disputes that arise over whether the parties intended a condition or a promise. In one famous case, for instance, a farmer plowed under his rain-damaged tobacco stalks before the insurance corporation inspected them.[21] The corporation refused to pay because the contract said:

> The tobacco stalks . . . with respect to which a loss is claimed shall not be destroyed until the Corporation makes an inspection.[22]

The court had to decide whether this provision was a promise or a condition. If it was the farmer's promise, the insurer could recover damages; if it was a condition, however, the insurer would not have to pay at all. Noting the general legal policy against a forfeiture, the court said the provision was a promise only. But the result would probably have been the same even if the drafter had used *must* instead of *shall.*

Unfortunately, reserving *must* for conditions has not caught on, at least not yet. No matter which term is used, the drafter must add words to make a condition explicit: "As a condition precedent to the corporation's paying for a loss, the insured must not destroy the tobacco stalks until the corporation inspects them." Or the drafter must revise: "If the insured destroys the tobacco stalks before the corporation inspects them, the corporation is not liable for the loss."[23]

One other point. In contracts, an unmet condition has graver consequences than a broken promise. The insurance company

---

21. Howard v. Federal Crop Ins. Corp., 540 F.2d 695, 696 (4th Cir. 1976).

22. *Id.*

23. For guidance on drafting conditions, see SCOTT J. BURNHAM, THE CONTRACT DRAFTING GUIDEBOOK §§ 11.1–11.10, 18.6.3 (1992).

would have had no duty to pay the tobacco farmer if the provision had been interpreted as a condition. So we should not be misled by Dickerson's idea of a "mere condition precedent." I suspect that Dickerson, steeped as he was in legislative drafting, viewed the failure to qualify for something ("the owner must sign the application") as less serious than "a flat-out command, the breach of which risks legal discipline."[24] In contracts, however, we might more accurately think of a "mere promise" as opposed to a condition.

Commentators have recommended other uses for *must.* Driedger himself recommends *must* when you are stating a command without specifying the actor:[25]

> The brief must include a summary of argument.

The National Conference of Commissioners on Uniform State Laws suggests always using *must* in the passive voice:[26]

> A notice of appeal must be filed within 30 days.

Dickerson disagrees.[27] He allows *shall* with a passive verb as long as it is clear who has the duty. In the last example, he would probably use *must,* but not for grammatical reasons. He would, I think, regard timely filing as a condition to preserving an appeal — a condition to legal effectiveness.

Finally, the National Conference of Commissioners recommends also using *must* with "an inactive [linking] verb":[28]

> The applicant must be an adult.

---

24. Reed Dickerson, *Choosing Between* Shall *and* Must *in Legal Drafting,* 1 SCRIBES J. LEGAL WRITING 144, 144 (1990).

25. DRIEDGER, *supra* note 15, at 14.

26. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 761 (1987) [HANDBOOK].

27. Dickerson, *supra* note 24, at 145–46.

28. HANDBOOK, *supra* note 26, at 761.

Again, Dickerson would agree with the *must*, but disagree with the grammatical rationale.

Even if we accept Dickerson's single use of *must*, for conditions only, some examples present tough calls:

> The trial judge shall inform the defendant of the maximum and minimum sentence.

Is this a "flat-out command"? If so, what is the legal penalty? A remand? Or is telling the defendant about the sentence a condition precedent to the legal effectiveness of sentencing? Is the difference even significant here?

In one last twist, Barbara Child agrees with Dickerson's distinction between *shall* (command) and *must* (condition) in legislation, but she recommends *will* instead of *shall* in contracts.[29] She says that statutes give orders, whereas contracts recite what the parties have agreed to. This is nicely consistent with the volitional sense of *will*; you could test it by substituting either *promises to* or *agrees to* for *will* (except in the passive voice). One disadvantage is that sometimes you also need *will* for plain future: "The employee understands that she will learn confidential information during her employment." Or: "If the bank makes an insurance payment, it will be added to the loan balance."

Given all these possibilities, the drafter has to decide what distinctions are needed and how to make them. A drafter who wants to use *shall* (or *will*) for one meaning and *must* for another meaning had better set out those meanings in the document.

The Case for Abandoning *Shall*

Several influential voices have called for completely giving up on *shall* and using *must* instead.

David Mellinkoff writes that *shall* and *may* are "frequently treated as synonyms"; that "[c]ontext and interpretation . . . easily

29. CHILD, *supra* note 17, at 204–06, 383–84.

overwhelm either word"; and that we should substitute *must* or *required* for *shall* "[u]nless context can be made crystal clear."[30]

Shall has indeed become a flimsy word. I doubt, however, that simply replacing it with *must* would make a big difference in the amount of litigation. At the same time, I do understand the argument that, having been so thoroughly watered down over such a long period, *shall* has lost its force.

Two other arguments for *must* are made by leading writers: *shall* is archaic; and lawyers are prone to misuse it, confusing it with future tense.[31] Both arguments are valid. Then again . . .

Shall is not as easy to dismiss as most legal jargon and legal mannerisms. It has produced volumes of litigation. It is a critical word. If it can be replaced with *must*, fine. But we do give up a potentially useful distinction, or at least we have to make the distinction in other ways.

As for the lawyers' misuses, they do not normally cause trouble — at least not directly — but they do cause some:

> This mortgage shall become due and payable forthwith at the option of the mortgagee if the mortgagor shall convey away said premises or if the title thereto shall become vested in any other person or persons in any manner whatsoever.[32]

In this case, the mortgagors argued that the second *shall* was modal (*has a duty to*). Although they conveyed the property, they did it voluntarily, so the clause did not apply. A strained interpretation,

---

30. DAVID MELLINKOFF, MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 402–03 (1992).

31. MICHELE M. ASPREY, PLAIN LANGUAGE FOR LAWYERS 98–102, 149–52 (1991); VEDA R. CHARROW & MYRA K. ERHARDT, CLEAR AND EFFECTIVE LEGAL WRITING 116–17 (1986); JANICE C. REDISH, HOW TO WRITE REGULATIONS AND OTHER LEGAL DOCUMENTS IN CLEAR ENGLISH 38 (1991); Michele M. Asprey & Robert Eagleson, *Must We Continue with* Shall?, 63 AUSTL. L.J. 75–78 (1989).

32. Home Fed. Sav. & Loan Ass'n v. Campney, 357 N.W.2d 613, 616 (Iowa 1984).

and they lost, but if the drafter had tried to replace each *shall* with *must*, the drafter would have realized that none of them works.

That seems to be the best argument for abandoning *shall* — it would make the drafter think and write more clearly to begin with. One drafter scored two misuses in this rule on issuing licenses to junkyards:

> The license provided for in the second section of this ordinance shall be issued by the Supervisors after application shall have been made therefor by the person desiring to be licensed.[33]

In this case, the court agreed with the Supervisors that the first *shall* was not mandatory; they had no duty to issue a license to someone who was operating a junkyard improperly. But given a choice between *must* and *may* instead of the ubiquitous *shall*, the drafter would not have used *must* if he or she meant *may*. Or perhaps the drafter really wanted something in between:

> The Supervisors must issue the license unless they have reasonable grounds to believe that the applicant would not be a responsible operator.

In summary, I'm afraid that *shall* has lost its modal meaning — for drafters and for courts. Drafters use it mindlessly. Courts read it any which way. The commentators are certainly right that we might better try something new.

What the Cases Show

I have read a hundred cases, sorting and resorting them. There is no order and not a lot of certainty.

You have only to look over the 76 pages of abstracts in *Words and Phrases*[34] and the 67 pages in *Sutherland Statutory Construc-*

33. Earhart v. Board of Supervisors, 296 A.2d 284, 286 (Pa. Commw. Ct. 1972).

34. 39 WORDS AND PHRASES 111–64 (1953); 40–63 (Supp. 1992).

tion,[35] which contains a mishmash of extracts, contradictions, and exceptions. Even today, we are still debating about the following *shall*, in the Constitution:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.[36]

As one article asks, does "shall be vested" mean "must be vested" or "may be vested" or "will be vested" or "is vested"?[37]

At most, *shall* creates a presumption that the provision is mandatory or the duty absolute. Courts have found many ways to overcome the presumption:

(1) Mandatory *shall* would defeat the legislative intent.[38]

(2) The provision merely guides the conduct of officials or specifies the time for performing an official duty.[39]

(3) The official's conduct is not prescribed in order to safeguard someone's rights.[40]

(4) The provision does not go to the essence of the statutory purpose.[41]

(5) The provision does not set out consequences for a violation.[42]

---

35. 3 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION §§ 57.01–.26 (5th ed. 1992).

36. U.S. CONST. art. III, § 1, cl. 1.

37. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1162, 1178–79 & n.125, 1187, 1209–10 (1992).

38. Andrews v. Foxworthy, 373 N.E.2d 1332, 1335 (Ill. 1978).

39. *Id.*

40. *Id.*

41. Hancock County Rural Elec. Membership Corp. v. City of Greenfield, 494 N.E.2d 1294, 1296 (Ind. Ct. App. 1986).

42. *Id.*

(6) Mandatory *shall* would infringe on the separation of powers.[43]

We could easily expand the list. In every jurisdiction, we find exceptions and qualifications.

Now, as I said earlier, lawyers' misuses, including the confusion of modal and future *shall*, are not the main problem — although the misuses might have indirectly weakened the force of *shall*. Rather, the litigation is about how strong the *shall* is.

In one group of cases, the question is whether the duty is absolute so that you can compel someone to perform it. In other words, is the provision mandatory or permissive?

- Whenever . . . the Administrator finds that any person is in violation of [the Water Pollution Control Act], he shall issue an order requiring such person to comply with [the Act] or he shall bring a civil action in accordance with subsection (b) of this section.[44] (If the Administrator does not bring a civil action, can he be compelled to issue an order?)
- When a divorce is granted, the wife shall be restored to her maiden name or former name if she so desires.[45] (Can a judge refuse the wife's request?)
- [T]he parties agree that in any dispute jurisdiction and venue shall be in California.[46] (Can a party have the case transferred from North Carolina to California?)

In another large group of cases, the question is whether the duty is absolute so that, if it is violated, the proceedings are invalid. In other words, is the provision mandatory or directory?

- [U]pon request of either the State or defendant the judge shall include in said charge the maximum and minimum

43. People v. Davis, 442 N.E.2d 855, 858 (Ill. 1982).

44. Sierra Club v. Train, 557 F.2d 485, 488 (5th Cir. 1977).

45. Sneed v. Sneed, 585 P.2d 1363, 1364 (Okla. 1978).

46. Sterling Forest Assocs. Ltd. v. Barnett-Range Corp., 840 F.2d 249, 250 (4th Cir. 1988).

sentences which may be imposed . . . .[47] (Is this mandatory, and if so, is the error reversible?)

- Upon the written request of a person whose privilege to drive has been revoked or denied, the director shall grant the person an opportunity to be heard within 20 days after the receipt of the request . . . .[48] (If the 20-day period is not met, must the revocation proceedings be dismissed?)
- [A]ny person . . . having [a malpractice claim] . . . shall, within 15 days after the date of filing an action in court, file a request for mediation.[49] (If the person does not file within 15 days, does the court lose jurisdiction?)
- [W]ritten notice stating that the purpose . . . of such meeting is to consider the sale [of corporate assets] shall be given to each shareholder of record . . . .[50] (If a minority shareholder is not given notice, is the sale of assets void?)

The cases, incidentally, are misleading in that they tend not to explain or distinguish between what is directory and what is permissive. A directory provision conveys the meaning of *should* (or a little stronger), while a permissive provision conveys the meaning of *may*. The cases are also not very specific about the consequences of violating a provision that is directory but not mandatory. One case concluded that a violation does not invalidate the proceedings unless prejudice is shown.[51]

We are still left without a word to express a mandatory, or absolute, duty, but I doubt that switching to *must* would do the job, because courts generally equate it with *shall* and seem equally willing to give it a soft interpretation. In a number of cases, *must*

47. Williams v. State, 378 So. 2d 902, 903 (Fla. Dist. Ct. App. 1980).

48. Taylor v. Department of Transp., 260 N.W.2d 521, 522 (Iowa 1977).

49. Eby v. Kozarek, 450 N.W.2d 249, 251 n.1 (Wis. 1990).

50. Fishkin v. Hi-Acres, Inc., 341 A.2d 95, 97 (Pa. 1975).

51. *Taylor*, 260 N.W.2d at 523.

has been read as not being mandatory.[52] Any number of other cases contain dicta that *must* is not always mandatory or can be read as *may* (and vice versa).[53] One commentator acknowledges such cases, yet takes it on faith that replacing *shall* with *must* "would go a long way toward clarifying legislative intent."[54] I wonder.

The most we can say is that *must* has produced fewer cases than *shall* — probably because *must* is less common — and so it does not have as strong a history of corruption.

What to Do?

To review: *shall* can mean "absolutely must" or "should" or "may." *Must*, though, can be slippery too.

Our problem has no easy solution, and any proposal will be open to criticism. To some extent, drafters must be guided by their own judgment and their own philosophy of drafting. You may believe that most legal documents are overdrafted and suffer from a self-defeating elaboration of detail. Absolute precision, after all, is a dream; flexible language is not only useful but necessary.[55] If we can live with flexible terms like "good cause" and "a reasonable time," then we can live with *must* — which at least has a presumption in its favor. So forget the archaic *shall*, use *must*

---

52. *See, e.g.*, Bartholomew v. United States, 740 F.2d 526, 530–31 (7th Cir. 1984); Argonaut Ins. Co. v. Industrial Accident Comm'n, 23 Cal. Rptr. 1, 4 (Cal. Dist. Ct. App. 1962); Klecan v. Schmal, 241 N.W.2d 529, 532–33 (Neb. 1976); People v. Schonfeld, 535 N.Y.S.2d 479, 480 (N.Y. App. Div. 1988); Morris v. State Transp. Comm'n, 590 P.2d 260, 262–63 (Or. Ct. App. 1979).

53. *See, e.g.*, State Highway Comm'n v. Mabry, 315 S.W.2d 900, 905 (Ark. 1958) (*must* can be directory); Bochantin v. Petroff, 555 N.E.2d 1066, 1069 (Ill. App. Ct. 1990) (*may* can mean *must*); Clark v. Riehl, 230 S.W.2d 626, 627 (Ky. Ct. App. 1950) (*must* can mean *may*); *In re* D.S., 263 N.W.2d 114, 119 (N.D. 1978) (*must* can be directory).

54. Timothy P. O'Neill, *Shall the Illinois Legislature Stop Using* Shall?, CHI. DAILY L. BULL., 5 July 1988, at 2, 20.

55. *See* CHILD, *supra* note 17, at 303–07.

instead (or *will* in contracts), and know that the parties will almost always carry out their duties anyway.

Besides, the drafter can still make distinctions and provide for consequences. Important conditions can be made explicit: "Before keeping a pet in the apartment, the tenant must get the landlord's approval."[56] Consequences can be dealt with in a general way: "A failure to meet a requirement of these rules makes the proceedings or action invalid, unless the requirement is primarily a matter of form or the court finds a good excuse for the failure." And consequences or remedies can be covered in separate sections of the act or the contract.

If this is your philosophy of drafting and you can live with controlled uncertainty, then you have a choice of which term to use to impose a duty. *Must* does have the advantage: it is plainer, less prone to misuse, and somewhat less corrupted.

On the other hand, the careful drafter may wish to define the terms of authority in some documents, especially those involving many procedural or administrative matters. For example, in legislation:

- *Must* means "is required to," or else the proceedings or action is invalid.
- *Shall* [or *should*] means "has a duty to"; a violation will normally result in sanctions but will not invalidate the proceedings or action.
- *May* means "is authorized to."

In contracts:

- *Must* means "is required to"; the requirement is a condition either of the party's right to act or of the other party's duty to perform.
- *Shall* [or *will*] means "promises to."
- *May* means "is authorized to."

---

56. *See supra* note 23 and accompanying text.

Definitions are the neatest way to make these distinctions, if the drafter feels the need. Naturally, the definitions may vary from context to context.[57] In some legislative contexts, the drafter might even want to distinguish between the degree of duty imposed by *shall* and *should* and to specify the possible consequences of noncompliance. Whatever the definitions, the drafter must of course follow them religiously. The important thing — with the terms of authority or any terms — is to be consistent within the document.

In the end, there is no one and only way to work out *shall*. We are up against conflicting recommendations, the limitations of language, the variety of legal documents, and the vagaries of interpretation. Most of all, we are up against the failure of our profession to learn the discipline of legal drafting.

57. *See, e.g.*, WASH. R. APP. P. 1.2(b) (distinguishing between *must* and *should*, using *will* and *may* for acts of the court, and using *shall* for acts to be done by persons other than the court or a party).