

CALLING BALLS AND STRIKES IN PRISONER LITIGATION

“A loose vocabulary,” John Chipman Gray once wrote, “is a fruitful mother of evils.”¹ One of the loosest words in legal vocabulary is also one of its most commonly deployed: dictum. Dictum is slippery. As any first-year student knows, it can be tough to pin down the holding — and clear away the dicta — in any given case. Scholars have said as much for decades.² So have judges.³ Such debate is to be expected in a system that prizes stare decisis; the borderline of dictum and decision is, after all, what demarcates the scope of one judge’s power to bind another.⁴

The loose definition of dictum also plays a role in a more prosaic debate. That debate centers around a provision of the Prison Litigation Reform Act of 1995⁵ (PLRA). Under the PLRA, indigent prisoners may file suit in forma pauperis (IFP) and thus proceed without prepaying standard filing fees.⁶ But there is a catch. Under § 1915(g), a district court must deny IFP status if the prisoner has brought three or more actions that were dismissed on specified grounds (accruing three “strikes”).⁷ For those in prison, it is no exaggeration to write that this provision — the three-strikes rule — determines who holds “the key to the courthouse door.”⁸

On one § 1915(g) issue, the courts of appeals agree. When a district court dismisses a prisoner’s lawsuit, it cannot insist that later courts count that dismissal as a strike.⁹ It is only later, when a prisoner files anew, that a binding strike call can be made. The current strike-counting court may not just “defer” to the earlier dismissal-ordering court’s “labeling of [the] dismissal as a strike.”¹⁰ It must “decide for itself.”¹¹

¹ John C. Gray, *Some Definitions and Questions in Jurisprudence*, 6 HARV. L. REV. 21, 21 (1892).

² See, e.g., Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1061 n.330 (2005).

³ See, e.g., BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 62–65 (2016).

⁴ Cf. *United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring) (“A judge’s power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word ‘hold.’”), *aff’d*, 449 U.S. 424 (1981).

⁵ Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of the U.S. Code).

⁶ 28 U.S.C. § 1915(a)(1).

⁷ See *id.* § 1915(g).

⁸ *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1153 (D.C. Cir. 2017) (Kavanaugh, J.).

⁹ See, e.g., *DeLeon v. Doe*, 361 F.3d 93, 95 (2d Cir. 2004) (per curiam); *Fourstar*, 875 F.3d at 1152; *Dooley v. Wetzel*, 957 F.3d 366, 377 (3d Cir. 2020); *Hill v. Madison County*, 983 F.3d 904, 906 (7th Cir. 2020) (Easterbrook, J.); *Simons v. Washington*, 996 F.3d 350, 352 (6th Cir. 2021) (Sutton, C.J.); *Gonzalez v. United States*, 23 F.4th 788, 790 (8th Cir.), *cert. denied*, 142 S. Ct. 2837 (2022); *Pitts v. South Carolina*, 65 F.4th 141, 145 (4th Cir. 2023) (Harris, J.).

¹⁰ *Fourstar*, 875 F.3d at 1153.

¹¹ *Id.* at 1149.

But on another issue, the courts of appeals are split. What happens if a district court does purport to call a strike at the time of dismissal (stating, for instance, that the dismissal “shall serve as a ‘strike’”¹² or that the prisoner “IS ASSIGNED a third ‘strike’ . . . and is barred from filing subsequent claims”¹³)? What if it includes that language not only in its opinion, but also in its formal order of judgment?¹⁴

All agree that language does not bind future courts, but uncertainty surrounds what (if any) effect the premature strike call may have. Is it dictum that an appellate court should just ignore? Or is it a faulty decision that appellate review must correct? The various answers to these questions can be organized into three categories:

THE PERMISSIVE APPROACH: In the Sixth and Eighth Circuits, such statements — whether in a court’s opinion or its judgment — are permissible. These courts have held that such strike calls are dicta and thus insulated from appellate review.¹⁵

THE INTERMEDIATE APPROACH: The Seventh Circuit distinguishes strike calls in judgments from those in opinions. Strike calls in orders of judgment “exceed[] the authority granted by statute” and must be vacated.¹⁶ Strike calls in opinions are permissible, “for opinions are just explanations.”¹⁷ Even if a strike call appears only in an opinion, however, the courts of appeals have jurisdiction to review it on the merits, as each one may “draw a future judge’s attention” and “induce the judge to deny *forma pauperis* status wrongly” in a future suit.¹⁸

THE STRICT APPROACH: In the Second, Third, and Fourth Circuits, all contemporaneous strike calls are impermissible and subject to vacatur on appellate review. These courts differ as to why. The Second and Third Circuits have focused on justiciability, holding that preemptive strike calls are unripe for adjudication.¹⁹ The Fourth Circuit has hedged on ripeness and instead has held that district courts lack statutory authority to make binding strike determinations.²⁰

This Note examines this split and sketches a path forward. It proceeds in three Parts. Part I provides background regarding in forma pauperis status and the PLRA. Part II sets forth the current landscape in the courts of appeals regarding strikes. Part III articulates an affirmative case for vacatur as the appropriate remedy. It contends that the

¹² *E.g.*, *Pitts v. South Carolina*, No. 20-cv-92, 2020 WL 4506681, at *4 (D.S.C. Aug. 5, 2020), *vacated in part*, 65 F.4th 141.

¹³ *E.g.*, Order ¶ 3, *Moment v. Jackson*, No. 16-cv-4040 (D. Md. Feb. 15, 2017), ECF No. 5.

¹⁴ *E.g.*, Order at 6, *Millsaps v. Franks*, No. 12-cv-203 (W.D.N.C. Jan. 15, 2013), ECF No. 4.

¹⁵ *See* *Gonzalez v. United States*, 23 F.4th 788, 790–91 (8th Cir.), *cert. denied*, 142 S. Ct. 2837 (2022); *Simons v. Washington*, 996 F.3d 350, 353–54 (6th Cir. 2021).

¹⁶ *Hill v. Madison County*, 983 F.3d 904, 906 (7th Cir. 2020).

¹⁷ *Id.*

¹⁸ *Id.* at 908; *see also id.* at 907–08.

¹⁹ *Dooley v. Wetzel*, 957 F.3d 366, 377 (3d Cir. 2020); *see also* *DeLeon v. Doe*, 361 F.3d 93, 95 (2d Cir. 2004) (per curiam).

²⁰ *Pitts v. South Carolina*, 65 F.4th 141, 146 (4th Cir. 2023).

debate thus far has ignored the core question in strike-calling cases: did the district court's language create a legal injury, cognizable under Article III, sufficient to support standing on appeal? In arguing that premature strike calls do create such an injury, it offers a field guide for distinguishing the different meanings of dictum and decision.

I. A BRIEF INTRODUCTION TO PRISON LITIGATION

In 1892, Congress enacted the first federal statute allowing litigants to file suit without the prepayment of fees.²¹ That law allowed any citizen to “commence and prosecute to conclusion” a lawsuit in federal court “without being required to prepay fees or costs, or give security therefor before or after bringing suit.”²² To qualify, a litigant was required to file “a statement under oath” attesting to his inability to pay and affirming his belief that “he is entitled to the redress he seeks.”²³ “[H]aving established courts to do justice to litigants,” the House of Representatives declared, it would not do to “admit the wealthy and deny the poor entrance to them to have their rights adjudicated.”²⁴

One hundred years later, Congress enacted the Prison Litigation Reform Act of 1995 to curb the flow of such lawsuits. By that time, concerns about the “unleashed” caseload “monster” had reached a fever pitch, as had fears that its insatiable hunger would soon overwhelm the federal courts.²⁵

One focus of reformers was prisoner-initiated litigation. “Over the past two decades,” Senator Bob Dole declared, the country had “witnessed an alarming explosion in the number of lawsuits filed by State and Federal prisoners.”²⁶ Most of those lawsuits were doomed to fail. In the year before the PLRA's enactment, more than 95% of such suits were either voluntarily dismissed or terminated before trial in favor of the defendant.²⁷

²¹ See Act of July 20, 1892, ch. 209, 27 Stat. 252. In enacting this statute, Congress followed a storied tradition, established as early as the fifteenth century, of allowing poor litigants to forgo typical filing fees. See Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1486 (2019) (citing An Acte to Admytt Such P[er]sons as Are Poore to Sue In Forma Paup[er]is 1495, 11 Hen. 7 c. 12 (Eng.)).

²² Act of July 20, 1892, 27 Stat. at 252.

²³ *Id.*

²⁴ H.R. REP. NO. 52-1079, at 1 (1892).

²⁵ See, e.g., Robert S. Want, *The Caseload Monster in the Federal Courts*, 69 A.B.A. J. 612, 615 (1983) (“[S]tatistics reveal that a monster is loose in the federal courts. Fed by 20,000 to 25,000 new cases each year, its rampant growth will not soon slow down.”).

²⁶ 141 CONG. REC. 14570 (1995) (statement of Sen. Robert Dole).

²⁷ See Margo Schlanger, *Trends in Prisoner Litigation, As the PLRA Approaches 20*, 28 CORR. L. REP. 69, 84 tbl.3 (2017) (giving figures for fiscal year 1995); see also Molly Guptill Manning, *Trouble Counting to Three: Circuit Splits and Confusion in Interpreting the Prison Litigation Reform Act's “Three Strikes Rule,”* 28 U.S.C. § 1915(g), 28 CORNELL J.L. & PUB. POL'Y 207, 212–13 (2018) (citing examples of frivolous litigation). For discussion of the PLRA's impact in the immediate wake of its enactment, see generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

The PLRA “contain[ed] a variety of provisions . . . to bring this litigation under control.”²⁸ As one of its sponsors, Senator Orrin Hatch, was at pains to explain, the PLRA was not aimed at “prevent[ing] inmates from raising legitimate claims.”²⁹ Instead, the law was designed to “reduce the quantity and improve the quality of prisoner suits.”³⁰

Two of its most significant reforms were to the receipt of IFP status. First, for those prisoners who are permitted to file IFP, the PLRA added payment requirements to ensure those fees would be paid over time. Under § 1915(b), prisoners are required to “pay an initial partial filing fee” out of their prisoner trust accounts, followed by further payments in monthly installments.³¹ These payment requirements, Senator Jon Kyl explained, sought to realign potential litigants’ economic incentives, “forc[ing] prisoners to think twice about the case and not just file reflexively.”³²

The second reform was the creation of the three-strikes rule. Section 1915(g) provides:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.³³

Those prisoners who have incurred three strikes — and whose claim does not satisfy the narrow exception for “imminent danger” — must pay all filing fees upfront, no matter how meritorious their claim might turn out to be.³⁴

Given that the judicial function is to “call balls and strikes,”³⁵ one might think that a provision that requires courts to do just that would pose few, if any, conceptual difficulties. But that would be a mistake. Figuring out the strike zone has not been a simple task. Since the enactment of the PLRA in 1996, there have been numerous circuit splits on whether certain categories of dismissals qualify as strikes. The Court’s most recent decision on § 1915(g), *Lomax v. Ortiz-Marquez*,³⁶ was handed down in 2020. In *Lomax*, the Court resolved one circuit

²⁸ *Woodford v. Ngo*, 548 U.S. 81, 84 (2006).

²⁹ 141 CONG. REC. 27042 (1995) (statement of Sen. Orrin Hatch).

³⁰ *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

³¹ *Bruce v. Samuels*, 577 U.S. 82, 84 (2016).

³² 141 CONG. REC. 14572 (1995) (remarks of Sen. Jon Kyl).

³³ 28 U.S.C. § 1915(g).

³⁴ *Bruce*, 577 U.S. at 86. By statute, a party initiating a civil action must pay a fee of \$350, see 28 U.S.C. § 1914, a princely sum for many prisoners.

³⁵ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of then-Judge John G. Roberts, Jr.).

³⁶ 140 S. Ct. 1721 (2020).

split (whether a dismissal without prejudice qualifies as a strike) while reserving judgment on another (whether a *Heck*³⁷ dismissal qualifies as a strike).³⁸

One persistent yet underexamined area of confusion has been whether district courts may, consistent with the PLRA, issue strikes at the time of dismissal.³⁹ The next Part turns to the various approaches that courts of appeals have taken to address that question.

II. APPROACHES IN THE COURTS OF APPEALS

A. *The Permissive Approach: The Sixth and Eighth Circuits*

The Sixth and Eighth Circuits hold that district courts are free to issue contemporaneous strikes. These circuits hold that when district courts issue orders that purport to conclusively assess strikes, that declaration should be recharacterized as dictum. As a consequence, the courts of appeals are without jurisdiction to review such strikes at the time they are called.⁴⁰

³⁷ *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck*, a state prisoner may not use a suit under 42 U.S.C. § 1983 to mount a collateral attack on his conviction (for instance, through a claim that his initial prosecution proceeded without probable cause). See *id.* at 486–87; see also, e.g., *Thompson v. Clark*, 142 S. Ct. 1332, 1335 (2022).

³⁸ See *Lomax*, 140 S. Ct. at 1723–24, 1724 n.2; see also, e.g., *Coleman v. Tollefson*, 575 U.S. 532, 541 (2015) (resolving a circuit split as to whether a dismissal counts as a strike if appellate review of the dismissal has not yet concluded).

³⁹ The only prior discussion of this split in academic literature is a brief case comment published in the wake of the Sixth Circuit’s decision in *Simons v. Washington*, 996 F.3d 350 (6th Cir. 2021), which focuses on constitutional avoidance and was published before the Fourth and Eighth Circuits weighed in on the issue. See Emily O’Hara, Comment, *Calling Strikes: The Sixth Circuit’s Interpretation of the Prison Litigation Reform Act*, 63 B.C. L. REV. E. SUPP. II-80, II-90 to -93 (2022) (arguing in favor of the Sixth Circuit’s approach on the basis that it “harmonizes with the constitutional avoidance doctrine,” *id.* at II-94). But constitutional avoidance seems unlikely to offer much guidance here. The question, after all, is not whether the three-strikes provision is constitutional; the question is how an appellate court should respond when a district court purports to call a contemporaneous strike. It would be quite the expansion to transform constitutional avoidance — an interbranch doctrine based, at least in theory, on deference to congressional enactments — into an intrabranched doctrine that encourages appellate courts to tread lightly with respect to lower courts’ decisions. See *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (“[Constitutional avoidance] is followed out of respect for Congress, which we assume legislates in light of constitutional limitations.”).

⁴⁰ Although this section focuses on those courts that have expressly addressed the question, courts in the Fifth and Eleventh Circuits often purport to determine that their dismissals are strikes within § 1915(g). See, e.g., *Thomas v. Nino*, No. 22-cv-252, 2023 WL 3973610, at *3 (S.D. Tex. June 13, 2023) (“It is ORDERED that this dismissal count as a ‘strike’ for purposes of 28 U.S.C. § 1915(g)”); *Gibson v. Kirkman*, No. 21-cv-63, 2021 WL 784321, at *1 (N.D. Fla. Mar. 1, 2021) (“[T]he Court agrees with the magistrate judge’s determination that this case should be dismissed under the ‘three strikes rule’ in 28 U.S.C. § 1915(g).”); *Jones v. Gonzales*, 831 F. App’x 146, 147 (5th Cir. 2020) (per curiam) (“Our dismissal and the district court’s dismissal count as strikes for purposes of 28 U.S.C. § 1915(g).”). Although the Court has cautioned that even its own “drive-by jurisdictional rulings . . . have no precedential effect,” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998), these decisions could be interpreted as placing the Fifth and Eleventh Circuits in alignment with the permissive approach.

The Sixth Circuit, in an opinion by Chief Judge Sutton, staked out this position in *Simons v. Washington*,⁴¹ decided in 2021. In that case, the district court dismissed the plaintiff's action on preliminary post-filing screening.⁴² The district court then "addressed whether the dismissal would count as a 'strike' under 28 U.S.C. § 1915(g)" and "ruled that it counted."⁴³

Like all the other courts of appeals to address the question, the Sixth Circuit noted that the district court's contemporaneous strike call could not bind future district courts.⁴⁴ Section 1915(g), Chief Judge Sutton explained, "calls on a fourth (or at least later) court that has before it a civil action brought by the prisoner to engage in a backwards-looking inquiry."⁴⁵ That "binding determination" is therefore "reserve[d]" for the later court.⁴⁶

Because the strike call was nonbinding in fact, it was a mere "warning" and "non-binding strike recommendation."⁴⁷ Recharacterized in that way, the district court's purported strike "amount[ed] to dicta."⁴⁸ And because the strike call was dictum, the court of appeals had "no basis" for evaluating it on the merits.⁴⁹

In a split decision handed down in early 2022, the Eighth Circuit joined the Sixth Circuit in *Gonzalez v. United States*.⁵⁰ Writing for the panel, Judge Stras held that the statutory question of whether a particular dismissal meets the criteria outlined in § 1915(g) is not presented unless and until the prisoner chooses to file a future civil action and seeks IFP status in that future action.⁵¹ Only a "fourth or later" judge," he concluded, "can determine whether a prisoner is trying to 'bring a civil action' after having already done so on 'three or more prior occasions.'"⁵²

Judge Stras explained that because the court had answered a question that was not presented, the correct approach was to think of it as "a warning" (a "non-binding comment" or "statement of dicta").⁵³ The plaintiff would "remain[] free," in a future action, "to argue that the

⁴¹ 996 F.3d 350.

⁴² See *Simons v. Washington*, No. 20-cv-170, 2020 WL 1861871, at *1 (W.D. Mich. Apr. 14, 2020), *aff'd*, 996 F.3d 350.

⁴³ *Simons*, 996 F.3d at 352.

⁴⁴ See *id.*; see also cases cited *supra* note 9.

⁴⁵ *Simons*, 996 F.3d at 352 (citing *Furnace v. Giurbino*, 838 F.3d 1019, 1029 (9th Cir. 2016)).

⁴⁶ *Id.* (citing *Coleman v. Tollefson*, 575 U.S. 532, 532 (2015)).

⁴⁷ *Id.* at 353.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 23 F.4th 788 (8th Cir.), *cert. denied*, 142 S. Ct. 2837 (2022).

⁵¹ See *id.* at 790.

⁵² *Id.* (quoting *Simons*, 996 F.3d at 352).

⁵³ *Id.* at 790–91.

dismissal does *not* count as a strike, regardless of what the district court told him.”⁵⁴

Because the *impact* of the strike call pertained only to a contingent future event, the panel held that the issue of “whether the called strike was *correct* is not fit for judicial decision.”⁵⁵ The court, in other words, “lack[ed] jurisdiction on appeal” to review it.⁵⁶ Judge Stras recognized that this position was “in tension with” and required him to “disagree with” the Second, Third, and Seventh Circuits.⁵⁷

B. *The Intermediate Approach: The Seventh Circuit*

In *Hill v. Madison County*,⁵⁸ decided in 2020, Judge Easterbrook offered something of a hybrid solution. He first joined the chorus in recognizing that § 1915(g) “commits to a later tribunal the toting up of ‘strikes’ in earlier suits and appeals.”⁵⁹ A contemporaneous strike call, then, binds no one.

He concluded, however, that a premature strike call could, under certain circumstances, require correction from the court of appeals. He focused on the technical difference between judgments and opinions.⁶⁰ A strike within a formal order of judgment is impermissible, because “judgments are legally binding.”⁶¹ Because § 1915(g) “leave[s] the effective decision to a later tribunal, . . . the district court exceeded its statutory authority by treating a ‘strike’ as part of the judgment.”⁶²

But a strike call within an opinion is a different matter, “for opinions are just explanations.”⁶³ Indeed, “[i]t makes good sense for a judge who believes a dismissal to come within the scope of § 1915(g) to include

⁵⁴ *Id.* at 790.

⁵⁵ *Id.* at 790–91.

⁵⁶ *Id.* at 791.

⁵⁷ *Id.* n.3.

⁵⁸ 983 F.3d 904 (7th Cir. 2020).

⁵⁹ *Id.* at 906.

⁶⁰ Under the Federal Rules of Civil Procedure, “[e]very judgment . . . must be set out in a separate document” — that is, separate to the opinion that one might otherwise read in the *Federal Supplement*. FED. R. CIV. P. 58(a). These documents tend to be short and to the point. Consider, for example, the sample judgment set out in the Federal Rules:

This action came on for [trial] [hearing] before the Court, Honorable John Marshall, District Judge, presiding, and the issues having been duly [tried] [heard] and a decision having been duly rendered,

It is Ordered and Adjudged

[that the plaintiff A. B. recover of the defendant C. D. the sum of ____, with interest thereon at the rate of ____ percent as provided by law, and his costs of action.]

[that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C. D. recover of the plaintiff A. B. his costs of action.]

FED. R. CIV. P. Form 32 (2006) (abrogated 2015).

⁶¹ *Hill*, 983 F.3d at 906.

⁶² *Id.*

⁶³ *Id.*

notice to that effect,” in order to assist future judges in “concentrat[ing] their attention on a subset of the prisoner’s suits and appeals.”⁶⁴

Judge Easterbrook then turned to the question of the court’s jurisdiction to review such strikes. Whether strike calls come in the opinion or the judgment, contemporaneous strike announcements are dicta, he wrote, “in the sense that they are not *binding* in future litigation.”⁶⁵ However, “they still aggrieve [the plaintiff] because they draw a future judge’s attention to this suit and may induce the judge to deny *forma pauperis* status wrongly.”⁶⁶ Such strike notices therefore “cause[] . . . an injury whether or not [they are] conclusive” and thus may be considered on the merits on appeal.⁶⁷ As a result, courts of appeals are free to consider the merits of strikes on appeal — vacating ones in the judgment and either approving or disapproving ones in the opinion.⁶⁸

C. *The Strict Approach: The Second, Third, and Fourth Circuits*

In *Dooley v. Wetzel*,⁶⁹ decided a few months before *Hill*, the Third Circuit gave the first full rationale for the view that contemporaneous strikes violate Article III. In an opinion by Judge Rendell, the Third Circuit observed that the PLRA’s text “contemplates a prisoner who attempts to bring a suit after having had three *prior* suits dismissed” and “thus envisions a determination at the time of the subsequent suit.”⁷⁰ Accordingly, the Third Circuit concluded that “[a]t the time of the dismissal of [the plaintiff’s] action, the question of whether that dismissal constituted a strike under § 1915(g) was premature.”⁷¹

And because the strike call was premature, Article III forbade it. The strike call “had no immediate consequence,” Judge Rendell noted, “because [the plaintiff] may never again seek to file a lawsuit” and the strike was thus “not ripe for adjudication unless or until [the plaintiff] seeks to file a fourth suit *in forma pauperis*.”⁷² Without ripeness, a prerequisite for federal court jurisdiction, these strikes “run afoul of Article III’s case and controversy requirement.”⁷³ Accordingly, district courts in the Third Circuit “lack[] the authority to prospectively label the dismissal a strike under the PLRA,” and such strikes must be vacated.⁷⁴

⁶⁴ *Id.* at 906–07.

⁶⁵ *Id.* at 908.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See id.* (“The contested statement in the district court’s judgment is vacated, and the equivalent statements in the opinions are disapproved.”).

⁶⁹ 957 F.3d 366 (3d Cir. 2020).

⁷⁰ *Id.* at 377.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 376.

In an earlier per curiam decision, the Second Circuit gestured at a similar approach. In *DeLeon v. Doe*,⁷⁵ decided in 2004, the Second Circuit instructed its district courts that premature adjudication of whether their own dismissals qualify as strikes “is not a proper part of the judicial function.”⁷⁶ Like its sibling circuits, the Second Circuit observed that whether a dismissal counts as a strike is not presented “until a defendant in a prisoner’s lawsuit raises the contention that the prisoner’s suit or appeal may not be maintained in forma pauperis pursuant to 28 U.S.C. § 1915.”⁷⁷ Thus, “[l]itigation over the issue at an earlier juncture would involve the courts in disputes that might never have any practical consequence.”⁷⁸ The Second Circuit vacated that aspect of the district court’s order.⁷⁹

Last year, the Fourth Circuit, in a split decision, reached the same bottom line as the Second and Third Circuits, albeit using a slightly different path. In *Pitts v. South Carolina*,⁸⁰ Judge Harris held that the district court’s “declar[ation] in its opinion that the dismissal of Pitts’s lawsuit ‘constitutes a strike’” must be vacated.⁸¹

The Fourth Circuit declined to “reach out [and] resolve [the] constitutional questions” presented by contemporaneous strike calls.⁸² Instead, because § 1915(g) “makes clear that the strike decision is solely for the district court considering a subsequent request for IFP status,” Judge Harris concluded “that courts are not authorized” by the PLRA “to make binding strike determinations when they dismiss prisoners’ complaints.”⁸³ Because the district court presented its strike call “as an actual adjudication of the issue,” it exceeded its jurisdiction and vacatur was appropriate.⁸⁴

III. DISENTANGLING DEFINITIONS OF DICTUM FROM QUESTIONS OF JURISDICTION

Much of the debate canvassed above might seem semantic. That’s because it is. But beneath the semantics — the definitions of dictum and decision — lies an important distinction that has thus far eluded the courts of appeals. Do these strikes inflict a legal injury or not?

The existence (or nonexistence) of legal injury lies at the foundation of the doctrine of appellate standing. Here, unlike other fields, standing

⁷⁵ 361 F.3d 93 (2d Cir. 2004) (per curiam).

⁷⁶ *Id.* at 95 (quoting *Snider v. Melindez*, 199 F.3d 108, 115 (2d Cir. 1999)).

⁷⁷ *Id.* (quoting *Snider*, 199 F.3d at 115).

⁷⁸ *Id.* (quoting *Snider*, 199 F.3d at 115).

⁷⁹ *See id.*

⁸⁰ 65 F.4th 141 (4th Cir. 2023).

⁸¹ *Id.* at 144–45 (quoting *Pitts v. South Carolina*, No. 20-cv-00092, 2020 WL 4506681, at *4 (D.S.C. Aug. 5, 2020), *vacated in part*, 65 F.4th 141).

⁸² *Id.* at 146.

⁸³ *Id.*

⁸⁴ *Id.* at 147.

brings order to the chaos. It explains why certain statements are appealable and why others are not. It explains why judges' decisions matter. And it helps guide how we should use the words that have been the subject of such fierce dispute.

It also explains how appellate courts should respond. If these strikes do inflict legal injury, the question becomes one of power. Is it within a lower court's jurisdiction to inflict such an injury? When a court lacks the power to operate in a particular domain, and inflicts legal injury nonetheless, its acts are *ultra vires* and must be vacated.

This Part starts with first principles on standing to appeal. It then applies those principles to clarify the distinction between dictum and decision, at least as those words are used in a jurisdictional sense. It finally turns to a critical evaluation of the courts of appeals' current approaches and argues for the vacatur of premature strike calls.

A. *Dictum, Decision, and Standing*

i. Standing to Appeal from First Principles. — Of the courts discussed above, all but the Seventh Circuit seem to assume that the label used to describe a strike — dictum or decision — determines their jurisdiction over the strike on appeal. The Fourth Circuit put it this way: “[W]e are authorized to review judgments, not dicta.”⁸⁵ So did the Sixth Circuit: “[W]e review judgments, not opinions.”⁸⁶ In the past, the Supreme Court has said much the same thing: “This Court reviews judgments, not statements in opinions.”⁸⁷ These courts did not dwell on why that might be the case. But the reason informs the label.

The issue is not metaphysics; the issue is Article III. To bring an appeal, a litigant must have standing.⁸⁸ One requirement of appellate standing is injury in fact: a putative appellant must have “experienced an injury” that is “fairly traceable to the judgment below.”⁸⁹ Just like standing generally, not all injuries are cognizable for this purpose. Instead, as the Court has recently clarified, such injuries must bear “a close relationship to harms traditionally recognized . . . in American courts.”⁹⁰

⁸⁵ *Id.* at 149.

⁸⁶ *Simons v. Washington*, 996 F.3d 350, 354 (6th Cir. 2021).

⁸⁷ *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam).

⁸⁸ *See, e.g., Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64 (1997) (explaining that standing “must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance”).

⁸⁹ *West Virginia v. EPA*, 142 S. Ct. 2587, 2606 (2022) (emphasis omitted) (quoting *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019)).

⁹⁰ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

In the appellate context, the prototypical injury is an adverse judgment — that is, the final disposition of the case.⁹¹ In most cases, a court's decision alters tangible legal rights in a way we readily recognize. A defendant might be forced to pay a particular sum in damages. Or a plaintiff might have his claim dismissed with prejudice. Or a term of incarceration might be imposed. And so on. The use of decretal language ("the Court holds" or "the motion is granted") matters here because judges' power comes from words. Judges have "neither force nor will."⁹² Instead, judges do things with words. "[I]f you are a judge and say 'I hold that . . .' then to say you hold is to hold."⁹³ Not so if you are just a weirdo in robes.

That is why litigants have standing to appeal the judgments of Judge Posner, but not those of Judge Judy, for even Judge Posner's erroneous judgments (rare as they are) have binding force.⁹⁴ As Chief Justice Marshall put it in 1809: "The judgment it gave was erroneous, but it is a judgment, and, until reversed, cannot be disregarded."⁹⁵ Or as the Connecticut Supreme Court explained a few years before: "[T]he decrees of a court . . . are conclusive, while they remain unreversed, on every question which they profess to decide."⁹⁶ When a judge resolves a dispute about rights, duties, and liabilities, the relationship between the litigants changes accordingly, no matter the judgment's merits.⁹⁷ That is, in one sense, a trite conclusion from principles of preclusion (about

⁹¹ See 1 HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 1 (St. Paul, W. Publ'g Co. 1891) (defining "a judgment" as "the determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such court, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist").

⁹² THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

⁹³ J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 88 (J.O. Urmson ed., 1962); see also *id.* at 152–54 (discussing "verdictives" — that is, those statements "typified by the giving of a verdict" — which "have an effect, in the law, on ourselves and on others"). Tom Stoppard's *Guildenstern* had much the same insight: "Words, words," he laments to Rosencrantz, "They're all we have to go on." TOM STOPPARD, ROSENCRANTZ AND GUILDENSTERN ARE DEAD 32 (1967).

⁹⁴ Now, to be sure, those who consent to Judge Judy's jurisdiction are (presumably) bound by her rulings. Cf. *Kabia v. Koch*, 713 N.Y.S.2d 250, 254–55 (Civ. Ct. 2000) (holding that Mayor Ed Koch's decisions on *The People's Court* constitute binding arbitral awards). But those who did not consent to Judge Judy's jurisdiction are not; her "judgments," unlike those of Judge Posner, are entitled to no presumption of validity. (And, for another thing, "Arbitrator Judy" is a less catchy title.)

⁹⁵ *Kempe's Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173, 186 (1809); see also, e.g., *Sibbald v. United States*, 37 U.S. (12 Pet.) 488, 492 (1838) ("A final decree in chancery is as conclusive as a judgment at law. Both are conclusive on the rights of the parties thereby adjudicated." (citations omitted) (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 355 (1816); *Hopkins v. Lee*, 19 U.S. (6 Wheat.) 109, 113, 116 (1821))).

⁹⁶ *Rockwell v. Sheldon*, 2 Day 305, 312–13 (Conn. 1806).

⁹⁷ See, e.g., *United States v. Leffler*, 36 U.S. (11 Pet.) 86, 100–01 (1837) ("If there be any one principle of law settled beyond all question, it is this, that whensoever a cause of action in the language of the law, transit in rem judicatam, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone forever.").

which more below). At a deeper level, however, it reflects the judiciary's special role to "make authoritative and final judgments in individual cases."⁹⁸ (Consider the historic availability of nominal damages to "vindicate and maintain" one's rights, even in the absence of a claim for prospective relief or meaningful compensation.⁹⁹ Judgments matter, both as a practical matter and as a symbol.)

With that background in mind, turn once more to the bar on appealing "dictum" — or, put another way, the bar on appealing the rationale for a court's disposition of a particular matter, as opposed to the particular decision it reached. That limitation makes sense, given that "the traditional concern of the courts at Westminster"¹⁰⁰ was the ultimate determination of rights, duties, and liabilities, rather than the first-order set of reasons given for that particular determination. Indeed, under the Judiciary Act of 1789, appellate review in the Supreme Court was limited to the writ of error.¹⁰¹ Such a writ allowed for correction of errors of law — but only those errors appearing on the face of a limited record of the judge's decisions in that case (for example, the award of a particular sum in damages, the jury charge, the denial of a dispositive pretrial motion, and so on).¹⁰² As the Court put it in 1821: "The question before an appellate Court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed."¹⁰³

This focus on appellate courts' traditional functions helps explain other features of appellate standing, too. Consider the limitations on

⁹⁸ William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1815 (2008) (tracing the relationship between "[t]he judicial Power" as granted by Article III and the practical powers exercised by courts).

⁹⁹ *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800 (2021) (quoting *Ashby v. White* (1703) 92 Eng. Rep. 126, 136; 2 Ld. Raym. 938, 953 (QB) (Holt, C.J., dissenting), *rev'd*, (1703) 1 Eng. Rep. 417; 1 Brown 62 (HL)); *see also* *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (holding that a plaintiff who is awarded nominal damages receives "relief on the merits of his claim").

¹⁰⁰ *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.)).

¹⁰¹ *See* *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 327–29 (1796) (opinion of Elsworth, C.J.). In 1803, Congress enabled appeals for cases in equity, *see* Judiciary Act of 1803, ch. 40, § 2, 2 Stat. 244, 244, which had a more flexible approach to error correction than did the writ of error, *see* Aaron-Andrew P. Bruhl, *Law and Equity on Appeal 10–19* (Dec. 13, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4566299 [<https://perma.cc/P348-FF34>].

¹⁰² *See* 1 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 213–14, 222–24 (1903) (discussing the writ of error's limitations); *cf.* 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 175, at 162 (1st ed. 1833) (describing the writ as an "inherent right of the subject"). While it is true that review upon a writ of error entailed a "duty . . . to give judgment on the whole record," *see* *Garland v. Davis*, 45 U.S. (4 How.) 131, 143 (1846), it is important to recall just how sparse the "record" was in the late eighteenth and early nineteenth centuries, containing a judge's key decisions and those legal rulings a party objected to and insisted on including in a "bill of exceptions," *see, e.g.,* Benjamin B. Johnson, *Essay, The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 809–12 (2022).

¹⁰³ *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821); *see also* *Williams v. Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827) (Marshall, C.J.) ("If the judgment should be correct, although the reasoning, by which the mind of the Judge was conducted to it, should be deemed unsound, that judgment would certainly be affirmed in the superior Court.").

who can appeal a judgment. In general, that privilege is limited to “parties to a lawsuit, or those that properly become parties.”¹⁰⁴ That is not because nonparties lack “a keen interest in the issue” litigated.¹⁰⁵ Indeed, in prominent cases — when, for instance, a plaintiff seeks to enjoin a federal regulation — nonparties often have far more of a practical stake than the nominal defendant.¹⁰⁶ But that is not enough. One’s rights must have been conclusively adjudicated for one to have standing on appeal.¹⁰⁷ The same logic explains why the Court can review a state court’s final judgment on the merits, even if the underlying litigation flunks federal justiciability requirements. A “state court decree” — even one entered in a case that a federal court could not otherwise hear — creates a “defined and specific legal obligation” and thus itself causes the kind of “direct injury” long cognizable under Article III.¹⁰⁸ So, too, why an appellee may, without taking a cross-appeal, defend the judgment on a basis opposed to “the reasoning of the lower court.”¹⁰⁹ An affirmance, the Court has explained, does not expand the appellee’s rights, even when the appellate court’s reasoning is more favorable to the appellee’s interests than what it received from the lower court.¹¹⁰ These examples all go to the general proposition that what matters for appellate purposes is how a court allocates rights and remedies between

¹⁰⁴ *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) (citing *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917)); *see also, e.g., Bayard v. Lombard*, 50 U.S. (9 How.) 530, 551 (1850) (“It is a well settled maxim of the law, that ‘no person can bring a writ of error to reverse a judgment who is not a party or privy to the record.’”).

¹⁰⁵ *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013).

¹⁰⁶ *See, e.g., Arizona v. City & County of San Francisco*, 142 S. Ct. 1926, 1928 (2022) (Roberts, C.J., concurring in dismissal of the writ as improvidently granted) (noting the use of various procedural “maneuvers” by new presidential administrations to “circumvent” judicial review).

¹⁰⁷ *See Williams v. Morgan*, 111 U.S. 684, 699 (1884) (requiring a “final decision of [one’s] right or claim”). How about *Devlin v. Scardelletti*, 536 U.S. 1 (2002), in which the Court upheld the ability of some nonparties (nonnamed class members) to appeal particular orders (the district court’s approval of a settlement)? *See id.* at 14. That exception proves the rule. The Court’s decision in *Devlin* was predicated on the fact that such nonparties are “bound by the judgment,” which conclusively determined their “legal rights.” *Id.* at 7.

¹⁰⁸ *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617–18 (1989). In a recent case, Australia’s apex court approached the issue of appellate standing through a similar lens. There, the High Court held that the Australian Constitution’s Chapter III (its equivalent of Article III) required a live “dispute as to legal rights” for the exercise of appellate jurisdiction to be proper. *AZC20 v Minister for Immigr, Citizenship, Migrant Servs & Multicultural Affs* [2023] HCA 26 ¶ 92 (Austl.) (judgment of Edelman, J.); *see also id.* ¶ 35 (judgment of Kiefel, C.J. and Gordon & Stewart, JJ.) (similar). As Chief Justice Kiefel, Justice Gordon, and Justice Stewart explained:

An appeal is against orders, not reasons for judgment. The respective rights, duties or liabilities of the parties have been determined by the orders that have been made by the court below There has been an exercise of judicial power; the whole or part of the controversy between the parties has been quelled. . . . The question on appeal and for determination on appeal is whether the orders of the primary judge should be affirmed, varied or reversed — that is, whether the appeal should be allowed and, if so, what orders should be made in the place of the primary judge’s orders.

Id. ¶¶ 34–35 (footnotes omitted).

¹⁰⁹ *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924).

¹¹⁰ *See id.* at 435–36.

particular parties — not the reasons it advances for doing so, nor the impact those reasons might have in future.¹¹¹

2. *Redefining Decisions and Dictum.* — The principle recited above — that a party is entitled to appeal from a court’s adverse decision — helps clarify the meaning of “judgment” and “dictum,” at least in this context. Of course, the words themselves matter less than what those words imply.

But start with the words themselves. When a judge describes something as “dictum,” he likely has one of two meanings in mind. One is present tense; the other is past tense. Sometimes, a court hints at how it might apply a particular rule to a case that is not before it. This is dictum that is not couched as a holding — instead, it is dictum offered (sometimes expressly, but normally implicitly) as dictum. (Hence, present-tense dictum.) One well-known example is *Carolene Products*’s footnote four, in which Justice Stone advocated heightened judicial scrutiny in certain future cases.¹¹² Other times, dictum is used as a label to discount a past court’s statement about its decision.¹¹³ This is dictum that was, at one point, couched as a holding. (Hence, past-tense dictum — that is, dictum that was once decretal.) Take, for example, Chief Justice Marshall’s partial reversal in *Cohens v. Virginia*¹¹⁴ of his position in *Marbury v. Madison*¹¹⁵ that there can be no overlap between the Court’s original jurisdiction and its appellate jurisdiction.¹¹⁶ As he candidly admitted in *Cohens*, “some expressions” in “the reasoning of the Court” in *Marbury* “go far beyond” what “the case decided.”¹¹⁷

¹¹¹ For discussion of *Camreta v. Greene*, 563 U.S. 692 (2011), see *infra* section III.B.2, pp. 1177–79.

¹¹² See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that “more exacting judicial scrutiny” might apply to legislation “which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities” but noting that “[i]t is unnecessary to consider now” the details of such a rule).

¹¹³ Cf. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 377 (1996) (“[D]ictum is what can be ignored by a later court.”).

¹¹⁴ 19 U.S. (6 Wheat.) 264 (1821).

¹¹⁵ 5 U.S. (1 Cranch) 137 (1803).

¹¹⁶ Explanation of the reversal requires a brief detour. In *Marbury*, Chief Justice Marshall explained that Congress does not “remain[] at liberty to give [the Court] appellate jurisdiction where the Constitution has declared [its] jurisdiction shall be original” and vice versa. 5 U.S. (1 Cranch) at 174. In *Cohens*, the Court was presented with a criminal case prosecuted by the Commonwealth of Virginia. Given that the Court has original jurisdiction over “all Cases . . . in which a State shall be Party,” U.S. CONST. art. III, § 2, cl. 2, Virginia argued that, per *Marbury*, “if this Court could entertain jurisdiction of the case at all, it must be *original*, and not *appellate* jurisdiction,” *Cohens*, 19 U.S. (6 Wheat.) at 300 (argument of counsel). Chief Justice Marshall rejected Virginia’s argument, explaining that “the single question before the Court” in *Marbury* “was[] whether the legislature could give this Court original jurisdiction in a case in which the [C]onstitution had clearly not given it.” *Id.* at 400 (majority opinion). Although the “principle” stated in *Marbury* was “generally correct,” he continued, it was given “in terms much broader than the decision” and must be cabined to its proper scope. *Id.* at 401.

¹¹⁷ *Cohens*, 19 U.S. (6 Wheat.) at 400.

To the extent that the twin definitions of “dictum” are useful here, it is sensible to keep our distinctions straight. The strike calls at issue here are (or, more accurately, will be) past-tense dictum, as a later court should feel free to ignore the earlier court’s statements. But they are not present-tense dictum. When a judge calls a strike, whether in the judgment or the accompanying opinion, he purports to decide the matter once and for all. A few examples suffice: “[I]t is . . . hereby ordered . . . [the prisoner] IS ASSIGNED a ‘second strike’ pursuant to 28 U.S.C. § 1915(g).”¹¹⁸ “The Court ORDERS that this dismissal shall count as a ‘strike’ for purposes of 28 U.S.C. § 1915(g).”¹¹⁹ “[T]his Court holds that this action is indeed a ‘strike’ under Section 1915(g).”¹²⁰ That is decretal language, plain and simple; it is language that imposes a particular legal disability upon a particular party, no less than the words “with prejudice” create a particular legal disability upon a party whose complaint has been dismissed.

Whatever label one uses, then, what matters for present purposes is that these strikes *purport* to *bind* the plaintiff moving forward. In that sense, a premature strike creates a legal injury, just like any other adverse judgment; until vacated, after all, it is entitled to a “presumption[] in favour of . . . regularity.”¹²¹ The fact that a court is wrong to issue such a strike (and that the strike may be a nullity in a later action) does not insulate it from appellate correction — at least, not on standing grounds. It would be odd if only the most improper judgments — those judgments that are “so plainly beyond the court’s jurisdiction” as to lack preclusive effect¹²² — were not subject to review, or considered so out of bounds as to not cause injury at all. Indeed, at common law, such judgments were considered so outrageous as to warrant the issuance of a writ of prohibition, which required a lower court to stop exercising a jurisdiction that it could not lawfully exercise.¹²³ That the lower court’s ultimate judgments would have been null and void anyway — as all

¹¹⁸ Blankumsee v. Maryland, No. 19-cv-1324, 2020 WL 5076051, at *4 (D. Md. Aug. 27, 2020).

¹¹⁹ Pratt v. Martinez, No. 21-cv-100, 2022 WL 584269, at *1 (S.D. Tex. Feb. 24, 2022), *aff’d*, No. 22-40274, 2023 WL 3818380 (5th Cir. June 5, 2023).

¹²⁰ Johnson v. Woelkers, No. 10-cv-1207, 2010 WL 1337223, at *1 (N.D. Ill. Mar. 30, 2010).

¹²¹ Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 11 (1799).

¹²² RESTATEMENT (SECOND) OF JUDGMENTS § 12 (AM. L. INST. 1982).

¹²³ See JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES: EMBRACING MANDAMUS, QUO WARRANTO, AND PROHIBITION §§ 762–764, at 549–50 (Chicago, Callaghan & Co. 1874) (“[The writ of prohibition is] an extraordinary judicial writ, issuing out of a court of superior jurisdiction and directed to an inferior court, for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested. . . . [It is] of very ancient origin, and it may be said to be as old as the common law itself.”); see also James E. Pfander, *Judicial Review of Unconventional Enforcement Regimes*, 102 TEX. L. REV. (forthcoming 2024) (manuscript at 12–16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4403476 [<https://perma.cc/3XBS-278S>] (discussing the use of the writ of prohibition in the early Republic).

judgments without jurisdiction were at the Constitution's framing¹²⁴ — did not factor into the equation. When a court decides a particular claim adversely to one party, it creates a legal injury, whether it had jurisdiction to decide that claim or not.

B. *Stumbling Blocks in the Courts of Appeals*

With the underbrush cleared away, this section turns to a critical appraisal of current approaches. It first addresses various elements of the Seventh Circuit's intermediate position, which offers a useful launching point for evaluation of both the permissive approach (adopted by the Sixth and Eighth Circuits) and the strict approach (adopted by the Second, Third, and Fourth Circuits). It then argues for vacatur of contemporaneous strike calls.

1. *Judgments or Opinions?* — Two elements of Judge Easterbrook's view require discussion here. The first, which can be dealt with briefly, is the distinction between a district court's opinion and its formal order of judgment. Here is how Judge Easterbrook framed the issue in *Hill*:

[T]he district court exceeded its statutory authority by treating a “strike” as part of the judgment. . . . [O]pinions are just explanations, while judgments are legally binding. Advice from a judge to a litigant does not violate Article III, precisely because it is not conclusive. . . . [Thus,] the language in the opinions dismissing Hill's suit was proper. . . . The contested statement in the district court's judgment is vacated.¹²⁵

The dispositive question, in his view, is where the strike was located. If it was in the judgment, it must be vacated; if it was in the opinion, it was proper.

But this view places far more weight on the technical distinction between judgments and opinions than the distinction can bear. Some brief exposition for the perplexed: under Rule 58 of the Federal Rules of Civil Procedure, “[e]very judgment” must “be set forth on a separate document.”¹²⁶ As a result, when a district court disposes of a particular case, it hands down an opinion (often lengthy) and a judgment (always succinct). Such judgments include the bare minimum required to decipher the outcome of the lawsuit. Consider, for example, the lower court's judgment in *Hill* itself:

¹²⁴ See, e.g., *Kempe's Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173, 184 (1809) (Marshall, C.J.) (describing a judgment without jurisdiction as an “absolute nullity . . . to be entirely disregarded”); see also BLACK, *supra* note 91, § 242 (“[A] judgment which passes upon matters entirely outside the issue raised in the record is so far invalid.”). For a detailed historical account of the “bootstrap doctrine,” which gives res judicata effect to a court's determination as to its own jurisdiction, and thus bars a collateral attack in some instances, see Ryan Williams, *Jurisdiction as Power*, 89 U. CHI. L. REV. 1719, 1738–47 (2023).

¹²⁵ *Hill v. Madison County*, 983 F.3d 904, 906–08 (7th Cir. 2020).

¹²⁶ FED. R. CIV. P. 58(a); see also *supra* note 60 (excerpting the sample formerly included in the Federal Rules of Civil Procedure of the form of such a judgment).

This action came before the Court, District Judge J. Phil Gilbert, and the following decision was reached: JUDGMENT IS HEREBY ENTERED AGAINST Plaintiff and IN FAVOR OF Defendants.

Plaintiff shall recover nothing, and the action is DISMISSED with prejudice, the parties to bear their own costs. This dismissal shall count as one of Plaintiff's allotted "strikes" under the provisions of 28 U.S.C. § 1915(g).¹²⁷

There is little to support the view that formal Rule 58 judgments "are legally binding," while "opinions are just explanations."¹²⁸ The Federal Rules did not include the separate-document requirement to settle metaphysical debates about dictum and decision. "[T]he sole purpose of the separate-document requirement," the Court has explained, "was to clarify when the time for appeal under 28 U.S.C. § 2107 begins to run."¹²⁹ In essence, prior to the Federal Rules, the rigid final-judgment rule permitted appeal only when a case terminated "not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved."¹³⁰ But reforms had expanded the availability of appeals — allowing, for instance, interlocutory appeals of those orders "separable from, and collateral to, rights asserted in the action,"¹³¹ as well as those orders granting or denying preliminary injunctive relief,¹³² and those orders resolving some subset of a plaintiff's claims.¹³³ There was confusion as to whether time to appeal ran from when an opinion issued containing "directive or dispositive words" or whether a formal notation on the docket was required.¹³⁴ In 1963, Rule 58 was amended to include the separate-document requirement to address that issue.¹³⁵ Indeed, that is why the Federal Rules define "judgment" as "any order from which an appeal lies," rather than, say, any order.¹³⁶

Tempting as it would be to have so clear a rule, the existence (or not) of a Rule 58 judgment does not solve the issue of premature strikes. The key question is not where a strike is called, or in which document, but whether a strike is called at all. If it is presented as part of the court's decision, then it is part of its decision, whether the relevant language is in the opinion, the judgment, or both.

¹²⁷ Judgment at 1, *Hill v. Madison County*, No. 19-cv-555 (S.D. Ill. Jan. 21, 2020), ECF No. 11. This judgment hews closely to the example given in the Federal Rules, described at *supra* note 60.

¹²⁸ *Hill*, 983 F.3d at 906.

¹²⁹ *Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 384 (1978).

¹³⁰ *Collins v. Miller*, 252 U.S. 364, 370 (1920); see also Note, *Finality of Judgments in Appeals from Federal District Courts*, 49 *YALE L.J.* 1476, 1477–78 (1940).

¹³¹ *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1948).

¹³² 28 U.S.C. § 1292.

¹³³ FED. R. CIV. P. 54(b).

¹³⁴ FED. R. CIV. P. 58(b) advisory committee's note to 1963 amendment.

¹³⁵ In fact, in *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978), the Court held that the separate-document requirement is waivable by the parties, see *id.* at 384 — a bizarre result if a Rule 58 judgment were required to create a decision of binding legal effect.

¹³⁶ FED. R. CIV. P. 54(a).

2. *Appealable Dicta?* — The second element of Judge Easterbrook’s rationale that bears discussion is his view on what follows from a strike call in an opinion. He argues that such strike calls are reviewable on the merits on appeal. As he puts it:

[Strike calls] are dicta in the sense that they are not *binding* in future litigation, but they still aggrieve [the defendant] because they draw a future judge’s attention to this suit and may induce the judge to deny *forma pauperis* status wrongly. Appeal is proper when a litigant suffers a legal injury from a decision. A strike notice causes such an injury whether or not it is conclusive. By disapproving that notice, we relieve [the defendant] of a potential obstacle to a future suit.¹³⁷

Both of the other courts of appeals that consider strike calls dicta reject Judge Easterbrook’s view.¹³⁸ And based on the analysis offered in the preceding section, that makes good sense; if these strike calls were dicta (if, for instance, they were merely phrased as recommendations), then it would be hard to see how a litigant would face legal injury redressable on appeal.

But Judge Easterbrook’s view might have more to commend it than appears at first glance. Although he did not cite it, *Camreta v. Greene*¹³⁹ could be read to offer some support for his approach — and, more broadly, for the idea that dicta can create legal injury sufficient to establish standing on appeal. In *Camreta*, a case brought under 42 U.S.C. § 1983, the Ninth Circuit held that two state officials, Bob Camreta and James Alford, violated the Fourth Amendment, but that their conduct was nonetheless shielded by qualified immunity, and thus judgment should be entered in their favor.¹⁴⁰ Camreta and Alford successfully sought a writ of certiorari from the Supreme Court with the aim of reviewing the Ninth Circuit’s constitutional holding.¹⁴¹

Over a strident dissent from Justice Kennedy, the Court held that it had the authority to do just that. Justice Kagan, writing for the Court, explained that the Ninth Circuit’s ruling had a “prospective effect on the parties” that could not be ignored.¹⁴² Despite the officers having “won” such a suit, the lower court’s reasoning required such state officials to “either change the way [they] perform[] [their] duties or risk a meritorious damages action.”¹⁴³ As Justice Scalia had written in an earlier case, this was “*not* mere dictum in the ordinary sense, since the

¹³⁷ Hill v. Madison County, 983 F.3d 904, 908 (7th Cir. 2020).

¹³⁸ See Simons v. Washington, 996 F.3d 350, 353 (6th Cir. 2021); Gonzalez v. United States, 23 F.4th 788, 790 (8th Cir. 2022).

¹³⁹ 563 U.S. 692 (2011).

¹⁴⁰ Greene v. Camreta, 588 F.3d 1011, 1030, 1033 (9th Cir. 2009), *vacated in part*, 563 U.S. 692.

¹⁴¹ See *Camreta*, 563 U.S. at 700.

¹⁴² *Id.* at 702.

¹⁴³ *Id.* at 702–03. Under the Court’s qualified immunity jurisprudence, a plaintiff must demonstrate that the defendant violated his “clearly established” rights — that is, in “light of pre-existing” precedents, the conduct’s unlawfulness “must be apparent.” Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

whole reason” the Ninth Circuit had ventured its holding on the topic was to “make unavailable repeated claims of qualified immunity in future cases.”¹⁴⁴

On one view, *Camreta* created a category of appealable dicta, contrary to the tradition discussed above of considering only the ultimate judgment on review.¹⁴⁵ But there is a way to reconcile the two. As the Solicitor General noted in his brief in *Camreta*, such holdings have the same effect as “a declaratory judgment against the government as a whole.”¹⁴⁶ Indeed, that is their purpose, as both Justice Kagan and Justice Scalia noted; such rulings are designed to make “clearly established” rights that were otherwise in dispute.¹⁴⁷ It is not difficult to see the logic in the argument that such a decree is worth at least as much as a nominal dollar.¹⁴⁸

Even so, however, *Camreta* does not stretch so far as to create appellate standing to review mere strike recommendations. (The appropriate disposition of actual strike calls is dealt with in the next section.) Justice Kagan’s opinion in *Camreta* was narrow — self-consciously so. She “adresse[d] only [the Court’s] authority to review cases in this procedural posture.”¹⁴⁹ The Ninth Circuit’s decision, she explained, was a “binding . . . determination[.]”¹⁵⁰ That is, if the exact same factual situation were to reoccur, a federal court in the Ninth Circuit would be required, as a matter of stare decisis, to bow to the prior court’s ruling. The Court expressly distinguished the decisions of district courts on the basis that such decisions are “not binding precedent[.] . . . even upon the same judge in a different case,”¹⁵¹ and thus “do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity.”¹⁵²

As a result, if a district court were merely to state that it “recommended” a future court consider its dismissal a strike, or to include a citation to § 1915(g), there would be no sense in which its decision bound anyone. Indeed, Judge Easterbrook’s solution turns the statutory scheme on its head. It is difficult to see how a litigant who appealed

¹⁴⁴ *Bunting v. Mellen*, 541 U.S. 1019, 1023–24 (2004) (Scalia, J., dissenting from denial of certiorari).

¹⁴⁵ See *Camreta*, 563 U.S. at 725 (Kennedy, J., dissenting) (“Until today, however, precedential reasoning of general applicability divorced from a particular adverse judgment was not thought to yield ‘standing to appeal.’” (quoting *Parr v. United States*, 351 U.S. 513, 517 (1956))).

¹⁴⁶ Brief for the United States as Amicus Curiae Supporting Petitioners at 13, *Camreta*, 563 U.S. 692 (No. 09-1454).

¹⁴⁷ *Pearson v. Callahan*, 555 U.S. 223, 240 (2009).

¹⁴⁸ Cf. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (holding that a claim for nominal damages is sufficient for standing purposes).

¹⁴⁹ *Camreta*, 563 U.S. at 708.

¹⁵⁰ *Id.* n.6 (quoting *id.* at 725 (Kennedy, J., dissenting)).

¹⁵¹ *Id.* at 709 n.7 (quoting 18 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 2011)).

¹⁵² *Id.*; see, e.g., *Wheeler v. City of Lansing*, 660 F.3d 931, 939–40 (6th Cir. 2011) (refusing to review the district court’s conclusion that the appellant engaged in unlawful, but immunized, conduct).

their initial strike recommendation could evade issue preclusion.¹⁵³ It is even more difficult to see how such a litigant could avoid vertical stare decisis, at least assuming their next lawsuit were filed in the same circuit.¹⁵⁴ That would not only turn every strike call into a several-lawsuit marathon; it would make contemporaneous strikes binding on future district courts. And, as then-Judge Kavanaugh put it, “[i]f Congress wanted district courts to contemporaneously label dismissals as strikes or wanted those labels to bind later district courts, Congress could have said so in the PLRA.”¹⁵⁵ But “Congress said no such thing.”¹⁵⁶

3. *Vacatur or Dismissal?* — But what about those strikes that *aren’t* recommendations? In Judge Easterbrook’s view, *because* a strike causes legal injury, the court of appeals must be able to review it on the merits. But that gets things backward. The real question — at the heart of all jurisdictional inquiries — is whether the district court was entitled to cause that legal injury at all. “Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”¹⁵⁷

Perhaps the most relevant case on this issue, uncited by the courts of appeals that have thus far considered the question, is *Electrical Fittings Corp. v. Thomas & Betts Co.*,¹⁵⁸ decided in 1939. In that case, the plaintiff alleged the infringement of a patent.¹⁵⁹ The district court held that the plaintiff indeed had a patent but that the patent had not been infringed. Rather than issuing a judgment “dismissing the bill without more,” the court instead “entered a decree adjudging [his patent] valid” and “dismiss[ed] the bill for failure to prove infringement.”¹⁶⁰ The

¹⁵³ “The preclusive effect” of the eventual judgment in a federal-question case “is determined by federal common law.” *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). Under federal common law, a litigant is subject to issue preclusion if an issue was (1) “actually litigated and determined” and (2) “essential to the judgment.” *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. L. INST. 1980)). Perhaps Judge Easterbrook would say that such a strike call is not essential to the judgment. But if an appellate case can be founded upon a strike call alone, as the Seventh Circuit held in *Hill*, then what else is the court of appeals doing if not reviewing the merits of the strike in a way essential to the disposition of the case before it? As a policy matter, it would be odd if issue preclusion did not apply to strike calls. The whole point of issue preclusion is, after all, to “prevent[] a litigant from taking two bites at the apple.” *United States v. Koerber*, 10 F.4th 1083, 1100 (10th Cir. 2021). Without issue preclusion, Judge Easterbrook’s interpretation would encourage at *least* two bites, if not more; such an interpretation would transform a statute enacted to streamline prison litigation into one that fostered endless litigation *about* litigation.

¹⁵⁴ See GARNER ET AL., *supra* note 3, at 27 (“Lower courts must strictly follow vertical precedents.”); HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW 330 (1912) (“[W]hen a circuit court of appeals has pronounced its decision upon a matter of law, it becomes a closed question for the inferior federal courts in that circuit.”).

¹⁵⁵ *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1152 (D.C. Cir. 2017).

¹⁵⁶ *Id.*

¹⁵⁷ *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

¹⁵⁸ 307 U.S. 241 (1939).

¹⁵⁹ *Id.* at 241.

¹⁶⁰ *Id.* at 242.

defendants, despite prevailing against liability for infringement, appealed to the Second Circuit, seeking to vacate the lower court's decree as to the patent's underlying validity.¹⁶¹ The Second Circuit held it was without jurisdiction to do so.¹⁶² The defendants then asked the Supreme Court for the same remedy.

Justice Roberts, on behalf of a unanimous Court, obliged. He "direct[ed] the District Court to reform its decree" to omit affirmance of the patent's validity.¹⁶³ He explained that a party "may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree"¹⁶⁴ — in basic terms, the bar on appealing dictum discussed above. "But," he continued, "here the decree itself purports to adjudge the validity of [the plaintiff's patent claim], and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated."¹⁶⁵ As a result, the defendants were "entitled to have this portion of the decree eliminated," such that the courts of appeals "had jurisdiction," as the Court did, "to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree."¹⁶⁶

It is difficult to imagine a case any more on point. Despite the fact that the lower court's determination of the patent's validity was "immaterial to the disposition of the cause" — and thus would lack *res judicata* effect in later litigation — the Court did not recast it as dicta,¹⁶⁷ as the Sixth and Eighth Circuits do with prematurely called strikes. Nor did the Court decide to review the patent's validity on the merits,¹⁶⁸ as the Seventh Circuit's approach would suggest. Instead, the Court employed *vacatur* to clear the proverbial slate.

As courts should here. In fact, the Court made the point even clearer in *Deposit Guaranty National Bank of Jackson v. Roper*.¹⁶⁹ There, it held that when a district court improperly decides a "hypothetical controversy" — even one that is "immaterial" to "subsequent litigation" — an appellate court has jurisdiction "to entertain the appeal" and "direct the reformation of the decree."¹⁷⁰ Correction of jurisdictional defects is, after all, why we have *vacatur* in the first place. As the Court put it in *Camreta*: "The point of *vacatur* is to prevent an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 243.

¹⁶⁴ *Id.* at 242.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (focusing on the fact that "the decree itself purports to adjudge the validity" of the patent).

¹⁶⁸ *Id.* (holding that the Court had jurisdiction "not for the purpose of passing on the merits, but to direct the reformation of the decree").

¹⁶⁹ 445 U.S. 326 (1980).

¹⁷⁰ *Id.* at 335, 336 n.7 (quoting *Elec. Fittings*, 307 U.S. at 242).

what we have called a ‘preliminary’ adjudication.”¹⁷¹ These preliminary adjudications, issued without jurisdiction, appear to be binding — both to pro se litigants and to future district courts — and thus create legal injury. Under such circumstances, vacatur is required.¹⁷²

CONCLUSION

Premature strike calls may, or may not, be bad policy. On one hand, strike calls offer useful guidance to litigants. “[A]s every baseball batter knows, taking a first strike changes your approach to the next pitch.”¹⁷³ On the other hand, these “haphazard” strike calls, issued sua sponte, often are mistaken on the merits.¹⁷⁴ To a pro se prisoner, a court’s decree that he is “BARRED” from filing future suits IFP is apt to be taken at face value.¹⁷⁵

That normative question is best left for another day. This Note has focused instead on the question of whether these strikes are within a court’s jurisdiction. They are not. The solution cannot be to relabel decision as dictum on appeal. Instead, appellate courts have an obligation to police the jurisdictional limitations of lower courts and vacate premature strikes.

¹⁷¹ *Camreta v. Green*, 563 U.S. 692, 713 (2011) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40–41 (1950)).

¹⁷² One remaining question is whether the Second and Third Circuits are correct that premature strikes create a constitutional defect. This presents a closer question. All agree that federal courts cannot issue advisory opinions; few agree on just what an advisory opinion is. *See generally* Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621 (2021) (offering a thoughtful discussion of differing views on the subject). But the issue is of little practical significance. As Justice Thomas recently noted in dissenting from denial of certiorari in *Waleski v. Montgomery, McCracken, Walker & Rhoads, LLP*, 143 S. Ct. 2027 (2023) (mem.), a district court that proceeds without statutory jurisdiction has, by necessity, proceeded without constitutional jurisdiction. *See id.* at 2027 (Thomas, J., dissenting from denial of certiorari) (“[T]he lower courts’ distinction between ‘statutory jurisdiction’ and ‘Article III’ jurisdiction seems untenable.”). A federal court’s jurisdiction is, after all, “limited both by the bounds of the ‘judicial power’ as articulated in Article III, § 2, and by the extent to which Congress has vested that power in the lower courts.” *Id.* (quoting *Kaplan v. Cent. Bank of Islamic Republic of Iran*, 896 F.3d 501, 517 (D.C. Cir. 2018) (Edwards, J., concurring)). Because “[c]ourts created by statute can have no jurisdiction but such as the statute confers,” *id.* at 2028 (quoting *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850)), to proceed without such jurisdiction is, “by very definition, . . . to act ultra vires,” *id.* (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998)). On this view, then, the statutory defect is a constitutional one, too.

¹⁷³ *Belanus v. Clark*, 796 F.3d 1021, 1028 (9th Cir. 2015).

¹⁷⁴ *Fourstar v. Garden City Grp., Inc.*, 875 F.3d 1147, 1153 (D.C. Cir. 2017) (Kavanaugh, J.).

¹⁷⁵ *E.g., Ibenyenwa v. Wells*, No. 21-40241, 2022 WL 413941, at *2 (5th Cir. Feb. 10, 2022).