

**“SHOULD” OR “MUST”?: DISTINGUISHING MANDATES FROM  
GUIDELINES IN TORT CLAIMS CONTEXTS**

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## I. INTRODUCTION

Immunity is everything that it's cracked up to be. As politicians and warlords have always known, those entitled to it enjoy protection from liability that similarly-situated defendants do not;<sup>1</sup> this is the case despite circumstances that are practically identical, if not wholly so.<sup>2</sup> The plaintiff is just as injured in one situation as the other, but his remedy may be denied him based on whether or not the party he complains of enjoys the coveted status.<sup>3</sup>

To counter this state of affairs, immunity is seldom granted, and it is often only qualified immunity at that.<sup>4</sup> The lone body to which a blanket immunity has always been granted in some form has been the sovereign itself.<sup>5</sup> Whether under the historic justification that “the King can do no wrong,”<sup>6</sup> or for the practical reason that it is best to preserve the public treasury as much as possible, the government—both federal and state—has deemed itself nearly impregnable to actions taken against it.<sup>7</sup> Of course, exceptions exist, but only when the government deems that they do by way of a waiver.<sup>8</sup>

When it comes to negligence, the sovereign—again, both at the state and federal levels—has generally granted that waiver in America.<sup>9</sup> Tired of the trouble it took to grant case-by-case pleas for redress, most of these respective bodies have granted waivers by means of tort claims acts<sup>10</sup>—in which the state

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<sup>1</sup> See Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 772–73 (2008) (discussing the origins of sovereign immunity in American law).

<sup>2</sup> See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001) (stating that “[t]he effect of sovereign immunity is to place the government above the law and to ensure that some individuals who have suffered egregious harms will be unable to receive redress for their injuries”).

<sup>3</sup> See *id.*; see also JAMES M. WAGSTAFFE, RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL ch. 2E, § 12 (national ed. 2015) (stating that “[t]he United States, including its agency and employees, can be sued only to the extent that it has expressly waived its sovereign immunity”).

<sup>4</sup> Unlike absolute immunity, an immunity that is qualified creates only a presumption of the immunized state, which can be overcome. Other than tort claims acts, types of qualified immunity include those involving families, charities, workers' compensation statutes, and state and local governments. See VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVE F. PARTLETT, PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS ch. 12, § 3 (13th ed. 2015).

<sup>5</sup> See Chemerinsky, *supra* note 2, at 1201–03.

<sup>6</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 245 (12th ed. 1793) [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk1ch7.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk1ch7.asp).

<sup>7</sup> See Chemerinsky, *supra* note 2, at 1201–03.

<sup>8</sup> See WAGSTAFFE, *supra* note 3, ch. 2E, § 12 (providing the list of waivers to sovereign immunity).

<sup>9</sup> See, e.g., 28 U.S.C. § 1346(b)(1) (2014).

<sup>10</sup> The Federal Tort Claims Act is located at 28 U.S.C. § 1346(b)(1) (2014); a table consisting of citations to state tort claims acts, as well as their discretionary function exception

deigns to be sued, generally, on any grounds that the courts recognize under the common law.<sup>11</sup> Where a tort claims act exists, no longer does the age-old obstacle of the defendant's status stand in the way of a recovery.<sup>12</sup> Plaintiffs are free to proceed with their proof of duty, breach of duty, and damages.<sup>13</sup> Considering just the number of federal workers in America, potential liabilities in the area are staggering:

[d]uring recent years it has not been uncommon to find that there were some 3,000 lawsuits against the United States under the Federal Tort Claims Act pending before the federal courts at one time involving claims of approximately \$5 billion. New suits are filed at the rate of more than 1,500 each year. Administrative claims, presented by claimants each year to federal agencies which is a prerequisite to filing suit, number some 10 to 20 times this amount.<sup>14</sup>

If state claims figures were added, several more sets of commas and zeroes could be added to the tally.

However, what the state grants, it can also take away. And when it comes to matters that require discretion, the state will argue most stridently that the waiver should not take effect. Under what is generally known as a "discretionary function exception" ("DFE"),<sup>15</sup> courts must dismiss actions that amount to no more than second-guessing the defendant's judgment on some matter that the plaintiff claims led to his injury.<sup>16</sup> In other words, if a plaintiff asserts that he was injured because a government-owned park road was not marked a certain way, or because a certain government-owned trail was not closed, both discretionary actions, then the defendant's judgment about whether to mark the road or close the trail is not open to debate.<sup>17</sup>

However, if the case in question involves non-compliance with a mandatory matter (i.e., a rule that the government made and then broke), the

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sections, has been compiled by the National Conference of State Legislatures. JAIME RALL, NATIONAL CONFERENCE OF STATE LEGISLATURES, WEATHER OR NOT? STATE LIABILITY AND ROAD WEATHER INFORMATION SYSTEMS (RWIS) 56–63 (April 2010), [http://www.ncsl.org/documents/transportation/Weather\\_or\\_Not\\_App\\_B\\_Rall\\_04.30.10.pdf](http://www.ncsl.org/documents/transportation/Weather_or_Not_App_B_Rall_04.30.10.pdf).

<sup>11</sup> See 28 U.S.C. § 1346(b)(1).

<sup>12</sup> See Nicole Melvani, *The Fourteenth Exception: How the Feres Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 46 CAL. W. L. REV. 395, 399–400 (2010).

<sup>13</sup> See RESTATEMENT (THIRD) OF TORTS § 3 (AM. LAW INST. 2010).

<sup>14</sup> 1 LESTER S. JAYSON & HON. ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* §1.01, at 1–8 (2014).

<sup>15</sup> See 28 U.S.C. § 2680(a).

<sup>16</sup> See generally JAYSON & LONGSTRETH, *supra* note 14, § 12.03.

<sup>17</sup> See, e.g., *Childers v. United States*, 40 F.3d 973, 975–76 (9th Cir. 1995) (holding that the decision not to post warning signs in the national park was protected by DFE).

question of policy never enters the picture.<sup>18</sup> Thus, the DFE does not come into play, and the plaintiff may proceed to his proofs.

To put it another way, although a plaintiff cannot argue “you should have done a better job of it,” which amounts to second-guessing the government in matters of judgment and is disallowed under the DFE,<sup>19</sup> the plaintiff can argue that “you didn’t do what you said you would,” which will lead to government liability, if proven.<sup>20</sup> A government that did not follow its own rule is open to that charge; as such, the waiver will apply.<sup>21</sup>

But therein lies the question in such matters: does the case involve a government-made rule? This precipitates yet another question: what exactly is a “rule,” in the sense meant in this context? Or, to put it another way, what is a “mandate” and what is only a “guideline”? When is something an order/directive/charge, a failure in the observance of which will be addressed under most iterations of tort claims acts, and when is it merely a suggestion/counsel/resolution, which will require a further inquiry—whether the matter is policy-related, and therefore the subject of discretion for which the government does not waive its immunity?<sup>22</sup> With so much turning upon how a statement is communicated, what are the criteria by which courts can make an objective analysis, one based upon scientific factors that will bring a much-needed level of clarity to this cloudy area?

There are two prongs to the test of the DFE: (1) whether the government statement is a mandate or a guideline; and (2) whether that statement is policy related. Much has been written about the second question.<sup>23</sup> But little has been written about the first question, related to whether alleged

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<sup>18</sup> According to the Supreme Court, the purpose of the discretionary function exception is “to prevent ‘judicial second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984).

<sup>19</sup> *See id.*

<sup>20</sup> *See Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (stating that “the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow”).

<sup>21</sup> *See id.*

<sup>22</sup> *See Varig Airlines*, 467 U.S. at 814.

<sup>23</sup> As stated by the Supreme Court in the seminal case, *Berkovitz*, there are two questions that the government must meet in order to invoke the discretionary function exception successfully: (1) “whether the action is a matter of choice for the acting employee;” and (2) “whether that judgment is of the kind that the discretionary function exception was designed to shield.” Representative articles analyzing the discretionary function exception’s policy prong include: Andrew Hyer, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, 2007 BYU L. REV. 1091; Mark C. Niles, “*Nothing but Mischief*”: *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275 (2002); Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis*: *United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447 (1997); Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365 (1995).

breaches should be considered mandates or only guidelines. Since the second question is only reached by going through the first,<sup>24</sup> the matter is no small thing. But all in all, the courts have bumbled around with the issue.<sup>25</sup> They have been no more direct in articulating their analyses of it than the parties to such lawsuits have been in arguing that a particular government statement was either an absolute directive or only a passing recommendation.<sup>26</sup> The analysis must begin and end with more than charges that "they *had* to do it!" and "we did *not*!"

This Article intends to bring some order to the discussion, both by means of explaining what the science of the language arts—linguistics—says about the matter, and by explaining how that science comports with what courts think they are doing when they determine a government statement is, or is not, a mandate. Linguists have considered language crimes before,<sup>27</sup> relating to perjury, bribery, and criminal threats,<sup>28</sup> and I myself have conducted a linguistic analysis with regard to the civil law *Tarasoff* context (i.e., "duties to warn"<sup>29</sup>), but a linguistic analysis of mandates as opposed to guidelines has not yet been attempted.

Part II will explain the background involving the Federal Tort Claims Act and its state law counterparts, particularly with regard to the development of the DFE. Part III will demonstrate what mandates mean by the employment of speech act theory and the concept of implicature, both of which are dimensions of pragmatics,<sup>30</sup> itself the branch of linguistics dedicated to explaining how language functions in context.<sup>31</sup> Part IV will demonstrate the type of analysis that the courts have used in determining whether a government statement is a mandate or a guideline. Part V will set out an analytical framework—a set of factors—for courts to use in determining this issue, based both upon the pragmatic study conducted in Part III, and upon a formalization of what precedent shows the courts have been doing, which is the subject of Part IV. This part will also prioritize the factors, suggest a rationale for their application, and explain how they square with other tools of statutory interpretation and construction. Part VI will conclude.

## II. THE HISTORY OF SOVEREIGN IMMUNITY, TORT CLAIMS ACTS, AND THE

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<sup>24</sup> See *Berkovitz*, 486 U.S. at 536.

<sup>25</sup> See cases cited *infra* note 326.

<sup>26</sup> See cases cited *infra* note 326.

<sup>27</sup> See ROGER W. SHUY, *LANGUAGE CRIMES: THE USE AND ABUSE OF LANGUAGE EVIDENCE IN THE COURTROOM*, at xvi–xvii (1996).

<sup>28</sup> See *id.* at 20, 97, 136.

<sup>29</sup> See A.G. Harmon, *Back from Wonderland: A Linguistic Approach to Duties Arising from Threats of Physical Violence*, 37 *CAP. U. L. REV.* 27, 34 (2008).

<sup>30</sup> See *id.* at 36–37.

<sup>31</sup> See *id.* at 34.

## DISCRETIONARY FUNCTION EXCEPTION

The concept of sovereign immunity is historically grounded in the doctrine of the divine right of kings.<sup>32</sup> This theological and political concept is of ancient lineage, by most accounts traced from Justinian<sup>33</sup> down through centuries of development and elaboration in ecclesiastical law.<sup>34</sup> English jurisprudence kept the idea alive through various iterations,<sup>35</sup> and the concept developed in America by way of a trio of cases<sup>36</sup> that were based on what one judge considered purely practical grounds<sup>37</sup>—preserving the ability of government to function:

Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person.<sup>38</sup>

Thus, although political policy replaced ecclesiastical imprimatur, the consequence was the same.<sup>39</sup> There are many demands upon the contents of the governmental purse,<sup>40</sup> and a reluctance to make disbursals is a natural reaction,

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<sup>32</sup> See generally Herbert Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349 (1925); Stanwood R. Duval, *Sovereign Immunity, Anachronistic or Inherent: A Sword or a Shield?*, 84 TUL. L. REV. 1471 (2010); George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953); Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393 (2005).

<sup>33</sup> Seidman, *supra* note 32, at 415–16.

<sup>34</sup> *Id.* at 409.

<sup>35</sup> *Id.* at 402–30.

<sup>36</sup> *Gibbons v. United States*, 75 U.S. 269 (1868); *Nichols v. United States*, 74 U.S. 122 (1868); *The Siren*, 74 U.S. 152 (1868). According to the leading treatise on the FTCA, the idea of sovereign immunity, though not expressly stated in the Constitution, is derived by implication. JAYSON & LONGSTRETH, *supra* note 14, § 2.01 (citing *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388 (1939); *Monaco v. Mississippi*, 292 U.S. 313, 321 (1934); *Williams v. United States*, 289 U.S. 553, 577 (1933)).

<sup>37</sup> Duval, *supra* note 32, at 1477–78; see JAYSON & LONGSTRETH, *supra* note 14, § 2.01 (stating other justifications for the doctrine).

<sup>38</sup> *Nichols*, 74 U.S. at 126.

<sup>39</sup> See Chemerinsky, *supra* note 2, at 1201–03.

<sup>40</sup> See JAYSON & LONGSTRETH, *supra* note 14, § 1.01, at 1–8.

even when fraud—an ever-present concern when the public fisc is involved<sup>41</sup>—is not the case.

Of course, such a practical stance has its drawbacks—namely, the fact that the government, through its agents, can and does hurt people.<sup>42</sup> To deal with this reality, the first way around the doctrine was by means of private legislation, sponsored by a legislator.<sup>43</sup> This means was subject to all of the delays, objections, and frustrations commensurate with a legislative body conducting what in effect amounts to judicial determinations.<sup>44</sup> From the federal perspective,<sup>45</sup> complaints about the process began at least in the administration of John Quincy Adams, carried through to the administration of Millard Fillmore,<sup>46</sup> and ultimately led to the establishment of the Court of Claims Act in 1885.<sup>47</sup>

The problem with the aforesaid act was that although it relieved Congress of investigating claims against the government, the court itself could not act upon those deliberations.<sup>48</sup> Judgments still had to be rendered by Congress.<sup>49</sup> This only had the effect of postponing the delay of justice to a later date, and the amount of time Congress spent on reviewing the record amassed by the court was no less burdensome than its prior investigatory role.<sup>50</sup> Most important for the tort claimant, the Court of Claims Act did not confer jurisdiction to hear tort claims.<sup>51</sup> A legislative attempt to remedy that problem, by including tort claims jurisdiction in the Tucker Act of 1887, was unsuccessful.<sup>52</sup> Enacting various carve outs permitting tort claims in limited

<sup>41</sup> See James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1261–62 (2013).

<sup>42</sup> See, e.g., *Berkovitz v. United States*, 486 U.S. 531, 533, 547 (1988) (stating plaintiff's allegations—that the federal agency acted wrongly by approving the release of a polio vaccine that caused a two-month-old infant to contract polio disease—and holding that the complaint survived the government's motion to dismiss based on the DFE); *Sutton v. Earles*, 26 F.3d 903, 910 (9th Cir. 1994) (holding that the Navy was negligent in its failure to post a warning sign and that such failure caused an accident, in which several people died).

<sup>43</sup> See Walter Gellhorn & Louis Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COLUM. L. REV. 1, 1–2 (1955).

<sup>44</sup> See generally *Private Bills in Congress*, 79 HARV. L. REV. 1684 (1966).

<sup>45</sup> Not a great deal has been written about the history of state tort claims act. *But see* Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543, 547–53 (2003).

<sup>46</sup> JAYSON & LONGSTRETH, *supra* note 14, § 2.02, at 2–6 to 2–7.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* § 2.03, at 2–9 (citing *United States v. Klein*, 80 U.S. 128, 144 (1872)).

<sup>49</sup> *Id.* (stating that “[the court’s] decisions . . . were subject to the approval or disapproval of Congress”).

<sup>50</sup> *Id.* at 2–10.

<sup>51</sup> *Id.* at 2–11.

<sup>52</sup> *Id.* § 2.04, at 2–17.

areas was the pattern over the successive years,<sup>53</sup> but no comprehensive reform was proposed until after the events of 1945.<sup>54</sup>

That year, in a tragedy grimly reminiscent of 9/11 in many ways—other than the fact that it occurred by accident, not terrorist design—a U.S. Army bomber lost its way in a dense fog and crashed into the Empire State Building.<sup>55</sup> Many people were killed and property damage was extensive.<sup>56</sup> The fact that because the plane was federally owned, the suits against the government were consequently barred, did not sit well with either the claimants or the public.<sup>57</sup> Twelve months later, the Federal Tort Claims Act was passed in August of 1946,<sup>58</sup> permitting suit in tort against the federal government:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.<sup>59</sup>

But just as the government granted jurisdiction to sue as a general principle, it also reserved that immunity in certain cases by way of exception—a tactic that is a constant theme in this area.<sup>60</sup> Among that list is the DFE<sup>61</sup>: “[a]ny claim . . .

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2–18.

<sup>55</sup> *Id.* § 2.01, at 2–3.

<sup>56</sup> See Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 535 (2008) (stating that “ten people on the ground, in addition to the flight crew of the American military aircraft, lost their lives, others were injured, and substantial property damage resulted”).

<sup>57</sup> JAYSON & LONGSTRETH, *supra* note 14, § 2.01, at 2–3 (stating that “[t]he victims of this frightful accident must have been shocked . . . that there was no judicial remedy available to them through which they could recover damages from the United States Government”). Before the FTCA, the only remedy available to the victims of government employees’ tortious acts was to petition the Congress for the passage of a private bill. Century-long deliberations in Congress and many victims with no redress led to the enactment of the FTCA. *Id.* at 2–4.

<sup>58</sup> *Id.* at 2–3.

<sup>59</sup> 28 U.S.C. § 1346(b)(1) (2014). For the legislative history of the FTCA, see JAYSON & LONGSTRETH, *supra* note 14, §§ 2.09–2.13.

<sup>60</sup> See generally JAYSON & LONGSTRETH, *supra* note 14, §§ 2.01–2.10 (discussing sovereign immunity of the government and the gradual development of the waiver to it, which was subject to many limitations and specific circumstances at various stages of its development).



based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."<sup>62</sup>

As stated above, the application of this exception required the courts to develop a two-prong test: (1) "whether the action is a matter of choice for the acting employee," and (2) "whether the judgment is of the kind that the discretionary function exception was designed to shield."<sup>63</sup>

The first prong, "whether the action is a matter of choice" (i.e., whether it is a mandate or not) is the subject of this Article's inquiry.

### III. LINGUISTIC ANALYSIS OF MANDATES

Before turning to an analysis of what courts have done and are doing in their assessments of statements in the DFE context, this part will explain what the field of language studies can contribute to such an analysis. Indeed, a linguistic breakdown of the matters involved can help determine how a particular statement is functioning in the language, providing scientific explanations for that inquiry that other approaches cannot.<sup>64</sup> The most useful field of linguistics for this inquiry is that of pragmatics,<sup>65</sup> but the field of syntax can also play an important role.<sup>66</sup>

#### A. *Pragmatics*

Pragmatics is devoted to the study of language in a situational context, as opposed to the study of its structure.<sup>67</sup> As such, it explains the way language is used (i.e., in conversation, spoken or written),<sup>68</sup> not how it is made (i.e., its component parts, the arrangement of those parts, etc.), which is the purview of

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<sup>61</sup> For the full list of statutory exceptions, see 28 U.S.C. § 2680. Implied exclusions are discussed in JAYSON & LONGSTRETH, *supra* note 14, § 11.03.

<sup>62</sup> 28 U.S.C. § 2680(a).

<sup>63</sup> Berkovitz v. United States, 486 U.S. 531, 536 (1988).

<sup>64</sup> See SHUY, *supra* note 27, at 1–2 (discussing the importance of language analysis in criminal cases and stating that "the field of law must rely on what is known about how language works in order to evaluate legal evidence which just happens to be in the form of language").

<sup>65</sup> See Harmon, *supra* note 29, at 34 (discussing the usefulness of pragmatics as study of language in context as applied to the duty to warn).

<sup>66</sup> See, e.g., Craig Hoffman, *When Worldviews Collide: Linguistic Theory Meets Legal Semantics in United States v. X-Citement Video, Inc.*, 73 WASH. U. L.Q. 1215, 1219 (1995) (discussing the connection between the legal statutory interpretation and syntax, and stating that "the syntax and the legal principles work together to form an integrated interpretation of the statute").

<sup>67</sup> See Harmon, *supra* note 29, at 34.

<sup>68</sup> See *id.* at 34 (stating that "pragmatics can help establish whether the triggering event [of duty to warn] occurred or not" when analyzing what has been said and heard in the "situational context").

grammar.<sup>69</sup> When the question is whether a certain statement qualifies as a mandate or a guideline, as it is in tort claims cases concerning the DFE,<sup>70</sup> pragmatics can supply the necessary analytical tools for both the advocates and the decision-maker.<sup>71</sup> In other words, if the litigants in a tort claims contest are arguing about whether a certain statement was mandatory or merely precatory, pragmatics can supply legitimate evidence to be used by both parties in arguing their positions, as well as a scientific means for a court to use when faced with making that assessment. At this juncture, two important areas of pragmatics must be explained: speech acts and implicature.

### 1. Speech Acts

In his work *How To Do Things with Words*,<sup>72</sup> philosopher John Austin demonstrated that while some statements seek to describe a reality—and can be judged as “true” or “false”—other statements not only *say* something, but also *do* something.<sup>73</sup> For example, if one party makes a promise to another party, he not only says the words “I promise X,” but by using those words in the present tense, in fact *makes* that promise.<sup>74</sup> Indeed, it is impossible to make a promise without uttering the requisite words in the prescribed way.<sup>75</sup> Synonyms may be employed—“pledge” or “vow,” etc.—or even signs substituted for spoken speech (the gesture of a cross made over the heart, for instance). But the *expression* of the promise must be made to *communicate* that promise;<sup>76</sup> if it is, nothing more need be done, for the promise is made by the very act of its utterance.<sup>77</sup> It is a fully integrated, existential, metaphysical occurrence.

This is only one type of speech act, and a particularly special kind at that;<sup>78</sup> there are many others, as will be explained below, but at this point it is important to appreciate the gravity of Austin’s contribution. For our lives revolve around what we do with words. As linguist Anna Wierzbicka points out, in a way that particularly resonates with the tort claims DFE context,

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<sup>69</sup> See Craig Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary When Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 401, 403 (2003).

<sup>70</sup> See *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (stating the first prong of the test to determine whether DFE applies).

<sup>71</sup> See generally Harmon, *supra* note 29 (discussing the usefulness of pragmatics in determining whether the duty to warn was triggered).

<sup>72</sup> J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 14 (2d ed. 1975).

<sup>73</sup> *Id.* at 98–99.

<sup>74</sup> *Id.* at 7.

<sup>75</sup> See Harmon, *supra* note 29, at 40–41 (explaining that by uttering the apology in the present, the accountant not only said it, but also did it—i.e., “apologized”).

<sup>76</sup> See *id.*

<sup>77</sup> See *id.* at 40 n.59 (“Austin termed such acts ‘performatives,’ i.e., locutions that ‘perform’ the act that they name.”).

<sup>78</sup> *Id.* at 40.

from morning to night, we seek to interpret what other people are saying, i.e., what kinds of speech acts they are performing. Virtually every time someone opens his or her mouth in our presence, we seek to categorize their utterance as this or that kind of speech act. Was this a threat? Or just a warning? Was this a suggestion or rather a request? Was this a criticism or just a casual remark? Was this a hint? . . . The difference between a *threat* and a *warning* may be a matter of life or death; the difference between *demand* and *suggest* may be a matter of bad relations or good relations with another person. ("I wasn't demanding anything, I was just suggesting . . .").<sup>79</sup>

Further, when it comes to the law, what is done with words is the whole point.<sup>80</sup> In fact, the question of the mandatory/precatory nature of the speech acts in the tort claims context is the difference between immunity and potential liability.<sup>81</sup> Everything hinges upon the determination.<sup>82</sup>

#### *i. Types of Speech Acts*

To return to the explanation of speech act theory, some definitions and distinctions are crucial.<sup>83</sup> First, any statement, whether made by an individual or a group, involves two things: the *locutionary act* (i.e., what is said) and the *illocutionary act* (i.e., what is done; in the above example, the promise).<sup>84</sup>

<sup>79</sup> ANNA WIERZBICKA, ENGLISH SPEECH ACT VERBS: A SEMANTIC DICTIONARY 3–4 (1987). Dr. Wiersbicka adds, "[i]t would not be an exaggeration to say that public life can be conceived as a gigantic network of speech act. History itself seems to consist largely in acts of speech acts (threats, condemnations, offers, demands, negotiations, agreements, and so on)." *Id.* at 3. The aptness of this phrase to the legal context is apparent, as the law deals essentially with offers, promises, demands, threats, warnings, bribes, etc.

<sup>80</sup> See, e.g., Robert F. Blomquist, *The F-Word: A Jurisprudential Taxonomy of American Morals (In a Nutshell)*, 40 SANTA CLARA L. REV. 65, 74 (1999) (citing *B.E.S. v. State*, 629 So.2d 761, 764–65 (Ala. Crim. App. 1993) (where the court examined the nature of the words uttered by the defendant and stated that depending on the status of the addressee and ordinary human perception, the words could or could not provoke a violent response by the addressee)); C. O. Wolfe, *Property—Limitation of Estates—Rule in Shelley's Case—Remainders—Statute of Limitations as Affecting Same*, 1 TEX. L. REV. 316, 316 (1923) (giving an example of the deed of conveyance and stating that "[t]he primary principle adopted by the courts in the construction of written instruments is to gather, as nearly as possible, from language used in the instrument itself the intent of the maker").

<sup>81</sup> See *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) ("[C]onduct cannot be discretionary unless it involves an element of judgment or choice" and that the "[DFE] will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive.").

<sup>82</sup> See *id.*

<sup>83</sup> See AUSTIN, *supra* note 72, at 98.

<sup>84</sup> *Id.* at 98–99.

Second, a particular illocutionary act can fall into one of several categories, depending upon what kind of *illocutionary force* is intended by the speaker (i.e., the objective sought), be it a question, a confession, a demand, etc.<sup>85</sup> Although there are many classifications of illocutionary acts,<sup>86</sup> Austin's pupil, philosopher John Searle, set up a classification that will be followed in this analysis.<sup>87</sup> I have used the following examples for the types of illocutionary acts in another article and quote them here for ease of reference<sup>88</sup>:

1. Representatives: A statement by which speakers commit themselves to the truth of the proposition made. E.g., "The sky is blue." (Under this category would fit illocutionary acts such as asserting, confessing, admitting, forecasting, etc.)<sup>89</sup>
2. Directives: A statement by which speakers intend to get their hearers to do something. E.g., "Go to the grocery store for me." (Under this category would fit illocutionary acts such as insisting, demanding, requesting, advising, etc.)<sup>90</sup>
3. Commissives: A statement by which speakers commit themselves to certain expressed acts. E.g., "I'll help you with your homework." (Under this category would fit illocutionary acts such as promising, vowing, pledging, etc.)<sup>91</sup>
4. Expressives: A statement by which speakers convey their internal psychological states or feelings. E.g., "You have my sympathy for your loss." (Under this category would fit

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> John R. Searle, *A Classification of Illocutionary Acts*, 5 LANGUAGE SOC'Y 1 (1976). Searle is of the opinion that the basic unit of human linguistic communication is the illocutionary act. *Id.*

<sup>88</sup> See Harmon, *supra* note 29, at 41.

<sup>89</sup> *Id.*; see also Searle, *supra* note 87, at 1.

<sup>90</sup> Harmon, *supra* note 29, at 41. Searle includes questions—requests for information—as directives. Searle, *supra* note 87, at 11.

<sup>91</sup> Consider the following:

Searle notes G.E.M. Anscombe's point that each illocutionary act seeks either to match the "world to the words" (I am going to make my statement come true in the world) or the "words to the world" (I am going to make my words resemble some truth in the world). A mandate, as a directive, seeks to bring the proposed act objectively true in the world by way of ordering the behavior, and therefore its "direction of fit" is "world to the words."

Harmon, *supra* note 29, at 41 n.65; see generally G.E.M. ANSCOMBE, INTENTION (1957).

illocutionary acts such as apologizing, congratulating, condoling, objecting, etc.)<sup>92</sup>

5. Declarations: A statement by which speakers change the status of some entity. E.g., "You're under arrest." (Under this category would fit illocutionary acts such as christening, surrendering, excluding, bestowing, etc.)<sup>93</sup>

Apropos to the tort claims DFE analysis, a "mandate"<sup>94</sup> would be classified as a "directive," as the speaker is ordering another to do something.<sup>95</sup> Interestingly, a mere suggestion is also a type of directive, but does not have the power that the mandate does.<sup>96</sup> That is, it seeks to influence behavior (i.e., to gain what is sought), but it does not command/order that it be done.<sup>97</sup> A suggestion offers an array of things and highlights them as particularly apt or illustrative, but it falls short of saying that those things *must* come to be.<sup>98</sup> In other words, the suggestion paints out a picture, points to it and says "this is the *kind* of thing that *ought* to be done";<sup>99</sup> a mandate, on the other hand, chisels out a sculpture, points to it and says "this is the *very* thing that *must* be done."<sup>100</sup>

It is important to understand that a suggestion may vary in emphasis;<sup>101</sup> it may even be strongly or emphatically stated, but it always falls short of a mandate.<sup>102</sup> Note that a "demand" is also a directive, but even though it is more strongly stated (and the context is usually one in which the speaker is asking for the fulfillment of something to which he claims entitlement), the degree of emphasis and even the pique with which the statement is made do not turn it

<sup>92</sup> Harmon, *supra* note 29, at 41; Searle, *supra* note 87, at 12.

<sup>93</sup> Harmon, *supra* note 29, at 42; Searle, *supra* note 87, at 13.

<sup>94</sup> The word "mandate" is being used for simplicity's sake, and is meant to be synonymous with "order," "command," "direct," etc. Similarly, "guideline" will be used as a general term that stands in for "suggestion," "advisement," "counsel," "principle," etc.

<sup>95</sup> Searle, *supra* note 87, at 11.

<sup>96</sup> *See id.* ("They may be very modest 'attempts' as when I invite you to do it or suggest that you do it . . .").

<sup>97</sup> *See infra* Part III.A.1.v (describing the classifications of verbs by groups).

<sup>98</sup> *See infra* Part III.A.1.v and text accompanying note 137 (defining "suggest" as a verb in the "advise" group).

<sup>99</sup> *See infra* text accompanying notes 134–39.

<sup>100</sup> *See* Searle, *supra* note 87, at 11.

<sup>101</sup> *Compare* Freeman v. United States, 556 F.3d 326, 338 (5th Cir. 2009) ("The ostensibly mandatory language 'is required' . . . did nothing more than explain the needs that arise in an emergency."), *with* Miller v. United States, 163 F.3d 591, 594–95 (9th Cir. 1998) (holding that the language of a manual to the effect that "initial attack response may vary depending on availability of resources" was discretionary).

<sup>102</sup> *See infra* text accompanying note 139 (stating the difference between "order" and "ask").

into a mandate.<sup>103</sup> For the latter, there must be some power over the hearer.<sup>104</sup> That is a condition of that category and one of several that a particular statement must meet to qualify as such.<sup>105</sup>

*ii. Illocutionary Force*

For a locutionary act to have the intended illocutionary force, Austin determined that certain conditions must be met.<sup>106</sup> Depending upon the particular class, these conditions decide whether a statement is “felicitous” (i.e., has the requisite illocutionary force), or is “infelicitous.”<sup>107</sup> I have explained the kinds of felicity conditions in an earlier article and quote that explanation here, with its list of pertinent examples<sup>108</sup>:

1. Preparatory Conditions: condition(s) that precede the utterance.

E.g., for a valid confession (in the religious sense), the penitent must have done something wrong under the code of his faith.

2. Sincerity Conditions: conditions that relate to the speaker’s state of mind.

E.g., for a valid confession (in the religious sense), the penitent must be truly sorry for the wrong he has done.

3. Essential Conditions: conditions that require the utterance be recognizable as the type of illocutionary act in question.

E.g., for a valid confession (in the religious sense), the penitent must express his contrition in a confessional booth or some other dedicated space, to a priest or minister, using language or formulary phrases that imply regret—“I confess that . . . .”

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<sup>103</sup> While a demand in the strictest sense may imply that exact kind of power, it is often used in a sense that makes it synonymous with “insist.” See *infra* notes 124–26 and accompanying text.

<sup>104</sup> See *infra* text accompanying notes 123–29 (describing the “order” group).

<sup>105</sup> See Harmon, *supra* note 29, at 42–43 (describing the conditions that must be met in order for the utterance to have the desired effect on the hearer).

<sup>106</sup> AUSTIN, *supra* note 72, at 98–99.

<sup>107</sup> *Id.* at 54–71.

<sup>108</sup> Harmon, *supra* note 29, at 42–43 (internal citations omitted).

4. Propositional Content Conditions: conditions that relate to the proper context of the statement.

E.g., for a valid confession (in the religious sense), the penitent's utterance must predicate the penitent's *past* act—"I'm sorry that I *lied* to my wife."

Again, each speech act has its own set of these conditions, which must be met for them to have the intended illocutionary force.<sup>109</sup>

### iii. *Perlocutionary Effect*

One other feature of speech acts must be explained before proceeding to set out the felicity conditions for a mandate. Distinct from both the locutionary act (the utterance) and the illocutionary act (the force of that utterance) is what Austin termed the perlocutionary effect (i.e., the effect that the utterance has on the hearer)—such as the elicitation of concern, pity, surprise, delight, etc.<sup>110</sup> The perlocutionary effect is what the speech act creates;<sup>111</sup> if the illocutionary force is the pistol's report,<sup>112</sup> the perlocutionary effect is the runners starting from their blocks.<sup>113</sup>

In the DFE context, the directive mandate should have the perlocutionary effect of compliance with the content of the locution. That is, if the mandate is "pave the road with asphalt and mark it every two miles with road markers," the subordinate will have to do what the mandate requires (or suffer the consequences of non-compliance, whatever they may be—reprimand, demotion, fine, discharge, etc.). Evidence that there was no repercussion for non-compliance (i.e., that there was no enforcement) might refute the sincerity condition.<sup>114</sup> In other words, a claim that "nobody ever did X because they (those in a position of authority over the matter) never enforced X, and so nobody ever took X seriously," if supported by evidence of such non-feasance, would go some way towards showing that the statement was not a true directive at all. The speaker would be estopped from saying a mandate existed if he never treated it as such himself.

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<sup>109</sup> The following is also illuminative: "The primary function of speech act verbs consist in interpreting people's speech acts, not in performing speech acts." WIERZBICKA, *supra* note 79, at 16.

<sup>110</sup> AUSTIN, *supra* note 72, at 101–08.

<sup>111</sup> *See id.*

<sup>112</sup> *See id.* at 98–99 (defining the illocutionary force as the intention of the speaker to provoke certain kind of behavior).

<sup>113</sup> *See id.* at 101 (defining the perlocutionary effect as the effect the speaker's words have on the addressee).

<sup>114</sup> *See* Harmon, *supra* note 29, at 43 (defining "sincerity condition" as "relat[ing] to the speaker's state of mind").

Indeed, the failure to enforce a mandate might affect the recognizability of future similar mandates. That is, an unenforced “directive” might become such a scarecrow that similar “directives” would not be taken seriously, regardless of how they were “put”; the perlocutionary effect of non-enforcement could compromise the essential condition with regard to even a more boldly stated directive: it would not be recognizable anymore because the force behind it would not be feared or respected, leading to a consequent non-compliance with its propositional content.<sup>115</sup> A lack of enforcement might also affect the preparatory condition of future similar “directives,” in that the speaker would have lost his authority to be heard;<sup>116</sup> if the king does not wield his sword, he loses the power to speak his word.

*iv. Felicity Conditions: Mandates*

With this general appreciation of felicity conditions and perlocutionary effects, it is now possible to construct a scheme of felicity conditions for a mandate that would trigger liability under a typical tort claims act:

1. Preparatory Conditions:

The mandate must be *spoken by the proper party* (i.e., a mandate cannot be given by one who does not have the authority to speak);

The mandate must be *directed toward the proper party* (a mandate cannot be followed unless the hearer is both in a position to do what is mandated and is obligated in some way to perform what is done).

2. Sincerity Conditions:

This condition relates to the earnestness of the speaker, and can be refuted by evidence that shows the perlocutionary effect of the statement was not that of a directive (as

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<sup>115</sup> “The Boy Who Cried Wolf,” one of Aesop’s Fables, is an example of the perlocutionary effect described here. See BEN EDWIN PERRY, *BABRIUS AND PHAEDRUS* 462 (1965). Fear of “course of dealing” has instigated the “No Implied Waiver” or “No Oral Modifications” clauses in contracts, forbidding the interpretation of leniency in one instance as being precedent for future leniency. See CHARLES M. FOX, *WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN’T TEACH YOU* 248 (2002). However, such attempts to restrict the parties’ freedom to contract can be found impermissible. See, e.g., *Hovnanian Land Inv. Grp. v. Annapolis Towne Ctr. at Parole, LLC*, 25 A.3d 967, 983 (Md. 2011) (holding such a clause unenforceable).

<sup>116</sup> See Harmon, *supra* note 29, at 42–43 (defining “preparatory conditions” as “condition[s] that precede the utterance” and explaining by means of an example that before a sin is confessed, a sin must be done). Therefore, a commitment of sin is a preparatory condition to utterance of confession.



explained above).<sup>117</sup> If the supposed mandate was never enforced, and if the hearers did not take the speaker seriously, the effect of the speech act belies the sincerity of the locution.<sup>118</sup>

### 3. Essential Conditions:

The mandate must use language that denotes an imperative, whether communicated directly or indirectly;

The mandate must be specific (orders require action, and unless they can be carried out explicitly, they do not qualify as orders);

The mandate must take the proper form (the more formal the communication, the more recognizable it is as a mandate—e.g., a statement made in an official employee handbook regarding “duties” as opposed to an offhand remark made during a lunch break).<sup>119</sup>

### 4. Propositional Content Condition:

The content of the mandate must predicate that a future course of action be taken.<sup>120</sup> Of all the conditions, this is the least debatable in the terms of the DFE context, since both mandates and guidelines are future-oriented, and the immediacy of the mandate or guideline (i.e., whether it mandates/suggests something be done as soon as possible or over a span of time) does not alter its character.

If any of these conditions is not met, the attempted communication of a mandate is “infelicitous;”<sup>121</sup> as such, it is not a directive at all.

### v. *Semantics*

With regard to the essential conditions, particularly with regard to the imperatives used, a diversion into the field of semantics is important. Semantics

<sup>117</sup> See discussion *supra* Part III.A.1.iii and note 114.

<sup>118</sup> See discussion *supra* Part III.A.1.iii and note 114.

<sup>119</sup> Arguably, the form that the statement takes is also a preparatory condition.

<sup>120</sup> Similarly, the propositional content condition, one of the felicity conditions, “relate[s] to the proper context of the statement.” Harmon, *supra* note 29, at 43. Some event must take place before a certain statement is made, which affirms the occurrence of the event. See *id.*

<sup>121</sup> *Id.* at 42 (stating that “[if] a requisite condition is absent[,] the utterance is said to be ‘invalid’ or ‘infelicitous’”).

is the field of language studies concerned with meaning.<sup>122</sup> As such, a taxonomy of imperatives/orders, which can be used in the construction of a mandate, as well as a taxonomy of requests/advisements, which cannot, will be useful in the analysis to follow.

In her dictionary of speech act verbs, Dr. Wierzbicka breaks imperatives into a group of “Order” words and explains the underlying set of assumptions in each. I have selected the following, along with Dr. Wierzbicka’s illuminating commentary, to create a taxonomy. The entrants listed here go some ways towards satisfying a component of the essential condition for a mandate. Some of these words will be more commonly used than others in the tort claims context (some will in fact rarely be used), as government statements that purportedly require compliance are most often written, rather than communicated orally. However, with this caveat understood and appropriately appreciated, the following list suggests the semantic parameters of mandates:

“Order” Group<sup>123</sup>

Order:

A person who *orders* someone to do something wants the addressee to do it and expects to cause him to do it via the speech act. He presumes that the addressee has to do whatever the speaker says he wants him to do, and that the addressee understands this. He doesn’t appeal to the addressee’s feelings or goodwill, but he does appeal to his understanding. Utterances which are meant to trigger immediate and quasi-automatic reactions tend to be reported as commands, rather than orders . . . . If a response is expected to be delayed, *order* is more appropriate [thus, *order* is future-oriented, whereas *command* is present-oriented].<sup>124</sup>

Command:

Unlike *orders*, [*commands*] don’t appeal to the addressee’s understanding. The most typical *commands* have the form of set phrases (“Fire!”, “Sit!”), which act upon the addressee as a

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<sup>122</sup> See Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 688 n.11 (2014).

<sup>123</sup> With regard to orders, Dr. Wierzbicka explains the unspoken assumptions made by the speaker in this way: “Whether we say ‘I order you to do it!’ or simply ‘Do it!’ (with the intonation and demeanor characteristic of an order), we are expressing the following attitude: I want you to do it[;] I assume that you have to do what I say I want you to do.” WIERZBICKA, *supra* note 79, at 16.

<sup>124</sup> *Id.* at 38.

Pavlovian signal acts on a dog. Naturally, the speaker expects an immediate response.

*Commands* are typically present oriented, because they expect to trigger a semi-automatic response. . . .

. . . .

. . . [Another difference is that] in the case of *order*, the action doesn't have to be performed by the addressee himself. For this reason, one can say, for example, "The Prime Minister ordered a survey/an investigation/a search," and so on, but not "The Prime Minister commanded a survey/an investigation/a search." In this respect, *command* behaves like *tell* and *instruct*, whereas *order* behaves like *request* and *demand*.<sup>125</sup>

#### Direct:

*Directing* is similar to *telling (to)* in being, intuitively speaking, somewhere between *requesting* and *ordering/commanding*: the directing person wants the addressee to do something, and expects to cause him to do it by his speech act; at the same time, *direct* does not envisage any possible conflict of wills (as *order* does) and it expects conscious cooperation rather than automaton-like obedience, as *command* does. The *directing* person expects that if the addressee knows what the speaker wants him to do, he will be willing to do it. Thus, the speaker expects compliance but not blind obedience. (In this respect, *direct* is similar to *instruct*, as well as to *tell*.)<sup>126</sup>

#### Instruct:

The person who *instructs* [in the imperative sense] someone to do something wants the addressee to do it and expects to cause him to do it by the speech act. One can't *instruct* one's equals or superiors to do something . . . . But the nature (or the interpretation) of the relationship is not as hierarchical in the case of *instruct* as it is in the case of *direct*: a "director" assumes that his subordinates have to do things that he *directs* them to do (if these things are within the scope of their formal

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<sup>125</sup> *Id.* at 39.

<sup>126</sup> *Id.* at 43.

relationship);<sup>127</sup> but when somebody *instructs* his agent, lawyer or personal assistant to do something, the expectation is that they want to do whatever they are *instructed* to do—not because their personal wishes coincide with the speaker’s wishes, but because their subordination to the speaker is voluntary and constitutes an aspect of a freely accepted professional or quasi-professional relationship.<sup>128</sup>

Require:

In some ways, *require* can be said to be halfway between *order* and *request*. The main difference between *require* and *request* concerns the element of obligation. *Request* implies that the addressee doesn’t have to do whatever is requested. For example, printed invitation forms which say that somebody “requests the pleasure” of somebody else’s company don’t imply that the addressee **has to** attend. By contrast, if a Court *requires* that somebody should attend a court session, the implication is that the addressee **has to** do it. Presumably for this reason, invitations couldn’t be phrased in terms of *require*, and court summonses couldn’t be phrased in terms of *request* . . . .

*Require* is less personal than *order* in another way, too. What the speaker wants is not so much another person’s action as a certain state of affairs.<sup>129</sup>

Of course, other verbs may be added to this list, and depending upon the context, some of those listed might not amount to a mandate, even though their basic semantic make-up would suggest that they do. Further, as will be seen, more important than any of these verbs to the construction of a mandate may be the use of a certain arrangement, or collocation of words, or the use of a particular modal, which can take any verb—even one that does not belong to the taxonomy just set forth—and give it the force of a directive.

Similarly useful in the task of distinguishing mandates from guidelines is a taxonomy of words that Dr. Wierzbicka included in groups she nominated “Ask” and “Advise.”<sup>130</sup> As stated with regard to the “Order” words, these two groups are not meant to be exhaustive, and some would be unlikely candidates for inclusion in a governmental utterance. However, they are listed below to

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<sup>127</sup> *Id.* at 45. Note how this statement relates to the preparatory condition. *See supra* Part III.A.1.iv. The formal relationship between the parties presupposes that the speaker has authority to speak and that the hearer has the authority to follow the direction.

<sup>128</sup> WIERZBICKA, *supra* note 79, at 45.

<sup>129</sup> *Id.* at 47.

<sup>130</sup> *See id.* at 181–90.

convey the kinds of semantic concepts that underpin guidelines. A selection is set out below, along with Dr. Wierzbicka's commentary.

"Ask" Group

Ask:

The *asking* person wants the addressee to do something that would be to his (the speaker's) benefit. He assumes that the addressee **can** do it, but he doesn't assume the addressee **will** do it.<sup>131</sup>

Request:

According to [C.J.] Smith [citations omitted], *request* "is a more polite word for the same thing as *ask*." "Nevertheless," he goes on to say, "it is sometimes used with an implied sense of authority, amounting virtually to a command." Studying the differences in the usage of *ask* and *request* one comes to agree with Smith's judgment: *request* is more elaborately polite, and yet more forceful than *ask*. *Ask* is direct, personal and informal; *request* is formal, impersonal, markedly polite and yet self-assured . . . .

. . . .

. . . *Request* doesn't imply any superiority or inferiority either, but it does imply a specific sort of relationship: formal, distant, and impersonal.<sup>132</sup>

Urge:

*Urging* is an attempt to get the addressee to do something. To that extent, it is similar to *ask*, *request*, *order*, *command* and many other verbs. Unlike *ask* and *request*, however, it doesn't imply that the speaker is seeking a benefit for himself, and unlike *order* and *command*, it doesn't imply that the speaker has power over the addressee.

. . . [T]he only kind of pressure he can exercise is psychological.<sup>133</sup>

"Advise" Group

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<sup>131</sup> *Id.* at 50.

<sup>132</sup> *Id.* at 50–52.

<sup>133</sup> *Id.* at 61–62.

Advise:

*Advise* has two different meanings, and two different sets of syntactic frames . . . .

**Advise<sub>1</sub>** can be performed by means of a bare imperative (“Hand it this way, he advised”), and, like *ask*, *invite*, *suggest* and many other speech act verbs, refers to a possible future action of the addressee. The speaker thinks that he knows what the addressee should do—and he says so, confident that it will be a good thing if the addressee follows the proposed course of action . . . .

. . . .

Like *suggestions*, *advise* does not have to be solicited.<sup>134</sup>

**Advise<sub>2</sub>** is an official speech act, often performed (in writing) by institutions addressing individuals. It is also characteristic of lawyers, agents, and other professional people, who need to convey information to their clients and other members of the public, implying that they are acting in the addressee’s interest. . . . [I]n the case of *advise<sub>1</sub>*, the speaker specifies what the addressee should do. In the case of *advise<sub>2</sub>* the addressee’s action is not specified; what is specified is the information which is expected to be followed by some sort of action on the part of the addressee.<sup>135</sup>

Recommend:

[I]n *recommending*, as in *advising*, the speaker thinks that he can guide the addressee’s future actions in some way, and that the addressee would welcome this. This means that in both cases the speaker expresses his view concerning the addressee’s future actions in response to the addressee’s actual or imagined invitation for him to do so. . . .

. . . .

. . . [A]*dvising* aims at saying what the addressee **should** do, whereas *recommending* seems to aim at saying what would be **good** for the addressee.<sup>136</sup>

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<sup>134</sup> *Id.* at 181–82.

<sup>135</sup> *Id.* at 182–83.

<sup>136</sup> *Id.* at 185–86.

Suggest:

The person making a *suggestion* thinks that it might be a good thing if the addressee did something. He invites, therefore, the addressee to imagine himself actually doing it, so that he can form an opinion about this possibility, and decide whether or not he wants to follow it.<sup>137</sup>

Propose:

The person who *proposes* something . . . envisages a collective action, including both the speaker and the addressee. The speaker himself is in favour of this collective action, but he knows that he cannot cause it to take place unless the other people involved also express themselves in its favour. What he wants to achieve, therefore, is to make those other people consider this action and to say whether they want it to happen.<sup>138</sup>

Dr. Wierzbicka makes a fundamental distinction between "ask" and "order" in the following comment:

[T]he common part of *order* ("I order you to do it") and *ask* ("I ask you to do it") can be represented in terms of the sentence "I want you to do it," and the additional semantic components of *order* can be portrayed as "I assume that you will do it" and "I assume that you have to do what I say I want you to do," whereas the additional semantic components of *ask* can be portrayed as "I don't know if you will do it" and "I assume that you don't have to do what I say I want you to do."<sup>139</sup>

Finally, another group has significance for mandate formation:

*"Declare" Group*

Declare:

When the chairman of a meeting declares the meeting open he does it not only "to cause people to know what they should think," but also to cause them to act accordingly . . . .

. . . .

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<sup>137</sup> *Id.* at 186–87.

<sup>138</sup> *Id.* at 188.

<sup>139</sup> *Id.* at 11–12.

*Declare* . . . seems to create a new situation in the external world . . . .<sup>140</sup>

Pronounce:

*Pronouncing* involves saying something about a given entity, doing it in an authoritative way, as if determining the correct way for this entity to be viewed, and implying serious consequences for this entity.<sup>141</sup>

Resolve:

*Resolve* . . . refers to a speech act which is not self-contained but which culminates a certain process. Most other speech act verbs can be analysed as bundles of simultaneous assumptions . . . integrated into a single act. But *resolve* implies a past, as well as a present . . . .

[With the background of a group wanting to do something about a matter, discussing it, and coming to know what they want to do], the speakers proceed to say what they want to do, assuming that saying it will lead them to doing it. Their purpose consists not in informing other people about the conclusion they have reached, but simply in articulating it for themselves and in committing themselves to a common goal . . . .<sup>142</sup>

Note that a governmental body may make a general statement— aspirational in nature—that amounts to its taking up of a duty—a “resolution,” as it were.<sup>143</sup> But a resolution is a commissive, not a directive;<sup>144</sup> it is a *promise to do* something in general, but it does not say *how it is to be done*.<sup>145</sup> That is often how courts articulate a statement’s failure to meet the DFE, by holding that the rule maker required *that* something be done, but did not elaborate on *how* it should be done.<sup>146</sup>

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<sup>140</sup> *Id.* at 349.

<sup>141</sup> *Id.* at 350.

<sup>142</sup> *Id.* at 359. “Decree” is in this group as well, and is an institutional order or command. It could be used in a mandate, but is so imperious that it is unlikely to be. *See id.* at 353–54. Other words such as “proclaim” have the same cast to them. *See id.* at 352–53.

<sup>143</sup> *See infra* Part IV.A.

<sup>144</sup> *See* Searle, *supra* note 87, at 11–12.

<sup>145</sup> *See id.*; *see also supra* Part III.A.1.i and note 91.

<sup>146</sup> *See infra* Part IV.C.3.



In contrast, mandates must be clear and actionable.<sup>147</sup> A resolution is a philosophical position without a plan.<sup>148</sup> Regardless of the plan, it must be actuated—given arms and legs—by way of one or more mandates.<sup>149</sup> Likewise, decrees, proclamations, and pronouncements, however authoritatively spoken, fall short of a mandate when they stay at the level of generalities.<sup>150</sup> As shall be seen, a great deal turns upon how much is said and in what way.<sup>151</sup>

Once more, the above taxonomies cannot be, and are not intended as, an exhaustive vocabulary for either end of the spectrum—neither for mandates nor for guidelines. However, since one of the felicity conditions (essential) of a mandate is that it be recognizable as such,<sup>152</sup> and the words used to form it contribute in the most prominent way to the manifestation of that recognition,<sup>153</sup> these taxonomies can provide some criteria for the determinations that courts must make.

## 2. Implicature

Another major area in the field of pragmatics is the study of what philosopher Paul Grice refers to as the “cooperation principle.”<sup>154</sup> That is, for a conversation to take place, the participants must cooperate *with* each other by providing certain information *to* each other—in the amount, type, and manner expected, as well as with the proper motivation.<sup>155</sup> Grice termed the “maxims” as follows:

Maxim of Quality: The conversant responds with true information.<sup>156</sup>

Maxim of Quantity: The conversant responds with the amount of information—no more and no less—that is called for.<sup>157</sup>

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<sup>147</sup> See *supra* Part III.A.1.v and note 123.

<sup>148</sup> See WIERZBICKA, *supra* note 79, at 358–59.

<sup>149</sup> See, e.g., Sutton v. Earles, 26 F.3d 903, 909 (9th Cir. 1994) (holding that a regulation provided that a designated officer would enforce it, but did not prescribe a specific course of action of how that would be achieved, and thus, the regulation lacked the mandatory nature and the actions of the designated government officer fell within DFE).

<sup>150</sup> See *supra* text accompanying notes 140–42.

<sup>151</sup> See *infra* Part IV.C.

<sup>152</sup> See *supra* Part III.A.1.iv and note 115.

<sup>153</sup> See *supra* Parts III.A.1.ii, III.A.1.iv (stating what kind of language must be used to satisfy the essential condition).

<sup>154</sup> H. P. Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 45–46 (Peter Cole & Jerry L. Morgan eds., 1975).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

Maxim of Relation: The conversant responds with relevant information.<sup>158</sup>

Maxim of Manner: The conversant responds in a way that is expected.<sup>159</sup>

But when a conversant intentionally replies in a way that breaks one of these maxims, he is said to have “flouted” that maxim;<sup>160</sup> this gives rise to an implied meaning, or “implicature.”<sup>161</sup> Again, I have used an example of implicature in an earlier article that suffices here:

[A] client might ask his accountant whether he needs to report certain cash income on his income tax return for the year, to which the accountant could reply: “Do you want to get audited?” Obviously, a layperson would suggest, the accountant is really saying: “The law requires you to report that income.” But at the level of language, a great deal takes place in order for that meaning to be conveyed in the indirect way that it is.<sup>162</sup> First, the implicature “The law requires you to report that income” is not part of the accountant’s utterance; by definition, the implication is always unspoken. Second, the implicature is not “entailed.” That is, the implicature does not follow as a matter of course from the utterance. If the accountant had responded to the client’s question: “You have to report that income on page two of your return,” then the broader answer, “The law requires you to report that income,” would be entailed within the answer given. In the above exchange, by responding to the client’s question with another question—“Do you want to get audited?”—the accountant is said to “raise the implicature” that the income must be reported.

....

... By flouting the maxim of relation, the accountant in the example above “raises the implicature” that taxes are owed. The client unconsciously reasons as follows: *To my question about reporting cash income, Accountant did not answer yes or*

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 46.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 49.

<sup>161</sup> *Id.* at 44.

<sup>162</sup> Sarcasm, parody, and satire are all representative of the type of speech events that use indirectness to achieve their desired effects.

*no, but asked me a question about something other than reporting income—i.e. whether I wanted to get audited, which of course I don't. I asked him about one thing and he told me about something else. He intentionally did this, so I infer that if I don't report the income, I risk an audit.*<sup>163</sup>

All this makes the point that illocutionary acts can be made in indirect ways and are no less explicit for that fact. Searle noted that indirect speech acts are made when the syntactic form of the locution fits one classification, but carries the illocutionary force of another.<sup>164</sup> For example, if all of the felicity conditions for a "mandate" are present,<sup>165</sup> the illocutionary force of the directive "Do it" can take the syntactic form of all of the others classes:

Representative: "Fail to do X and see what happens" or "You must do X."

Expressive: "I'm dead serious about X being done."

Question: "Is there any conceivable excuse for not doing X?"

Declaration: "Anyone who doesn't do X is fired."

Note that the above utterances retain all of the semantic power of the directive.<sup>166</sup> In the legal context—and particularly in the tort claims context—the degree to which these statements are considered directives by the hearer would depend upon the degree to which the felicity conditions are satisfied, but that is a question for the trier of fact.<sup>167</sup>

It should also be noted that unless a particular statute, regulation, or rule forbids executive action taken in any way other than written form, there is

<sup>163</sup> Harmon, *supra* note 29, at 36–37.

<sup>164</sup> See John R. Searle, *Indirect Speech Acts*, in 3 SYNTAX AND SEMANTICS: SPEECH ACTS, *supra* note 154, at 59, 71.

<sup>165</sup> See *supra* Part III.A.1.iv.

<sup>166</sup> See *supra* text accompanying note 126 (defining direct); see also *supra* text accompanying notes 134–39 (discussing "advise" group). Also note that the taxonomy set forth in Part III can be undone by flouting maxims: "I suggest you do it immediately," said by a boss to a subordinate, is an indirect mandate taking the form of a representative even though it uses one of the most fundamental "guideline" words.

<sup>167</sup> See, e.g., *Navarette v. United States*, 500 F.3d 914, 917–19 (9th Cir. 2007) (discussing the specificity of the Army Corps of Engineers Manual Safety Plan, and holding that it was specific and did not allow for discretion). Using the felicity conditions, the trier of fact would determine whether the Safety Plan was presented to the employees by the proper authority; whether the Safety Plan was directed toward the proper parties; whether the Safety Plan was properly enforced; whether the Safety Plan used language that denotes an imperative; whether the Safety Plan required action; whether the Safety Plan was sufficiently formal; and whether the Safety Plan predicated that a future course of action be taken. See *supra* Part III.A.1.iv.

nothing to say that a governmental mandate cannot be made orally.<sup>168</sup> If a park service director, speaking *ex cathedra* about matters within his purview, verbally orders his staff to do X at a meeting, a mandate has been made if all of the felicity conditions are met. This imperative could be communicated in any one of the above-referenced indirect ways. Since indirect speech acts are perhaps more common to conversation than to handbooks, the occurrence of an indirect directive is more likely in the situational context of a meeting. But the orality of the communication should not, for that very fact alone, disqualify it from consideration as a mandate.

### B. Syntax

Syntax is the branch of linguistics that deals with the construction of language.<sup>169</sup> Its contribution to the mandate/guideline analysis comes by way of the fact that some word groupings, or “collocations,” evidence a mandate,<sup>170</sup> and by way of the fact that certain modalities can change the complexion of an utterance, turning it from a fairly innocuous statement into a mandate.

#### 1. Collocations

With regard to the collocation of the mandate, the order of the action required, who requires it, and who will perform it, are optional:

*The Department requires the janitorial staff to mop the floors weekly.*

*The floors will be mopped weekly by the janitorial staff as required by the Department.*

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<sup>168</sup> See, e.g., *Whisnant v. United States*, 400 F.3d 1177, 1183 (9th Cir. 2005) (holding that the government could not exercise discretion in maintaining the safe conditions in a grocery store).

<sup>169</sup> See M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 383 (1985) (“[A] speaker who violates the rules of English syntax is, in a sense, not speaking English. Even more clearly, a speaker who attempts to use English words with different meanings will fail to communicate with a conventional English-speaking hearer.”).

<sup>170</sup> Dr. Wierzbicka makes the points about collocations:

The meaning of a word can often be illuminated by the other words which it tends to co-occur with. For example, if we compare the adverbs which the three related verbs, *rebuke*, *reprimand* and *reprove*, tend to co-occur with, we will obtain important clues to the semantic differences between them . . . Thus *rebuking* tends to be done *sharply* whereas *reprimanding* tends to be done *severely*; and neither rebuking nor reprimanding can be done *gently*. On the other hand, *reproving* **can** be done gently, but cannot be done *sharply*; *severely* is not excluded, but it is less likely to co-occur with *reprove* than with *reprimand*.

WIERZBICKA, *supra* note 79, at 21.

*The janitorial staff, as required by the Department, will mop the floors weekly.*

Further, a direct mandate may, but need not, be communicated in the active voice, whereby the agent is shown:

*The Agency requires that all employees . . .*

A passive voice construction is also possible, suppressing the agent in favor of highlighting the action:

*All employees are required to . . .*

Therefore, the "fronting" of the agent in the articulated mandate can be implied. As long as the identity of the agent is clear, and as long as the agent has the requisite power and authority, necessary for the preparatory condition of a valid mandate,<sup>171</sup> the expression or suppression of the agent's name is optional. After all, an employee handbook published by the Arizona Department of Safety need not express every directive in terms of what "The Department" insists upon.

But there is less freedom to suppress the addressee in a mandate. The identity of exactly *who* it is that must perform the action is a more important matter. It *may* be implied, as in the case of an employee handbook given to all employees, who understand that every directive inside the book applies to everyone employed; it *might* even be clear from the context that the unstated addressee is the concerned party—for example, a member of the janitorial staff would gather that a directive stating that "all floors will be mopped once a week" is directed at him; however, the further the locution strays from specificity—one dimension of the essential condition—the more tenuous is the argument that it is a mandate rather than a guideline.<sup>172</sup>

This indicates the preeminence of the essential condition in the speech act analysis. Recognizability is most compromised when the predication—the "verbness"—of the utterance, is attenuated. *Who wants the action done* and *who will do the action* are more or less required for a mandate's validity, depending on the context,<sup>173</sup> but *what must be done* is indispensable, regardless of context.<sup>174</sup>

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<sup>171</sup> See *supra* Part III.A.1.iv.

<sup>172</sup> See, e.g., *Miller v. United States*, 163 F.3d 591, 594–95 (9th Cir. 1998) (holding that the guidelines in question were not mandatory "because they [did] not tell firefighters how to fight the fire," and because the guidelines did not address in more specificity what to do in a multiple fire situation).

<sup>173</sup> See *supra* Part III.A.1.ii.

<sup>174</sup> The importance of the object, depending upon the intended meaning, is explained this way:

[I]f a verb implies that the agent wants to achieve a certain state of affairs and that the role of the addressee is rather instrumental, then it is the desired

## 2. Modals

Modals are the aspects of language that allow the speaker to attach expressions of obligation, belief, or attitude to an utterance.<sup>175</sup> In English, these modes are often expressed through a small range of verbs: “can,” “could,” “may,” “might,” “shall,” “should,” “will,” “would,” and “ought.”<sup>176</sup> Such expressions can also be made lexically (i.e., through phrases, such as “if at all possible, X will . . .” or “without exception, the use of Y is called for when . . .”). With regard to the speech act analysis conducted here, the importance of the modals lies in whether they create an obligation to act in the fashion prescribed by the main verb, or on the other hand, express something less than that.

The use of “can” and “could”<sup>177</sup> denotes only the ability to do the act or the possibility of its occurrence, not an obligation to do it:

*The Committee can recommend the dissolution of the study in the event that . . . .*

*A snowstorm can precipitate the closure of the park by the staff.*

The use of “may” and “might” denote only the discretion to do the act, not an obligation to do it:

*The Committee may recommend the dissolution of the study in the event that . . . .*

The use of “should” can be used either way,<sup>178</sup> to denote obligation (and is synonymous with “shall” in such cases) or to imply suggestion.

state of affairs, rather than the addressee, which is treated as a direct object. Hence for example the following contrasts:

- he demanded the release of the prisoners
- \*he asked the release of the prisoners
- he asked them to release the prisoners
- \*he demanded them to release the prisoners[.]

WIERZBICKA, *supra* note 79, at 25.

<sup>175</sup> See *Modal Verbs and Their Meaning*, MY ENGLISH PAGES, [http://www.myenglishpages.com/site\\_php\\_files/grammar-lesson-modals.php#.VIXSn\\_2IzIJ](http://www.myenglishpages.com/site_php_files/grammar-lesson-modals.php#.VIXSn_2IzIJ) (last visited Feb. 27, 2016) (discussing modal verbs and stating that “[t]hey have a great variety of communicative functions”).

<sup>176</sup> *Id.*

<sup>177</sup> It is unlikely that “could” or “might” would appear in the form of a governmental pronouncement, but they are conceivable: “The staff could agree that no action is necessary when . . .”; “The agency might look to the data compiled by X when deciding whether . . . .” “Ought” is also a possibility, but would again suggest mere aspiration.

<sup>178</sup> The dual, sometimes contradictory, nature of words was analyzed by Sigmund Freud. He called these terms “primal words.” See Sigmund Freud, *The Antithetical Meaning of Primal*

Although typically "should" is used in the form of a recommendation, the context of the surrounding words can supply a different meaning<sup>179</sup>:

*The Board of Directors should meet four times a year in the main office of the corporation as opposed to Employees should make their best efforts to create a welcoming atmosphere for customers.*

The use of "shall" and "will" denote compulsion to do the act, if other indicators do not contradict them in some way or attenuate the order:

*The Committee shall/will meet four times a year.*

The use of "would" in a purported mandate has an attenuating function, just as in the case of "can," "could," "may," and "might."<sup>180</sup> As in the unlikely use of "could" or "might," the use of "would" weakens the sense of obligation so much that it becomes more of a guideline, politely stated: *The Agency would like to have all reports by the first of the month.* Note that the type of verbs bound with "would" are in the "Ask" group of speech acts,<sup>181</sup> or are not speech act verbs at all: *"I would ask that you . . . I would like for you to . . ."* However, a rather formal but nevertheless valid mandate could be formed using "would" in the following way: *The Agency would require that all employees . . .*, emphasizing the will of the Agency in an admittedly complicated fashion; still, the directive is plain.<sup>182</sup>

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*Words*, in WRITINGS ON ART AND LITERATURE (1997). Ethicist P.H. Nowell-Smith called such terms "Janus" words, since they looked in both directions. See P.H. NOWELL-SMITH, ETHICS 100, 223 (1954).

<sup>179</sup> An example, in which the court seems to interpret "should" in the sense of "shall," appears in a Southern District of Florida case, in which a diplomatic "Letter of Instruction," stated that an ambassador "*should* instruct all Executive branch personnel under [the Ambassador's] authority of their responsibility to keep [the Ambassador] fully informed at all times of their current and planned activities . . ." *Couzado v. United States*, 883 F. Supp. 691, 694–95 (S.D. Fla. 1995) (emphasis added), *aff'd in part, rev'd in part sub nom.*, 105 F.3d 1389 (11th Cir. 1997). The court construed the modal "*should*" in context with the other semantic words belonging to the "Order" semantic group, such as "require." *Id.*; see also *Garcia v. United States*, 709 F. Supp. 2d 1133, 1148–49 (D.N.M. 2010) (discussing the dual nature of "should").

<sup>180</sup> Dr. Wierzbicka states:

Speech act verbs differ also from one another in the range of modals which they can occur with. For example, one can make suggestions of recommendations using the frames "I would suggest . . ." and "I would recommend . . ." But one cannot order, confess or inform using the frames "I would order you . . .", "I would confess . . ." or "I would inform you." On the other hand, one can confess or inform—but not suggest or recommend—using the modal *must* ("I must confess . . .", "I must inform you . . .", "I must suggest . . .", "I must recommend . . .").

WIERZBICKA, *supra* note 79, at 22.

<sup>181</sup> For a discussion the "Ask" group of speech acts, see *supra* Part III.A.1.v.

<sup>182</sup> Dr. Wierzbicka makes the following distinction:

The importance of modals to the formation of mandates underscores the point made above with regard to collocations: mandates affect recognizability,<sup>183</sup> and since recognizability relates to the essential condition of a felicitous mandate,<sup>184</sup> its preeminence is doubly clear.

In summary, pragmatics and syntax play a key role in the understanding of what mandates and guidelines are at the level of language. Both the situational context regarding the utterance as well as its basic construction are the means by which hearers interpret a particular statement as a mandate or not. Viewed through this linguistic lens, an appreciation of the variables that contribute to the mandatory nature of a particular utterance is more acute.

#### IV. JUDICIAL INTERPRETATIONS OF TORT CLAIMS ACTS: FEDERAL AND STATE

Turning to what courts have done when analyzing the question of whether a statement is a mandate or a guideline, the best articulation of what is at stake was made by the United States Supreme Court in *Berkovitz v. United States*.<sup>185</sup> The pronouncement applies to the federal context, but is also applicable to state tort claims acts.

As described in *Berkovitz*, to show that a statement is a guideline rather than a mandate, the government must first prove that “the action is a matter of choice for the acting employee.”<sup>186</sup> Because “conduct cannot be discretionary unless it involves an element of judgment or choice,” a government employee’s action is not discretionary if “a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.”<sup>187</sup> Accordingly, the DFE exception “does not protect the government when it elects not to perform a duty that a statute or regulation requires it to perform.”<sup>188</sup> Therefore, the first level of inquiry is whether there is a codified statute or regulation that speaks to

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The difference between “I would suggest” and “I would order you . . .” is easily explained in terms of meaning, because of the inherent tentativeness of *suggesting*, and forcefulness of *ordering*. It also seems clear why one doesn’t introduce suggestions in the frame “I must suggest . . .”, again because of the tentativeness of *suggesting*. But then, why can’t orders and commands be introduced in the frames “I must order you” or “I must command . . .”?

WIERZBICKA, *supra* note 79, at 22–23.

<sup>183</sup> See *supra* Part III.B.1.

<sup>184</sup> See *supra* Part III.A.1.iv.

<sup>185</sup> 486 U.S. 531 (1988).

<sup>186</sup> *Id.* at 536.

<sup>187</sup> *Id.* For example, California requires by statute that its hospitals screen for Methicillin-resistant staphylococcus aureus (staph infection) in all intensive care units, burn units, dialysis patients, and patients transferred in from a skilled nursing facility. CAL. HEALTH & SAFETY CODE § 1255.8 (West 2012). Failure to follow such a rule would result in a waiver of government liability under the state’s tort claims act, CAL. CONST. art. III, § 5, without argument over the applicability of its discretionary function exception. CAL. GOV’T CODE § 820.2 (West 2012).

<sup>188</sup> *Sutton v. Earles*, 26 F.3d 903, 2011 (9th Cir. 1994) (citing *Berkovitz*, 486 U.S. at 536).



the matter in this way.<sup>189</sup> If so, there is no option in the matter, and failure to comply with the statute will result in liability for a resulting injury.<sup>190</sup>

However, there is an important distinction between regulations that direct certain behavior, permitting discretion in achieving that behavior, and regulations that direct a specific course of action to achieve a specific result.<sup>191</sup> As the Court explained in *Berkovitz*, an action protected by the DFE must actually be discretionary—or, alternatively, cannot be a mandatory action prescribed by statute, regulation, or other policy.<sup>192</sup>

The determination of whether a mandatory directive exists must depend on “established governmental policy, as express or implied by statute, regulation, or agency guidelines.”<sup>193</sup> In these pronouncements lies the rule that permits the waiver of liability as per a particular tort claims act—and makes inapplicable a DFE thereby—when a statement involves a mandate.<sup>194</sup> The plaintiff can proceed to his proof because the matter is one relating to whether the defendant breached his duty to perform the directed action.<sup>195</sup>

On the other hand, if the statement does not involve a mandate, then the second prong of the DFE must be examined (i.e., whether the matter involved was policy related).<sup>196</sup> Guidelines are perforce discretionary matters, and a government defendant who has won the first battle—determining the nature of the statement to be precatory, not mandatory—creates a presumption that the matter also involved policy.<sup>197</sup> To reiterate, the stakes of winning the first prong of a DFE are therefore quite high, in that the plaintiff can go immediately to proof of injury—always a good position from a tort perspective.<sup>198</sup> On the other hand, the defendant can proceed to claim essential matters of policy when the statement is determined to be merely a guideline,

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<sup>189</sup> *Berkovitz*, 486 U.S. at 536.

<sup>190</sup> *See id.*

<sup>191</sup> *See Sutton*, 26 F.3d at 908–09 (noting that, while the regulations in question imposed specific duties on boat operators, they did not specifically mandate any action by the government entity tasked with enforcing those regulations).

<sup>192</sup> *Berkovitz*, 486 U.S. at 536.

<sup>193</sup> *Terbush v. United States*, 516 F.3d 1125, 1130 (9th Cir. 2008) (citing *United States v. Gaubert*, 499 U.S. 315, 316 (1991)).

<sup>194</sup> *See id.* at 1131 (citing *Berkovitz*, 486 U.S. at 536).

<sup>195</sup> *See Sutton*, 26 F.3d. at 908.

<sup>196</sup> *See Berkovitz*, 486 U.S. at 537 (stating that “the exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy”).

<sup>197</sup> *Gaubert*, 499 U.S. at 324.

<sup>198</sup> *See Berkovitz*, 486 U.S. at 536 (stating that “the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow”).

suggestive in nature only (and by implication, open to interpretation as to how the suggestion should be accomplished).<sup>199</sup>

In the following pages, the analysis categorizes various cases, both federal and state, in terms of the felicity conditions for mandates set out above. In other words, the holdings in these opinions are based on principles that square with the felicity conditions, in that the particular governmental statement (1) was or was not from the right party or to the right party (Preparatory Condition); (2) was or was not in the proper form, was or was not specific enough, or does or does not use mandatory language (Essential Condition); or (3) was or was not enforced or treated as a mandate by the parties in question (Perlocutionary Effect, refuting Sincerity Condition).<sup>200</sup> All of the conditions must be met, but as will be seen, the vast majority of cases in the area turn upon matters relating to the essential condition—the recognizability of the mandate.<sup>201</sup> As such, cases involving the matters related to the preparatory and sincerity conditions will be dealt with first.

#### A. *Preparatory Condition: The Speaker and the Audience*

As set forth above, the speech act preparatory condition for a valid mandate would concern things that are pre-utterance, namely, that the parties involved must be relevant to the act. A mandate can only be spoken by a party with the authority to give it, and can only be addressed to one in a place to act upon it.<sup>202</sup> Cases involving this component of mandate/guideline analysis include a seminal opinion in the area handed down by the Supreme Court, as well as an important pronouncement made by the First Circuit.<sup>203</sup>

In a significant declaration, the Supreme Court stated in *United States v. Gaubert* that whether an action is mandatory or discretionary depends upon “the nature of the conduct, rather than the status of the actor.”<sup>204</sup> Consequently, discretionary action is not confined to individuals in management positions.<sup>205</sup> The day-to-day management of a business requires discretionary action to the same extent as “policymaking or planning functions”; so the distinction between actions at the managerial level and actions at the operational level was

<sup>199</sup> See *Sutton*, 26 F.3d at 909–10 (holding that the government could exercise the discretion when deciding whether to enforce “the various provisions of the system of boater control” provided in the regulations, and therefore, the court could move on to the next prong to determine whether the decision not to post the warning sign was grounded in policy).

<sup>200</sup> See *supra* Part III.A.1.iv. The propositional content condition is not in question in these cases.

<sup>201</sup> See *infra* Part IV.C.

<sup>202</sup> See *supra* Part III.A.1.iv.

<sup>203</sup> See *infra* notes 204, 213.

<sup>204</sup> *United States v. Gaubert*, 499 U.S. 315, 325 (1991) (citing *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984)).

<sup>205</sup> *Id.*

held to be invalid for the purposes of determining the nature of the action as mandatory or discretionary.<sup>206</sup>

However, the Court's statement in *Gaubert* is more nuanced than it might first appear.<sup>207</sup> While it is true that the act of exercising discretion—the balancing and weighing that makes something a matter of judgment—is something that can be done on the day-to-day, operational level just as much as at the management stage, such an acknowledgement is not a judicial refutation of the preparatory condition.<sup>208</sup> Rather, the point the Court makes relates to the *performance* of the discretion;<sup>209</sup> it is not a pronouncement on who can make the rule. Anyone at any level may be required to exercise discretion, but only the proper party can make the rule.<sup>210</sup> As such, the preparatory condition is observed.<sup>211</sup>

The Court's understanding of this point is highlighted in a 1998 First Circuit opinion, in which the plaintiff claimed that the testimony as to the mandatoriness of a rule should be allotted significant weight in determining the issue.<sup>212</sup> The First Circuit's assessment is clear:

The most obvious reason why such sources command less weight is *because it matters who speaks*. To determine what is agency policy, courts customarily defer to the statements of the official policymaker, not others, even though the others may occupy important agency positions. This case is a suitable vehicle for application of the principle. Congress has the legal authority to render a function either discretionary or obligatory, and it has delegated that power to the Secretary, not to OSHA's area directors or compliance officers. Hence, we decline to accord decretory significance to the area director's or compliance officers' thoughts on OSHA policy requirements, especially when the plaintiff insists on interpreting this testimony in a manner contrary to both the express statements of Congress and the agency's institutional pronouncements.<sup>213</sup>

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *See id.*

<sup>209</sup> *See id.* (citing *Varig Airlines*, 467 U.S. at 813).

<sup>210</sup> *See Varig Airlines*, 467 U.S. at 813–14.

<sup>211</sup> *See supra* Part III.A.1.iv (defining the preparatory condition as one requiring that the mandate be spoken by the proper party and directed at the proper party).

<sup>212</sup> *See Irving v. United States*, 162 F.3d 154, 164 (1st Cir. 1998).

<sup>213</sup> *Id.* at 166 (emphasis added) (citations omitted). The *Irving* court cited *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144, 144 (1991), which held that “where . . . the relevant regulations are ambiguous, a reviewing court must defer to the Commission's reasonable interpretation rather than the Secretary's interpretation, since Congress intended to delegate to the Commission the normal complement of adjudicative powers

As the court says, “it matters who speaks.”<sup>214</sup> While testimony as to interpretation and usage are relevant, which the court acknowledges, they do not trump an express iteration of a rule or pose a challenge to the authority of the rule maker.<sup>215</sup> It is never the case that a valid mandate can be made by one without the proper authority; nor can the converse be true: that a mandate communicated to the wrong party (i.e., one who does not have the power to carry it out) is valid.<sup>216</sup> In other words, the proper audience is as important as the proper speaker.

An illustration of this point is found in *Couzado v. United States*.<sup>217</sup> In *Couzado*, the United States government conducted a covert sting operation through the controlled delivery of a cocaine shipment.<sup>218</sup> Neither the flight crew, the passengers, nor the customs agents or Ambassador in Belize, where the flight made a stopover, were informed of the operation.<sup>219</sup> The cocaine was discovered in Belize, and the crew members and passengers spent eleven days in jail; they sued the government as a result.<sup>220</sup> The Southern District of Florida made a point that the Ambassador’s staff were all aware of notification requirements in an express policy; the court held that the non-observance of that policy breached a mandate.<sup>221</sup>

This point resonates with those pertaining to the sincerity condition, the requirement that for a valid mandate, the utterance must be made in earnest.

#### B. Sincerity Condition: Custom and Usage

As stated above, the sincerity condition for a mandate relates to the earnestness with which the utterance is made.<sup>222</sup> The sincerity of the expression is important in that it can be challenged by proof of contrary action. Again, as stated above, the sincerity of an utterance is in question, and the felicitous quality of the act compromised, by evidence that the act did not have the requisite perlocutionary effect. That is, evidence that the mandate was not

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possessed by traditional administrative agencies, including the power to ‘declare’ the law”; and *Director, Office of Workers’ Compensation Programs, U.S. Department of Labor v. Eastern Associated Coal Corp.*, 54 F.3d 141, 147 (3d Cir. 1995), which held that the courts will “give judicial deference to the Director, as policymaker, rather than to the Board, which is purely an adjudicator.”

<sup>214</sup> *Irving*, 162 F.3d at 166.

<sup>215</sup> *Id.*

<sup>216</sup> *See id.*; *see also supra* Part III.A.1.iv.

<sup>217</sup> 883 F. Supp. 691 (S.D. Fla. 1995), *aff’d in part, rev’d in part sub nom.*, 105 F.3d 1389 (11th Cir. 1997).

<sup>218</sup> *Id.* at 692.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 692–93.

<sup>221</sup> *Id.* at 694.

<sup>222</sup> *See supra* text accompanying notes 117–18.

*treated* as a mandate by the parties would go some ways towards refuting the argument that it was, in fact, a mandate.<sup>223</sup>

This point can be restated by means of another semantic feature of verbs, the nature of which reveals, but does not confirm, a particular mental or emotional state. Some verbs are "stative" in nature, as opposed to "dynamic,"<sup>224</sup> in that through their expression the speaker is revealing a state of being rather than denoting an action.<sup>225</sup> *John fixes cars*, expresses a state in the world that John enjoys—that of car repairman—whereas *John fixes cars Monday through Friday* expresses the dynamic action of actually fixing cars.<sup>226</sup>

Further, a particular type of stative verb, sometimes called a "mental verb,"<sup>227</sup> reveals something about the mental (strictly speaking) or emotional (more broadly speaking) state of the speaker.<sup>228</sup> *I know he's the best man for the job* expresses the speaker's professed belief. *I believe there's hope for him* professes a confidence in the object. But in neither of these last two cases can the hearer objectively confirm what the speaker actually "knows" or "believes."<sup>229</sup> The veracity of the statement is known only to the speaker (even then, he might be delusional). Any refutation of such a statement would have to come by way of circumstantial evidence as to the speaker's true knowledge and true belief.<sup>230</sup>

In much the same way, the effect of a particular utterance—how it is treated by both the speaker and the audience—can be evidence as to whether it was sincerely meant *as a mandate*, or was rather taken as merely a guideline.

"Custom and usage" has always been a means by which ambiguities can be resolved, even if it is not the first line of inquiry.<sup>231</sup> As the California appellate court put it: "[R]equisite standards of certainty can [often] be fleshed out from otherwise vague statutory language by reference to any of the following sources: (1) *long established or commonly accepted usage*; (2) usage

<sup>223</sup> See *supra* Part III.A.1.iii.

<sup>224</sup> ROBERT I. BINNICK, *TIME AND THE VERB: A GUIDE TO TENSE AND ASPECT* 183–84 (1991).

<sup>225</sup> *Id.* at 183.

<sup>226</sup> See *id.* at 183–84.

<sup>227</sup> See generally Carl Nils Johnson & Michael P. Maratsos, *Early Comprehension of Mental Verbs: Think and Know*, 48 CHILD DEV. 1743 (1977) (discussing children's understanding of the mental verbs "know" and "think").

<sup>228</sup> See generally *id.*

<sup>229</sup> See *id.* at 1744–47 (discussing the results of an experiment with three and four year-olds who *knew* where a hidden object was located, and who *thought* that they knew where it was located).

<sup>230</sup> See *id.* (discussing the responses of children when asked why they thought a hidden object was under "Box B" rather than under "Box A" and vice versa).

<sup>231</sup> See *Carey Can., Inc. v. Columbia Cas. Co.*, 940 F.2d 1548, 1556–58 (D.C. Cir. 1991) (resolving contractual ambiguities by looking to custom and usage). *But see* 12 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 34:7 (4th ed. 2012) (rejecting resort to custom and usage when contract is unambiguous).

at common law; (3) judicial interpretations of the statutory language or of similar language; or (4) legislative history or purpose.”<sup>232</sup>

A representative case, in which matters that pertain to the sincerity condition of a mandate, is discussed in the First Circuit opinion, *Kelly v. United States*.<sup>233</sup> There the court identifies the proper inquiry, then proceeds to analyze the customary treatment of the rule in question as evidence relevant to a determination of its nature:

We recently wrote that, in regard to the first part of the discretionary function test, “the proper inquiry must center on the amount of discretion actually held and exercised by the government employees whose actions or omissions are at issue.” Here, the record reveals without contradiction that (1) DEA officials consistently *regarded* regional managers as possessing discretion in handling unsubstantiated rumors, and (2) such discretion was *actually and consistently exercised* at the regional level. Kelly, a veteran agent, could have contested this interpretation of the regulations by evidence of contrary practice, but offered none. Instead, he relied solely on the letter of the regulations—*language which, while perhaps suggestive, was at the very least a mixed bag, interweaving imperatives with weaker, precatory verbs and generalities more characteristic of discretion than of mandatory directives*. Standing alone, this was not enough.<sup>234</sup>

Note that the court focuses upon the way the rule was “regarded” by the audience, and upon the way the discretion was “actually and consistently” exercised.<sup>235</sup> Both the perception of the audience as to the discretionary nature of the utterance in question, and the real and persistent treatment of the utterance, are key in deciding that the utterance was a guideline, not a mandate.<sup>236</sup>

Further, the court states that this evidence could have been rebutted by “evidence of contrary practice, but [the plaintiff] offered none.”<sup>237</sup> The rationale is clear: how the statement is treated—its reception and enforcement—is evidence of its nature.<sup>238</sup> In fact, the court privileges this evidence over evidence as to the language itself, at least in a case in which there is a mixture

<sup>232</sup> *People v. Nguyen*, 161 Cal. App. 3d 687, 692 (Cal. Ct. App. 1984) (emphasis added) (quoting *Sechrist v. Mun. Court*, 64 Cal. App. 3d 737, 745 (Cal. Ct. App. 1976)).

<sup>233</sup> *See* 924 F.2d 355, 360–62 (1st Cir. 1991).

<sup>234</sup> *Id.* at 360 (emphasis added) (citing *Irving v. United States*, 909 F.2d 598, 602 (1st Cir. 1990)).

<sup>235</sup> *Id.*

<sup>236</sup> *See id.*; *see also supra* Part III.A.1.iii.

<sup>237</sup> *Kelly*, 924 F.2d at 360.

<sup>238</sup> *See id.*

of "imperatives with weaker, precatory verbs and generalities."<sup>239</sup> Thus, the court takes the perlocutionary effect of the statement as evidence of its sincerity/intention.<sup>240</sup>

In *Garcia v. United States*,<sup>241</sup> the district court of New Mexico stated that it would consult testimony of the parties as to the meaning of the modal "should" in a police department's standard operating procedures:

Section 2–03–3, which states circumstances under which an off-duty officer "should not" engage in certain conduct, might be construed more strictly in practice than the language suggests. Some might consider the word "should" to be permissive, granting discretion, while others might consider it to exhibit a mandatory obligation . . . . The Court believes that testimony of the witnesses in the upcoming trial will aid the Court in determining the meaning of the Isleta SOPs § 2–03–2.<sup>242</sup>

In this case, the interpretation by way of custom and usage would inform how the statement was understood—"intended"—or in other words, "sincerely meant."<sup>243</sup> Note that the evidence produced by the sincerity condition, as illustrated in such instances, relates to interpretation of purpose, and not necessarily to veracity.<sup>244</sup> Again, evidence of how the speaker means the statement to be taken, and how the audience understands it to be taken, is all that can be offered to determine purpose. To hold that there is no evidence that the speaker meant the statement to be taken as he claims is not to charge him with a falsehood, but only to say that he cannot substantiate his claim.<sup>245</sup>

Although this type of evidence is granted a degree of deference, courts have also insisted that it give place to other evidence when it exists. In *Irving v. United States*, the court made a statement relating both to circumstantial, "anecdotal" evidence of usage (that which is relevant to the sincerity condition inquiry) as well as to evidence that came by way of more formal pronouncements (form being an aspect of the essential condition):

Although we do not suggest that those items invariably will be the exclusive sources for determining established policy, it

<sup>239</sup> *Id.*

<sup>240</sup> *See id.*; *see also supra* Part III.A.1.iii.

<sup>241</sup> 709 F. Supp. 2d 1133 (D.N.M. 2010).

<sup>242</sup> *Id.* at 1148–49. The court went on to quote *Kelly v. United States* as to the importance of the amount of discretion "actually held and exercised." *Kelly*, 924 F.2d at 360.

<sup>243</sup> *See Garcia*, 709 F. Supp. 2d at 1148–49.

<sup>244</sup> *See id.*

<sup>245</sup> *See Heinrich ex rel. Heinrich v. Sweet*, 62 F. Supp. 2d 282, 324–25 (D. Mass. 1999) (using correspondence between agency members to interpret a piece of legislation that "interw[ove] precatory with quasi-mandatory language").

bears remembering that the Court's recognition that informal rules may be a relevant source took place against a background understanding, both in administrative law generally and in the OSHA context specifically, that agencies typically make authoritative informal statements of policy positions through published interpretive rules or enforcement guidelines. Although anecdotal testimony sometimes may furnish clues regarding the nature of agency policy, it is usually a last-ditch resort.<sup>246</sup>

The court went on to say that even the plaintiff's "anecdotal" evidence of usage was suspect when offered as proof of the mandatoriness of the statement.<sup>247</sup> The evidence the plaintiff used in support of its argument was the following testimony, consisting of an exchange between plaintiff's counsel and the OSHA Area Director:

Q. And, by the way, the obligation and procedure of your department is to note and cite specific violations, is it not?

A. To note—document and—identify and document specific hazards, yes.

Q. Machine by machine by machine?

A. As far as we can see.

Q. Hazard by hazard by hazard?

A. As can be observed.<sup>248</sup>

The court stated that nowhere in this testimony is there indication of a policy to inspect *every* machine.<sup>249</sup> In other words, *any* machine inspected had to be thoroughly inspected, but not *every* machine had to be inspected.<sup>250</sup> The court said this indicated a discretionary guideline, not a mandate: "[a]t the very least, there must be an indication in the record that the witness demonstrated his awareness of the agency's formal policy statements, but nevertheless had some other articulable basis that supported his understanding of agency policy."<sup>251</sup> Here, the court implies that had there been articulable evidence of an understanding contrary to the formal statement, it would have been considered.<sup>252</sup> The weight given to the circumstantial evidence is, as always, subject to its credibility.<sup>253</sup>

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<sup>246</sup> Irving v. United States, 162 F.3d 154, 166 (1st Cir. 1998) (citations omitted).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 167.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *See id.*

<sup>253</sup> *See id.* at 166–67 (stating that circumstantial evidence may be given weight in some instances).



The “custom and usage” argument finds an analogy in basic estoppel arguments, such as the “government knowledge inference” defense in false claims actions.<sup>254</sup> In that area, evidence that the government knew of and acquiesced in the payment of claims submitted by the defendant is an answer to a charge that the defendant submitted a false claim. In short, the government cannot lead the defendant into a belief that its claims are valid, then turn around and charge the defendant with fraud for making the claims.<sup>255</sup>

Of course, the efficacy of such a defense turns upon how much the government knew, from which sources it knew it, the cooperativeness of the defendant in the process, the timing of the events, etc.,<sup>256</sup> but that is the case with any claim of estoppel.<sup>257</sup> In the DFE context, a defendant claiming that an alleged mandate was never enforced, or better yet, was deliberately made superfluous, would mount a more persuasive argument against its mandatory nature than if events proved otherwise.<sup>258</sup> In light of the *Irving* court’s pronouncement, such arguments would have a difficult time standing up against a clearly written specific mandate made by the proper party.<sup>259</sup>

### C. Essential Condition: Form, Language, Specificity

By far, the condition by which the mandate/guideline determination is judged most is the essential condition—those things that make the mandate recognizable *as* a mandate. The aspects of this condition relate to the form that the mandate takes, the words with which it is communicated, and the degree of detail into which it goes in that conveyance.

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<sup>254</sup> See 1 JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 2.06 (4th ed. 2014).

<sup>255</sup> See *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 957 (10th Cir. 2008).

<sup>256</sup> See *id.* at 951–54.

<sup>257</sup> See, e.g., John W. Lundquist, “*They Knew What We Were Doing*”: *The Evolution of the Criminal Estoppel Defense*, 23 WM. MITCHELL L. REV. 843, 855–61 (1997) (discussing the government’s knowledge requirement when the defendant invokes the defense of criminal estoppel).

<sup>258</sup> See, e.g., *Begay v. United States*, 768 F.2d 1059, 1064 (9th Cir. 1985) (holding that it was not a mandate for inspectors to implement safety regulations because they could choose to either do so or not).

<sup>259</sup> See *supra* notes 234–41. The *Irving* Court went on to say: “Where, as here, the statute and the applicable regulations clearly speak to the nature of the conduct, there is no occasion to consult informal rules.” *Irving v. United States*, 162 F.3d 154, 165 (1st Cir. 1998); see also *Kelly v. United States*, 924 F.2d. 355, 360 (1st Cir. 1991) (stating that “[a] regulation which straightforwardly strips all discretion might well be beyond the reach of 28 U.S.C. § 2680(a), even if ignored in practice”).

## 1. Form

When speaking of “form,” the question revolves around the method or means by which the alleged rule has been communicated.<sup>260</sup> Obviously, a more “formal” expression would be one that indicates the gravity of the utterance and the seriousness with which it is intended.<sup>261</sup> In this way, form is also somewhat indicative of the sincerity condition.<sup>262</sup> After all, an unmistakable communiqué from on high is not only understood to be what it is, but is understood to be the earnest desire of the communicator. Note also that a communication can obtain a good part of its formality by means of the person making it, which resonates with the preparatory condition.<sup>263</sup> The head of an agency who makes a pronouncement lends a degree of solemnity to even a spoken communication that a lesser functionary cannot.<sup>264</sup> All this is to say that a particular fact can contribute to more than one felicity condition.

Evidence that the courts have picked up on this aspect of the mandate/guideline determination is exemplified in a number of cases. For example, in *Tam v. United States*,<sup>265</sup> as evidence that the Forestry Service was negligent in managing an ice cave recreational area, the plaintiff offered a set of what the district court nominated “planning or policy documents.”<sup>266</sup> The court not only held that the language in the documents was discretionary in nature, but also that “[the] documents do not rise to the level of specific mandates directing a course of action under step one of the discretionary function exception. Both the [documents] are recommendations by a planning committee, not required mandates.”<sup>267</sup> The fact that the alleged rules were made by a “planning committee” also took them afoot of the preparatory condition, in that they were not made by an authoritative body.<sup>268</sup>

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<sup>260</sup> See, e.g., *Camozzi v. Rolald/Miller and Hope Consulting Grp.*, 866 F.2d 287, 290 (9th Cir. 1989) (holding that “a failure to effectuate policy choices already made and incorporated in the contracts” did not involve discretion). In the given case, the mandate took the form of a contract. See *id.*

<sup>261</sup> See *Irving*, 162 F.3d at 165–66 (holding that there is no need to consult informal rules when formal rules are available, and that informal rules are the last resort in determining the nature of the conduct).

<sup>262</sup> See *supra* Parts III.A.1.iv, IV.B (explaining sincerity condition).

<sup>263</sup> See, e.g., *Irving*, 162 F.3d at 166 (stating that “it matters who speaks”); see also *supra* Parts III.A.1.iv, IV.A. (explaining preparatory conditions).

<sup>264</sup> See *Irving*, 162 F.3d at 166 (“To determine what is agency policy, courts customarily defer to the statements of the official policymaker, not others, even though the others may occupy important agency positions.”).

<sup>265</sup> 905 F. Supp. 2d 1221 (W.D. Wash. 2012).

<sup>266</sup> *Id.* at 1232–33.

<sup>267</sup> *Id.* at 1233.

<sup>268</sup> *Id.*

In a similar vein, the Ninth Circuit in *Bibeau v. Pacific Northwest Research Foundation, Inc.*<sup>269</sup> reviewed a group of letters exchanged between individuals employed by the Atomic Energy Commission and the Division of Biology and Medicine discussing medical and safety issues concerning biological experiments conducted on inmates.<sup>270</sup> The court held that "sporadic communications, made by individuals of varying levels of importance to the operation of the experiments, cannot constitute a blanket regulation constraining the Government's operations."<sup>271</sup> Here, not only was the form too casual, but the sporadic means by which it was sent indicated that the utterance was merely suggestive, not mandatory, in nature.<sup>272</sup>

The reasoning in a First Circuit case resonates with both the preparatory condition and the essential condition. In *Irving v. United States*, a case in which the lower court looked only at formal pronouncements by an agency to determine mandatoriness, the appellate court acknowledged that though more casual, oral pronouncements can prove to be mandates; they are not at the forefront in the list of considerations.<sup>273</sup> The implication is that all things being equal, the more formal the expression, the more apt the courts are to find a mandate.<sup>274</sup> This disposition accounts for a finding by the Ninth Circuit that a procedural handbook, which contained a statement that "all complaints of alleged hazards . . . must be evaluated," issued by the Mine Safety and Health Administration, included mandates, not mere guidelines.<sup>275</sup> The formality of the official handbook in which the pronouncement appeared influenced the court's determination of the pronouncement's nature.

The district court of Massachusetts, in *Burnashov v. F/V Oceanview, Inc.*,<sup>276</sup> also rejected the argument that information in a certain kind of document could amount to a directive:

The documents cited by Oceanview, such as the nautical charts and DOD Manual, are not mandatory directives. "Because a mariner cannot reasonably rely solely on a chart, nautical charts do not induce reliance such that the government has a duty to ensure their accuracy, especially where the government

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<sup>269</sup> 339 F.3d 942 (9th Cir. 2003).

<sup>270</sup> *Id.* at 945.

<sup>271</sup> *Id.* at 945–46.

<sup>272</sup> *Id.*; see *supra* Part III.A.1.iv (explaining essential conditions).

<sup>273</sup> *Irving v. United States*, 162 F.3d 154, 166 (1st Cir. 1998).

<sup>274</sup> See *Bibeau*, 339 F.3d at 945–46; *Heinrich ex rel. Heinrich v. Sweet*, 308 F.3d 48, 59 (1st Cir. 2002); *Irving*, 162 F.3d at 166.

<sup>275</sup> *Olson v. United States*, 362 F.3d 1236, 1239–40 (9th Cir. 2004), *vacated*, 546 U.S. 43 (2005), *remanded to* 433 F.3d 1091 (9th Cir. 2006).

<sup>276</sup> 978 F. Supp. 2d 77 (D. Mass. 2013).

specifically directs mariners to other publications through warnings or cautions on the chart itself.<sup>277</sup>

In other words, the kind of information in this *type* of document could not be a directive by itself, as the conduct under question relied on consulting other publications.<sup>278</sup>

It is seldom that the courts hold on the grounds of form alone, which is perhaps a function of the fact that the means of communication are often accompanied by other aspects of the essential condition.<sup>279</sup> One of those aspects relates to language. The nature of the very wording used has proven a large part of judicial analysis.

## 2. Language

Judging by the number of times courts have based their holding upon it, a determinative factor in the mandate/guideline analysis is the type of language that the purported rule includes.<sup>280</sup> The verbs in the taxonomy set out in Part III above, along with the modals discussed in that same part, figure prominently in the court's assessment of the issue here.

Often, the clarity of a mandate turns upon the use of either an "Order" or "Ask" verb.<sup>281</sup> In these cases, the evidence yielded by a "plain reading" of the rule's text leads to the determination.<sup>282</sup> In *Faber v. United States*,<sup>283</sup> the Ninth Circuit held that a park's management plan *required* the Forest Service "to 'intensify management' at the Falls by 1) developing a sign plan, 2) formulating an on-going media program, and 3) providing a presence at the Falls to verbally warn the public."<sup>284</sup> As such, there was no choice in the matter, and the DFE did not apply.<sup>285</sup> Similarly, in *Couzado v. United States*, the Southern District of Florida held language to the effect that "DEA representatives were *required* to coordinate with the Embassy Narcotics Coordinator all sensitive or unusual DEA activities conducted in-country," to

<sup>277</sup> *Id.* at 82–83 (citing *Limar Shipping Ltd. v. United States*, 324 F.3d 1, 11 (1st Cir. 2003)).

<sup>278</sup> *See id.*

<sup>279</sup> *See* cases cited *supra* notes 274–75.

<sup>280</sup> *See, e.g.,* *Autery v. United States*, 992 F.2d 1523, 1525 (11th Cir. 1993); *Franklin Sav. Corp. v. United States*, 970 F. Supp. 855, 866 (D. Kan. 1997) (holding that "Regulations requiring that agency employees 'comprehensively and objectively weigh alternative actions,' and 'ensure that asset integrity and value are maintained,' hardly constitute the type of 'specifically prescribed courses of action' necessary to invoke the court's jurisdiction under the FTCA").

<sup>281</sup> *See supra* Part III.A.v.

<sup>282</sup> *See, e.g.,* *Faber v. United States*, 56 F.3d 1122, 1126 (9th Cir. 1995).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 1126 (emphasis added).

<sup>285</sup> *Id.*

notify U.S. embassies in certain countries of proposed flight plans, and to keep the Ambassador informed of certain matters.<sup>286</sup> Accordingly, there was no "element of choice" involved in the matter, which made the rule a mandate.<sup>287</sup>

In *Olson v. United States*, "require" was also used in the Mine Safety and Health Administration's procedures handbook that *required* the agency to "make inspections of each underground coal or other mine in its entirety at least four times a year."<sup>288</sup> The Ninth Circuit held the policy to be mandatory.<sup>289</sup> Non-compliance with its directive was deemed negligence unprotected by the DFE.<sup>290</sup>

However, while these cases use words from the taxonomy set out above, other instances finding a mandate illustrate that directives can be formed by other words when they are put in the imperative mood.<sup>291</sup> They can also be weakened to mere guidelines by the use of some kind of lexical attenuation, which weakens the force of the statement by use of conditional terms.<sup>292</sup> In *Autery v. United States*,<sup>293</sup> the Eleventh Circuit held that a letter to the Park Service to the effect that "[b]lack locust trees are short-lived and due to decay (following borer activity), break up and drop limbs and tops. Avoid them in new areas; *remove* them *when possible* in existing areas," did not create a mandate.<sup>294</sup> The order "to remove" the trees was conditional upon "possibility" and therefore was merely a guideline.<sup>295</sup>

At times, lexical attenuation of an alleged mandate can come by means of providing examples.<sup>296</sup> Words that undo specificity by opening something up

<sup>286</sup> 883 F. Supp. 691, 694–95 (S.D. Fla. 1995) (emphasis added).

<sup>287</sup> *Id.* at 695.

<sup>288</sup> *Olson v. United States*, 362 F.3d 1236, 1239 (9th Cir. 2004), *vacated*, 546 U.S. 43 (2005).

<sup>289</sup> *Id.* at 1239–40.

<sup>290</sup> *Id.* *But see* *Freeman v. United States*, 556 F.3d 326, 338 (5th Cir. 2009). In *Freeman*, the Fifth Circuit contextualized the passive use of the verb "require" in the expression "[m]edical support is required not only at medical facilities, but at casualty evacuation points" by pointing out that "[t]he ostensibly mandatory language 'is required,' when read in light of the broad goals of the Annex . . . did nothing more than explain the needs that arise in an emergency." *Id.* The court concluded that "[s]atisfaction of those needs was a broad, implied goal allowing for significant choice in its implementation by federal agencies." *Id.*

<sup>291</sup> *See, e.g., Navarette v. United States*, 500 F.3d 914, 917 (9th Cir. 2007) (holding that the language "[d]angerous terrain conditions, such as drop-offs, . . . will be properly marked or fenced" specifically prescribed the course of action for the employees to follow and did not allow for discretion).

<sup>292</sup> *See Autery v. United States*, 992 F.2d 1523, 1525 (11th Cir. 1993).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 1528–30.

<sup>295</sup> *Id.* at 1525.

<sup>296</sup> *See, e.g., Valdez v. United States*, 56 F.3d 1177, 1180 (9th Cir. 1995) ("[T]he Management Guidelines' broad mandate to warn the public of 'special hazards' through educational materials, brochures, pamphlets, and the like necessarily encompasses an element of discretion in identifying such hazards.").

to an array of choices leads to the interpretation that the alleged rule was only a guideline.<sup>297</sup> For example, in *Ard v. Federal Deposit Insurance Corp.*,<sup>298</sup> the United States District Court for the Central District of California determined a claim that the FDIC had “certain articulated duties,” such as a duty “to identify, monitor, and address risks to deposit insurance funds,” was insufficient to establish a mandatory action because it was not specifically prescribed by any regulation, statute, or policy.<sup>299</sup> However, the Ninth Circuit in *Navarette v. United States*<sup>300</sup> held that a checklist specifically identifying the types of things that qualified under a general term established a mandate, despite the use of general language about goals and objectives. The particular language in question was: “[d]angerous terrain conditions, such as drop-offs, etc., will be properly marked or fenced.”<sup>301</sup>

Modals are the means by which a statement’s mandatory or precatory nature is most often established.<sup>302</sup> In *Pelham v. United States*,<sup>303</sup> the district court of New Jersey found a mandate when:

The contract unequivocally state[d] that “[t]he Contracting Officer *will* notify the contractor of noncompliance with these requirements.” Thus, through use of the word “will,” the contract clearly accords the contracting officer with oversight responsibilities over the contractor’s final compliance obligation. While the contracting officer’s implementation of an inspection program for detecting safety breaches may be discretionary, once the officer suspects a safety deficiency, he or she does not have discretion as to whether or not act upon it.<sup>304</sup>

Similarly, the Eastern District Court of California held that a safety policy indicating “[r]egular inspection of work areas and visitor-use areas shall be completed and documented,” that “[a]ll employees shall correct hazards,” and that “[a]ll facilities . . . *shall* be designed with adopted national standard, codes,

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<sup>297</sup> *See id.*

<sup>298</sup> 770 F. Supp. 2d 1029 (C.D. Cal. 2011).

<sup>299</sup> *Id.* at 1033, 1036.

<sup>300</sup> 500 F.3d 914 (9th Cir. 2007).

<sup>301</sup> *Id.* at 917–18. Courts have also found that language merely instructive in nature is not a mandate. In *Franklin Savings Corp. v. United States*, language to the effect that the party should “take the necessary steps,” charging the party with certain tasks, “among other things,” and directing sales based on a variety of factors, was too precatory in nature to amount to a directive. 180 F.3d 1124, 1131–32 (10th Cir. 1999).

<sup>302</sup> *See* cases cited *infra* notes 305–06.

<sup>303</sup> 661 F. Supp. 1063 (D.N.J. 1987).

<sup>304</sup> *Id.* at 1069 (citations omitted).

and guidelines" was mandatory.<sup>305</sup> On the other hand, the District Court of Oregon held that fire control policies did not specifically mandate any course of action when they used the conditional "may" to suggest conduct.<sup>306</sup>

However, the use of the typically mandatory modal "shall" has not always been found determinative. In *Sierra Club v. Train*,<sup>307</sup> the Fifth Circuit took a wider view of a statutory rule, consulting its legislative history, among other things, to determine the mandatoriness of its nature:

The most persuasive evidence of Congressional intent is the wording of the statute. Upon "superficial examination," § 1319(a)(3)'s statutory language "shall" appears to clearly mandate that § 1319(a)(3) imposes a non-discretionary duty on the EPA Administrator. Use of the word "shall" generally indicates a mandatory intent unless a convincing argument to the contrary is made. Such an argument may be waged when extrinsic aids such as the purpose of the statute, the statute as a whole, or the legislative history indicates an intention that the statute be given a discretionary effect. Although a salutary rule of statutory construction prohibits resort to extrinsic aids when a statute on its face appears to be clear and unambiguous, we heed a caution which has been repeated with specific reference to the FWPCA of 1972 that "(W)hen aid to construction of the meaning of the words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"<sup>308</sup>

The court went on to look not only at the legislative history, but also at the administrative agency's interpretation of its rule—in this case, the EPA.<sup>309</sup> Since the agency itself construed the rule as merely discretionary, absent evidence that such a construction was contrary to legislative intent, that

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<sup>305</sup> *Botell v. United States*, No. 2:11-cv-01545-TLN-GGH, 2013 WL 3941004, at \*2-3, 6-7 (E.D. Cal. July 30, 2013) (emphasizing the use of the word "shall" throughout the policy to conclude that it was a mandatory policy); *see also* *Routh v. United States*, 941 F.2d 853, 855 (9th Cir. 1991) (holding that "shall" established a mandate); *Dugard v. United States*, No. 3:11-cv-04718-CTB, 2013 WL 6228625 (N.D. Cal. Nov. 27, 2013) (finding six mandates *inter alia*, on grounds that include the use of the modal "shall"); *Elson v. Pub. Utils. Comm'n*, 124 Cal. Rptr. 305, 308 (Cal. Ct. App. 1975) (holding that the modal "shall" established a mandate in a Public Utilities Code).

<sup>306</sup> *McDougal v. U.S. Forest Serv.*, 195 F. Supp. 2d 1229, 1234-37 (D. Or. 2002).

<sup>307</sup> 557 F.2d 485 (5th Cir. 1977).

<sup>308</sup> *Id.* at 489 (citing *Train v. Colorado Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 10 (1976)); *Exxon Corp. v. Train*, 554 F.2d 1310, 1322 (5th Cir. 1977) (citations omitted); *see also* *Fanoel v. United States*, 975 F. Supp. 1394, 1399-1400 (D. Kan. 1997) (finding a procedure discretionary despite use of the modal "shall").

<sup>309</sup> *Sierra Club*, 557 F.2d at 489.

interpretation was allowed.<sup>310</sup> Above all, a main reason that the court construed the rule as discretionary, despite the clear use of the obligatory “shall,” was that “where the result of one interpretation is unreasonable, while the result of another interpretation is logical, the latter should prevail.”<sup>311</sup> The court held that the reading suggested by the plaintiff would lead to an untenable set of actions by the Agency—in this instance, forcing the issuance of abatement orders that would amount to nothing more than empty gestures.<sup>312</sup>

Using a similar rationale, the First Circuit in *Kelly v. United States* held that the use of the modals “will” and “must” could not be interpreted as requiring the Drug Enforcement Agency’s Office of Internal Security to conduct an internal investigation, regardless of how spurious a report of wrongdoing was judged to be.<sup>313</sup> Such an interpretation would frustrate the very objective that the law was meant to achieve:

Although words like “will” and “must” are generally of mandatory effect, they may have other meanings and may be used, as here, in merely a directory sense. Moreover, both the heading of section 8121 and its lead sentence indicate that the prescribed obligations are triggered only when the DEA official in question receives “an allegation or complaint” concerning an employee. Although neither noun is defined in the Manual, we believe that, under common usage, it was permissible for the agency to interpret “allegation” and “complaint” as not encompassing mere buzznacking. Put another way, reading the words as giving DEA’s regional managers discretion to determine what comprised an “allegation” or “complaint” was a plausible rendition of the overall text, well within the purview of the regulation.<sup>314</sup>

The court went on to say that:

If the Manual were read to mandate that every bit of idle gossip intimating employee misconduct had to be reported, it would

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<sup>310</sup> *Id.* The Court went on to say that the legislative history of the statute was rife with dissension over whether the rule involved was a mandate or a guideline. *Id.* at 489–90.

<sup>311</sup> *Id.* at 490 (quoting C. SANDS, SUTHERLAND’S STATUTORY CONSTRUCTION § 45.12 (4th ed. 1973)).

<sup>312</sup> *Id.* at 490–91; *see also* Freeman v. United States, 556 F.3d 326, 339 (5th Cir. 2009) (citing Ochran v. United States, 117 F.3d 495, 500–01 (11th Cir. 1997) (holding that the word “‘shall’ in describing responsibilities . . . does not necessarily . . . [leave] no room . . . to exercise choice or judgment . . .”)).

<sup>313</sup> *Kelly v. United States*, 924 F.2d 355, 360–61 (1st Cir. 1991).

<sup>314</sup> *Id.* (citations omitted); *see also* Lopez v. U.S. Immigration & Customs Enf’t, 455 Fed. Appx. 427, 433 (5th Cir. 2011) (“That the USMS documents here in question state what the USMS ‘will’ do is far from dispositive; ‘will’ may be used to express a determination to commit a future act as easily as a command to perform that act.”).



constitute an open invitation to drug traffickers to make baseless claims against DEA agents. The legitimate business of the agency would grind to a halt, its limited resources diverted to the needless investigation of its own agents rather than the war against drugs.<sup>315</sup>

An alternative rationale consistent with the court's reasoning here is that the plaintiff's interpretation of what amounts to an "allegation" or "complaint" would be unreasonable.<sup>316</sup> If every call, regardless of its credibility, were taken to be an "allegation" or "complaint," then the statutory purpose of investigating corruption would be frustrated by spending valuable resources to review obvious falsehoods.<sup>317</sup> In other words, this is not so much a question of whether the Agency is required to investigate allegations and complaints; they are so required, just as the language states.<sup>318</sup> It is just that some things do not *amount* to allegations and complaints.<sup>319</sup> Perhaps in this point is a tacit, unstated admission that there is *some* judgment involved in the application of *every* rule, at least insofar as those charged with its execution must determine whether the variables it concerns are extant.<sup>320</sup> For example, a federal cleaning service charged with the mandate to "lock all doors upon leaving the building," must first determine whether they are open or not before any question of mandatoriness even comes into play.

Sometimes a purported rule includes both mandatory and precatory language. In that event, other indicators break the tie—particularly, the specificity with which the prescribed actions are set out.<sup>321</sup> In *Greene v. United States*,<sup>322</sup> the Eastern District of California held that a set of building standards was mandatory because it used language such as "requires," "maximum extent," and "shall comply."<sup>323</sup> An exception for "feasibility"—indicating that the government need not comply with the building codes if it was impossible to

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<sup>315</sup> *Kelly*, 924 F.2d at 361. In language mirroring that of *Sierra Club v. Train*, the Court said that "an agency's interpretation of its own regulations is entitled to substantial deference and will ordinarily be accorded controlling weight unless clearly erroneous." *Id.* (citing *Sierra Club*, at 489). This is of course in accordance with *Chevron* deference. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984).

<sup>316</sup> *See Sierra Club*, 557 F.2d at 490 (quoting SANDS, *supra* note 311, § 45.12).

<sup>317</sup> *See Kelly*, 924 F.2d at 361.

<sup>318</sup> *See id.* at 360–61.

<sup>319</sup> *See id.* (holding that "the prescribed obligations are triggered only when the DEA official in question receives 'an allegation or complaint' concerning an employee").

<sup>320</sup> *See, e.g., id.* (stating that the agency charged with the duty to execute a regulation could exercise discretion determining whether such a duty arose in the first place by distinguishing complaints/allegations from mere gossip).

<sup>321</sup> *See cases cited infra* note 326.

<sup>322</sup> 207 F. Supp. 2d 1113 (E.D. Cal. 2002).

<sup>323</sup> *Id.* at 1118, 1121.

do so—did not make the policy discretionary.<sup>324</sup> On the other hand, in *Terbush v. United States*,<sup>325</sup> the Ninth Circuit stated that the existence of some mandatory language does not eliminate discretion when an objective's broader goals require an element of discretion.<sup>326</sup> Therefore, it seems that the broader context—which requires weighing, balancing, and judgment calls—can override mandatory language.<sup>327</sup> However, an “escape-hatch” clause that attempts to make everything ultimately discretionary will not necessarily undo a list of directives made with “Order” verbs and mandatory modals. Such was the case in *Navarette v. United States*, where an attempt to diffuse the specificity of a checklist by including some general terms was held to be an ineffective attempt to preserve discretion.<sup>328</sup>

In summary, courts will take into consideration the purpose of the alleged rule, as well as its broader objectives and context, despite the tenor of the words used—whether they be mandatory words or precatory words. However, by and large, the semantic value of the verbs,<sup>329</sup> as well as that of the modals used, are honored when the terms are clear.

### 3. Specificity

By far, the degree of specificity involved is the most determinative of the three aspects of the essential condition used by courts to determine whether

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<sup>324</sup> *Id.* at 1120–22. In *Heinrich ex rel. Heinrich v. Sweet*, the alleged rule involved a mixture of precatory and mandatory language. 62 F. Supp. 2d 282, 324–25 (D. Mass. 1999). The court held that the situation permitted it to consult “informal indicia” in the form of correspondence to interpret a statement that “no substance known to be, or suspected of being . . . harmful . . . should be given to human beings . . . without informed consent.” *Id.* The evidence pointed to a mandate, which made the DFE inapplicable. *Id.*

<sup>325</sup> 516 F.3d 1125 (9th Cir. 2002).

<sup>326</sup> *Id.* at 1139–40; *see also* *Lopez v. U.S. Immigration & Customs Enf't*, 455 Fed. Appx. 427, 433 (5th Cir. 2011) (citing *Freeman v. United States*, 455 F.3d 326, 378 (5th Cir. 2008)) (“As this court has found, many policy statements couched in seemingly mandatory language ultimately present only ‘generalized precatory or aspirational language that is too general to prescribe a specific course of action for an agency or employee to follow.’”); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1131–32 (10th Cir. 1999) (“None of the four constitutes a ‘specific and mandatory requirement’ as this court’s precedents define that term. Instead, they all state general goals, or sets of objectives to balance, in precatory rather than mandatory language.”); *Magee v. United States*, 121 F.3d 1, 4 (1st Cir. 1997) (holding that a procedure involving the undertaking of a series of steps in order to make a decision did not constitute a particularized course of action); *Singh v. S. Asian Soc’y of George Washington Univ.*, 572 F. Supp. 2d 11, 14 (D.D.C. 2008) (citing *Fanoele v. United States*, 975 F. Supp. 1394, 1400 (D. Kan. 1997)) (holding that the use of “predominantly precatory language” invested discretion, not obligation, in the decision maker).

<sup>327</sup> *See* cases cited *supra* note 326.

<sup>328</sup> *See, e.g., Navarette v. United States*, 500 F.3d 914, 917–18 (9th Cir. 2007).

<sup>329</sup> *See supra* Part III.A.1.v.

a statement is a mandate or a guideline.<sup>330</sup> The other two aspects, form and language, play their roles, but the number of times courts have based their holding on matters of detail dwarfs all others. Indeed, the importance of specificity to mandates is fundamentally constitutive of them.

The courts have long said that the DFE will not apply if the statement in question is specific: "a general regulation or policy . . . does not remove discretion unless it specifically prescribes a course of conduct."<sup>331</sup> If the alleged rule consists of nothing more than broad generalities and high aspirations, without expressly and directly explaining how those aspirations are to take place, it remains at the level of platitude.<sup>332</sup> Like a resolution,<sup>333</sup> it expresses an intent to achieve a goal, or the adoption of a path that leads in a certain direction, but falls short of mandatory status.<sup>334</sup>

To caricature the point as a means of making it, platitudes such as "Be safe" and "Do good," however heartfelt, do not amount to orders of any type because they imply discretion in the means by which the "safe" can be accomplished or the "good" can be employed. In other words, if the statement stays at this level of abstraction, without a clear course of action that must be taken, the first prong of the DFE is not met.<sup>335</sup>

To put things in yet a third way—a principle *precedes* the mandate, and ultimately cannot be realized without it, but is not to be confused *with* the mandate.<sup>336</sup> "The quarters should be kept safe and operational at all times" is a principle or goal that cannot be realized without a definitive course of action that brings it to pass, such as directives to "lock all doors" and "conduct

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<sup>330</sup> See, e.g., *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

<sup>331</sup> *Kelly v. United States*, 241 F.3d 755, 761 (9th Cir. 2001); see also *Baker v. San Carlos Irrigation Project Dist.*, 176 F. Supp. 2d 970, 977 (D. Ariz. 2001) (holding that a directive must be mandatory and sufficiently specific), *rev'd*, 58 Fed. Appx. 303 (9th Cir. 2003). The *Baker* court is inexact in its phraseology when it uses the conjunctive "and"; one of the factors—if not the most important factor—in deciding mandatoriness is specificity. *Baker*, 176 F. Supp. 2d at 977. It is an aspect of mandatoriness, not a separate requirement. *Id.*

<sup>332</sup> See, e.g., *Terbush v. United States*, 516 F.3d 1125, 1132 (9th Cir. 2008) ("[The] provision is not a mandatory and specific policy, and the language itself implicates the NPS's broader mandate to balance access with conservation.").

<sup>333</sup> See *supra* text accompanying notes 144–46 (discussing the nature of a "resolution").

<sup>334</sup> The list of cases that have found language too broad to comprise a mandate are numerous. See, e.g., *Sabow v. United States*, 93 F.3d 1445, 1452–53 (9th Cir. 1996) (finding the language of the Naval Investigative Service investigation guidelines too broad to compromise a mandate); *Blackburn v. United States*, 100 F.3d 1426, 1430–33 (9th Cir. 1996) (finding the NPS policy guidelines too broad to compromise a mandate); *Valdez v. United States*, 56 F.3d 1177, 1179–80 (9th Cir. 1995) (finding the NPS policy guidelines too broad to compromise a mandate).

<sup>335</sup> See cases cited *supra* note 326.

<sup>336</sup> In this context, a principle of some sort is a preparatory condition to a mandate.

monthly maintenance checks.<sup>337</sup> Without the latter, there is discretion in the implementation, a fact that is intrinsically at odds with obligatory conduct.<sup>338</sup>

A legal articulation of the above is found in *Shansky v. United States*,<sup>339</sup> in which the First Circuit explains the difference between a “goal” and a “mandate”:

[The Plaintiff] finds succor in a broadly worded expression of a general policy goal contained in the Park Service’s operating manual to the effect that “[t]he saving of human life will take precedence over all other management actions.” But this passage does not specifically prescribe that any particular safety measure be employed at any particular place or in any particular facility. To the contrary, it suggests that the Park Service and its functionaries will have to make discretionary judgments about how to apply concretely the aspirational goal embedded in the statement. Statements made at this level of generality do not satisfy . . . specific prescription requirement. Were the law otherwise, the discretionary function exception would be a dead letter.<sup>340</sup>

The Tenth Circuit also makes the distinction in *Tippett v. United States*,<sup>341</sup> in which the court in a more succinct fashion states that “[t]he general goal of protecting human life in the nation’s national parks is not the kind of specific mandatory directive that operated to divest [the park ranger] of discretion in the situation he faced.”<sup>342</sup> Obviously, a generality so broad that it requires

<sup>337</sup> See, e.g., *Valdez*, 56 F.3d at 1180 (“While the said policy guidelines certainly outline general policy goals regarding visitor safety, the means by which NPS employees meet these goals necessarily involves an exercise of discretion.”).

<sup>338</sup> See cases cited *supra* note 326.

<sup>339</sup> 164 F.3d 688 (1st Cir. 1999).

<sup>340</sup> *Id.* at 691 (citations omitted).

<sup>341</sup> 108 F.3d 1194 (10th Cir. 1997).

<sup>342</sup> *Id.* at 1197; see also *Green v. United States*, 630 F.3d 1245, 1250 (9th Cir. 2011) (holding that regulations did not proscribe a specific course of action for lighting backfires); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1132 (10th Cir. 1999) (finding the alleged mandate “neither elaborates [a] general command nor specifies how to perform the discretionary task of balancing timeliness, efficiency, and return. The final passage lists four broad considerations to balance, in an unspecified calculus, without specifying a course of action for the complex task of managing asset sales.”); *C.R.S. ex rel. D. B. S. v. United States*, 11 F.3d 791, 796 (8th Cir. 1993) (holding that blood screening measures described no particular type of screen, and, therefore, left the decision open to discretionary exercise); *Baum v. United States*, 986 F.2d 716, 721–22 (4th Cir. 1993) (holding that the legislative advisement for the Park Service “to provide a . . . safe[ ] and suitable approach for passenger-vehicle traffic” was “general, sweeping language . . . insufficient to remove questions of design and construction”); *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1540–41 (10th Cir. 1992) (holding that a set of “minimum attainments” were not mandates because they set no course of action); *Walding v. United States*, 955 F. Supp. 2d 759, 786–87 (W.D. Tex. 2013) (holding that criminal laws were “written at a level of generality such that they

discretion to implement is a matter of judgment, and a matter of judgment is necessarily a matter of policy, which the DFE protects from being second-guessed.<sup>343</sup> Excessive breadth, therefore, leads not only to a failure of the first prong, but also to a failure of the second prong of the DFE.<sup>344</sup>

Another way that courts have articulated, however circuitously, the need for specificity in a mandate is by making the point that a mandate must have a certain scope. In other words, there must be both a clear course of action for actuating a principle and the principle must be capable of actuation. In *Deuser v. Vecera*,<sup>345</sup> an Eighth Circuit opinion, park rangers released a drunk man that they had detained during a city festival.<sup>346</sup> He later wandered onto a highway and was killed.<sup>347</sup> The decedent's family sued under the FTCA, claiming that the Park Service did not have the authority to terminate an arrest, once made.<sup>348</sup> In holding that the service's standard operating procedures did not mandate a policy in these circumstances, the Eighth Circuit said:

It would be impossible to put into a manual every possible scenario a ranger might encounter, and then to decide in advance for the ranger whether an arrest should be made and, once made, under what circumstances an arrest could be terminated. Just as the rangers had discretion to decide (within constitutional limits, of course) when and whether to make an arrest, so they had—and here exercised—discretion to terminate an arrest without charging the suspect. Under the terms of the Handbook, that discretion became even broader during the Fair. We hold that terminating Deuser's arrest, that is, releasing him without charging him with a crime, was a

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fail to prescribe a nondiscretionary course of action"). *But see* *McMichael v. United States*, 856 F.2d 1026, 1033 (8th Cir. 1988) (holding that a department policy prescribed a specific course of action to take in an electrical storm); *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986) (holding that a policy set forth a specific course of action for the elevation of electrical lines); *Harvey v. Bd. of Comm'rs of Wabash Cnty.*, 416 N.E.2d 1296, 1299 (Ind. Ct. App. 1981), *abrogated by* *City of Beech Grove v. Beloat*, 39 N.E. 3d 691 (Ind. Ct. App. 2015) (holding that adherence to a traffic manual was prescribed by statute).

<sup>343</sup> See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 798 (1984) (stating that the DFE's legislative intent was to protect the government from "second-guessing" when it made decisions "grounded in social, economic, and political policy").

<sup>344</sup> See *United States v. Gaubert*, 499 U.S. 315, 324 (1991) ("[I]f a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.").

<sup>345</sup> 139 F.3d 1190 (8th Cir. 1998).

<sup>346</sup> *Id.* at 1192.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

discretionary function reserved to the judgment of the rangers.<sup>349</sup>

The point also relates to the essential condition, in that a mandate cannot be recognizable as such if it is impossible to articulate in a set of terms.<sup>350</sup> This seems to admit something essential about directives: they can anticipate a certain decided set of circumstances related to a principle that is of a certain scope.<sup>351</sup> What a police officer or park ranger must do in *every* circumstance cannot possibly be articulated;<sup>352</sup> it is highly unlikely that what a police officer or park ranger must do in circumstances involving all intoxicated or belligerent detainees can be mandated;<sup>353</sup> it is more likely that what a police officer or park ranger must do when a belligerent detainee has a weapon and is threatening to shoot *can* be articulated.<sup>354</sup> This makes a mandate of such a statement made by the proper authority, to the proper audience, in the proper form, using the proper language, and without any controverting sincerity evidence.<sup>355</sup>

As stated above, when there is a stated set of factors for the government to apply in what is consummately a governmental function—weighing, balancing, and judging—the circumstances are ripe for a government victory.<sup>356</sup> In *Pope & Talbot, Inc. v. Department of Agriculture*,<sup>357</sup> the plaintiff argued that the government was required to close a forest to public access;<sup>358</sup> by not doing so, the plaintiff's land was damaged.<sup>359</sup> The applicable plan for closure of the woods contained a specific five factor assessment.<sup>360</sup> With regard to those factors, the district court of Oregon reasoned as follows:

The existence of the five factors does not require that the forest be closed. Rather, the five factors would have to exist to completely close the woods, but the mere existence of these factors does not mandate that the woods be closed, just that the threshold requirement has been met and the woods may be closed. The final decision whether to close the forest remained

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<sup>349</sup> *Id.* at 1195.

<sup>350</sup> *See supra* Part III.A.1.iv (discussing essential conditions).

<sup>351</sup> *See generally Deuser*, 139 F.3d at 1190.

<sup>352</sup> *See, e.g., id.* at 1195.

<sup>353</sup> *See, e.g., id.*

<sup>354</sup> *See, e.g., McMichael v. United States*, 856 F.2d 1026, 1033 (8th Cir. 1988) (stating that “the Department policy prescribed a course of action for the inspector to follow in the event of any electrical storm, and the inspector had no choice but to adhere to that directive”).

<sup>355</sup> *See supra* Part III.A.1.iv (describing the felicity conditions for a mandate).

<sup>356</sup> *See case cited supra* note 309.

<sup>357</sup> 782 F. Supp. 1460 (D. Or. 1991).

<sup>358</sup> *Id.* at 1461.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 1464.

with Mr. Grace, depending upon his evaluation and weighing of the public's need for open forests and the costs entailed with closing the forests against the danger of fire.<sup>361</sup>

Regardless of how specific the factors were, they *need not* lead to closure.<sup>362</sup> Specificity is a hallmark of mandates,<sup>363</sup> but other features can undo the mandatoriness of the statement.<sup>364</sup>

However, an argument that answers the "weighing of factors" circumstances was set out by the Eighth Circuit in *Appley Brothers v. United States*.<sup>365</sup> There, the court distinguished between the discretion to issue a revocation order after consulting certain data and a mandate to consult that data:

In conducting the August 5 inspection, the inspectors violated not only the mandatory requirements of the grain inspector's handbook, but also the stated purpose of their inspection. The inspectors had no discretion on August 5 as to whether they should check to see if Bird Grain had cured the deficiencies found on April 1 and to issue a new TW-125 reporting that information . . . . The fact that there is no written policy mandating that the U.S.D.A. revoke Bird Grain's license if inspectors discover substantial shortages is not fatal to Appley Brothers' argument that the discretionary function does not apply. Although the revocation order itself is discretionary, the inspectors' failure to see if Bird Grain cleared the violations noted in the April 1 report prevented the Secretary from exercising discretion to decide whether to revoke Bird Grain's license.<sup>366</sup>

In other words, while the inspector retained the discretion to issue the order once he had made the necessary check, he had no authority *not* to make the check.<sup>367</sup> Regardless of how much weighing and judging the government must do, if the mandate requires *that* the government weigh and judge, it must do so.<sup>368</sup> Failure will result in the inapplicability of the DFE.<sup>369</sup>

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<sup>361</sup> *Id.* at 1465.

<sup>362</sup> *See id.* at 1464–65.

<sup>363</sup> *See Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (“[T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.”).

<sup>364</sup> *See cases cited supra* note 342.

<sup>365</sup> 7 F.3d 720 (8th Cir. 1993).

<sup>366</sup> *Id.* at 725–26 (citations omitted).

<sup>367</sup> *See id.*

<sup>368</sup> *See id.* (indicating that before an inspector can exercise discretion, he has to conduct an inspection).

## V. A FACTORS APPROACH TO DISTINGUISHING MANDATES FROM GUIDELINES

As is apparent from the above discussion of the DFE, for some time the courts have implicitly, and unwittingly, relied upon the logic that underpins the linguistic distinctions explained in this Article. However, they have struggled to articulate a clear analytic framework for use in the tort claims area. This Article will now explain such a framework for the judiciary's use.

The scientific perspective provided by the linguistic analysis of speech acts reveals that certain facts supply information necessary as to whether a particular statement is a mandate or a guideline.<sup>370</sup> Their credibility is owing to the fact that they agree with the felicity conditions that establish mandates and distinguish them from guidelines.<sup>371</sup> As such, this information can be formed into a set of factors for use by both practitioners and judges—the former when arguing that a statement was or was not a mandate, the latter when deciding the same. The factors are as follows:

1. Parties: Who made the statement and to whom was the statement made? Did the speaker have the requisite authority to speak? Did the audience have the requisite authority and power to carry out the alleged mandate?

This factor corresponds to the preparatory condition for a mandate.<sup>372</sup> It underlies the rationale of those cases described in Part IV that turn upon the speaker and the audience. Unless the proper parties are involved, a statement cannot be a mandate.

2. Custom and Usage: How was the alleged mandate interpreted by the relevant parties? How long was this understanding in place? How was the alleged mandate enforced?

This factor corresponds to the sincerity condition for a mandate, and is informed by means of the statement's perlocutionary effect.<sup>373</sup> It underlies the rationale of those cases described in Part IV that turn upon the way that the statement was considered by the parties and the attitudes they took toward it. Failure to treat a mandate *as* a mandate can compromise an appreciation of its nature.<sup>374</sup>

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<sup>369</sup> See, e.g., *id.*

<sup>370</sup> See *supra* Part IV.

<sup>371</sup> See *supra* Part III.A.1.iv (describing felicity conditions).

<sup>372</sup> See *supra* Parts III.A.1.iv, IV.A.

<sup>373</sup> See *supra* Parts III.A.1.iii, III.A.1.iv, IV.B.

<sup>374</sup> See *supra* Part III.A.1.iii (discussing the recognizability of an utterance).



3. Expression: How formal were the means by which the alleged mandate was communicated? What kind of language was used (mandatory or precatory)? How specific was the alleged mandate?

This factor corresponds to the essential condition for a mandate.<sup>375</sup> It underlies the rationale of those cases described in Part IV that turn upon the language used, the means of its conveyance, and the clarity of its expression. A mandate must be recognizable as such—the form it takes, the words that comprise it, and the specificity with which it is related, are key to that recognition.

Although all of the above factors are relevant to the mandate/guideline inquiry, some points can be made about how courts have applied and prioritized them. Evidence as to the expression of the mandate has held most sway in finding a statement to be a mandate, with specificity being the most determinative aspect, followed by language, and then form.<sup>376</sup> While the importance of custom and usage can be attenuated by a clear expression of the mandate, when that clarity is lacking, courts consult prior history to resolve the ambiguity.<sup>377</sup> And although a challenge on the grounds that the proper parties were not involved in the communication of the mandate is rare, it is a significant factor. Still, a history of custom and usage whereby an alleged mandate was treated as such *despite* the fact that the rule-giver did not *actually* have the authority to hand down the rule, or the rule-performer did not *actually* have the power to actuate it, would logically weigh towards finding a mandate on estoppel grounds.<sup>378</sup>

Of course, use of these factors might also be seen along a continuum akin to the formalist vs. instrumentalist approaches to statutory interpretation.<sup>379</sup> If the “plain meaning” of the words is clear, no other evidence need be consulted, or so goes the argument.<sup>380</sup> The degree to which the other factors are taken into account—be they prior history, evidence of authority,

<sup>375</sup> See *supra* Part III.A.1.iv.

<sup>376</sup> See cases cited *supra* note 342.

<sup>377</sup> See, e.g., *Kelly v. United States*, 924 F.2d 355, 360–61 (1st Cir. 1991) (examining the customary treatment of a rule in question to determine its nature).

<sup>378</sup> See *supra* notes 254–57 and accompanying text.

<sup>379</sup> Another parallel to this factors approach would be contractual interpretation. From a policy standpoint, ambiguities in a contract are typically construed against the drafter, as he “controls the pen.” This is the doctrine of *contra proferentem*, of ancient origin. See generally RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981); David Horton, *Flipping The Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431 (2009). Risk allocation also provides a similar parallel: “[R]isk is best borne by the party who makes the mistake than by some wholly innocent party.” E. ALLAN FARNSWORTH, ALLEVIATING MISTAKES: REVERSAL AND FORGIVENESS FOR FLAWED PERCEPTIONS 82 (2004) (quoting RICHARD EPSTEIN, TORTS § 1.4.2, at 13 (1999)).

<sup>380</sup> See Steven W. Feldman & James A. DeLanis, *Resolving Contractual Ambiguity in Tennessee: A Systematic Approach*, 68 TENN. L. REV. 73, 80–81 (2000).

etc.—would be akin to seeking elucidation from legislative history and other external determinants.<sup>381</sup> Further, the degree to which specificity and clarity can be gleaned from other sources is akin to courts deciding to consult the canons of statutory interpretation, such as *Expressio unius* (“the express mention of one thing excludes all others”), *In pari materia* (“meaning can be gleaned from other rules upon the same matter or subject”), and *Noscitur a sociis* (“a word is known by the company it keeps”).<sup>382</sup>

Hopefully, the factors set forth here will provide a clear and precise tool by which courts can approach the often complex, muddled area of determining when a statement should be classified as a rule or a suggestion, as a “should” or a “must.”

## VI. CONCLUSION

It is worth noting that often when courts hold that the DFE does not apply, they say that “the statement told X to do something, but did not tell him *how* to do it,” and therefore X acted “at his discretion.”<sup>383</sup> What the courts should be saying is that because it was not clear what X should do, he was not given a mandate; the DFE does not apply, but for the reason that anything so generally stated stays at the level of the goal, the objective, the guideline. Mandates must be clear, stated to the right party, by the right party, through the right means, and treated *as* mandates by all involved. In so doing, they comport with what the law, and language, requires them to be.

The court’s task is a difficult one, balancing the needs of plaintiffs, whose injuries are no less grave simply because the tortfeasor is the government, against the needs of government agencies, whose tasks of public service lie somewhere between an art and a science, between absolute duties and subjective interpretations. When immunity is at stake, the costs are always high; as such, a careful, scientific determination of language can benefit not only interpreters but also drafters, providing a precise articulation of what is expected and who is accountable, and thereby also benefitting the public at large, whose safety and well-being are served in the process.

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<sup>381</sup> See Ellen P. Aprill & Nancy Staudt, *Theories of Statutory Interpretation (and Their Limits)*, 38 LOY. L.A. L. REV. 1899, 1900–01 (2005).

<sup>382</sup> See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521–35 (1960).

<sup>383</sup> See, e.g., *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1131–32 (10th Cir. 1999) (holding that “[f]our of the five requirements to maintain asset values, avoid sales that reduce franchise value, maximize value, and schedule sales based on various concerns . . . state[d] general goals . . . in precatory rather than mandatory language”).