Food shall be pure
Using “shall” carefully for clearer laws

I. Introduction
a. Why do we have difficulties using shall?
b. Why should we care?
c. Issues:
i. The false imperative
ii. The “wrong actor” problem
iii. “Shall have been”
iv. Passive voice

II. The false imperative
a. Definitions from Merriam-Webster online (www.merriam-webster.com)
i. Shall (verbal auxiliary) ...2 a—used to express a command or exhortation b—used in laws, regulations, or directives to express what is mandatory.
ii. Auxiliary 2 of a verb: accompanying another verb and typically expressing person, number, mood, or tense.
iii. Mood 2 distinction of form...of a verb to express whether the action or state it denotes is conceived as fact or in some other manner (as command, possibility, or wish).
b. The imperative mood expresses a command or requirement. The imperative mood is often the correct mood for a statute. When you want to impose a duty, the imperative is the appropriate mood and “shall” is the word to use.
c. The false imperative appears to impose a duty, but does not. A sentence with a false imperative is meant to state a fact or declare a legal result.
d. The indicative mood is used to state a fact or declare something.
e. Occurrences of the false imperative may not be obvious. To tell whether a sentence contains the false imperative, you might try substituting “has a duty to” for “shall” and ask whether the resulting sentence makes sense.
f. Wisconsin Bill Drafting Manual: The indicative mood expresses a fact or declaration. The imperative mood expresses a command...Draft in the indicative mood whenever possible. Avoid false imperatives, which are expressions that seem to direct behavior but do not. Do not say "The authority shall be a body corporate." Say "The authority is a body corporate."
g. Utah Legislative Drafting Style Manual: A common mistake in drafting legislation "is the use of 'shall' or 'shall not' to declare a legal result rather than to give a command. For example,...'The record for judicial review shall consist exclusive of...'A Government employee shall have a right of action against the Government ...' This usage is known as a false imperative because it does not give a command to someone to do something but rather declares a legal result. [Legislation] is self executing. If it says something 'is,' it is. Thus, if in a [statute] a word has a certain meaning, it is only necessary to say that the word 'means...' This usage is the
indicative mood... In addition to the use of *shall* in these circumstances being technically incorrect, the use of the indicative mood has two other advantages. Most important, it allows the use of *shall* only in those instances when the imperative mood is appropriate, this is when a command is given... Elimination of the unnecessary *shall*, of course, also reduces the number of words in the provision" (Martineau and Salerno 2005, pp. 47–48).

III. The wrong actor
   a. Many statutory provisions that correctly use the imperative mood (that is, they use “shall” and are meant to impose a duty) actually impose the duty on the wrong actor.
   b. The “has a duty to” test may also help to spot the wrong actor problem.
   c. *Wisconsin Bill Drafting Manual*: Do not use "shall" to direct the wrong entity. For example, "the clerk shall receive a salary of $30,000 per year" is incorrect because it makes no sense to direct someone to receive a salary. It would be better to write something like "the board shall pay the clerk a salary of $30,000 per year."
   d. “The most basic point about the subject of a legislative sentence is obvious but not always remembered. That point is that if a sentence forbids, authorizes or requires, the sentence should name the person who is being forbidden, authorized or require” (Stark 1995, p. 187).

IV. “Shall have been”
   a. “Will have been” expresses the future perfect tense in the passive voice or the future perfect continuous (or future perfect progressive) tense. It describes something that is expected to have been done before a future time or event or something that is expected to continue until a time or event in the future. “Shall have been” is sometimes used in the same way.
   b. “Shall have been” was widely used in legal documents at one time and it still appears in statutes, but it seems unlikely that it would be necessary to use the phrase. If it is necessary to use the future perfect passive or the future perfect continuous in a law, it would be better to use “will” and reserve “shall” for making commands.
   c. Sometimes the intent seems to simply be to describe something that happens or has happened.
   d. Sometimes “shall have been” seems to be intended to state a condition (for receiving a grant, for example), but it does not clearly do that.
   e. When you are asked to draft “shall have been,” find yourself writing that phrase, or are asked to amend a statute that uses it, consider whether the language is intended to impose a duty on someone. If so, reword the language so that it imposes the duty. If not, determine what is intended and reword the language without using “shall.”
V. Passive Voice
   a. In the active voice, the subject does the acting. In the passive voice, the subject is acted upon.
   b. The passive voice doesn’t necessarily involve “shall,” but in statutes it often does.
   c. The active voice is usually preferable, if only because it involves fewer words and a more familiar word order. There are situations in which the passive voice is preferable or even necessary, for example, when the actors are numerous or unknown.
   d. The danger with the passive voice related to the use of “shall” is ambiguity about who has a duty.
   e. Wisconsin Bill Drafting Manual: It is usually better to use an active rather than a passive verb. For example, state "the clerk of the circuit court shall appoint one or more deputies" rather than "one or more deputies shall be appointed." Use of the passive voice frequently makes it unclear who has the responsibility to carry out a law.
   f. Colorado Bill Drafting Manual: Whenever possible, write sentences that clearly identify the actor of the sentence, and use the active voice to make that actor take the action specified in the sentence.
      i. Passive voice (actor absent): A notice shall be mailed to the parties within fifteen days after issuance of an order.
      ii. Active voice (actor present): The commission shall mail a notice to the parties within fifteen days after issuance of an order.

VI. Suggestions for drafting
   a. Consider whether a sentence containing “shall” is meant to impose a duty and, if so, whether it imposes the duty on the right person.
   b. Consider rewording a sentence that includes “shall be,” “shall have,” or “shall have been.”

VII. References.