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Loud Rules

David Coale

Wendy Couture

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David Coale and Wendy Couture*

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I. INTRODUCTION

Are these statements different?

A. We hold that the ERISA plan administrator did not abuse his discretion in the interpretation of clause seven of the benefit plan.

B. We hold that the ERISA plan administrator did not abuse his discretion in the interpretation of clause seven of the benefit plan. ERISA plan beneficiaries are cautioned that further litigation of this ilk risks severe sanctions.[1]

The first appears to be a classic case "holding." The second is something more. In addition to stating a holding, it says that later litigants

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* Mr. Coale is a partner, and Ms. Couture an associate, practicing in the area of complex commercial litigation at Carrington, Coleman, Sloman & Blumenthal, L.L.P. in Dallas, Texas. The authors would like to thank Loyd Gattis for his research assistance and helpful insights.

1. *See generally* Tolson v. Avondale Indus., 141 F.3d 604, 611 (5th Cir. 1998).

should give the holding particular deference. The question addressed by this Article is what to make of this difference.

The second kind of statement can have considerable power. Depending on its force, such a statement can strongly deter later criticism of the holding. This deterrent can have particular influence in the modern court system, where the parties and their counsel settle most cases based on their perceptions of what a court will do with a case and, if sanctions are imposed, to them.[2] In addition to its *in terrorem* value, this kind of statement provides a valuable "sound bite" for later litigants and courts, making itself more attractive as a citation among the rapidly growing array of precedents now available to litigants.[3]

The underlying issue is the legitimacy of this power: should it be seen as a quirk of some judges' writing style, a dangerous expansion of judicial power, or a meaningful guide for the development of the law? This Article analyzes that issue to determine appropriate bounds for what it calls "loud rules."

Part II defines a loud rule as the combination of a statement of substantive law with an explicit or implicit threat of sanctions if the issue is relitigated.[4] Additionally, Part II examines the incidence of loud rules, noting several patterns in how courts use them, and then analyzes the effect of loud rules, including their power to chill innovative advocacy.[5]

Part III examines the traditional common law concepts of "holding" and "dictum" and the rationales behind them and then uses this framework to analyze loud rules.[6] Part III concludes that, although the "loud" component of a rule is technically dictum, it does not raise the same policy concerns that underlie the dicta-holdings distinction.[7]

Part IV examines the court's inherent power to regulate the cases before it.[8] The statement of a loud rule bears a strong resemblance to other exercises of a court's inherent power, and many of the policies underlying that exercise are implicated in a court's use of loud rules.

Based on the observations in Parts III and IV, Part V considers if, and if so how, a court can speak effectively when it speaks loudly.[9] It observes that the distinction between dictum and holding is often drawn by reference

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2. *See infra* notes 39-40 and accompanying text.

3. *See* Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986) (reviewing BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT (1985)) ("In interpretive arenas below the Supreme Court, one good quote is worth a hundred clever analyses of the holding."); *infra* notes 41-45 and accompanying text.

4. *See infra* notes 10-35 and accompanying text.

5. *See infra* notes 36-50 and accompanying text.

6. *See infra* notes 58-77 and accompanying text.

7. *See infra* notes 78-88 and accompanying text.

8. *See infra* notes 110-35 and accompanying text.

9. *See infra* notes 136-61 and accompanying text.

to whether a statement is "necessary" to the result. Similarly, in the context of a court's sanctioning power, there is also a focus on whether the use of that power is truly necessary to advance the orderly resolution of cases. The focal points of those tests differ, however. For example, in the context of distinguishing dictum and holding, the focus is primarily on the substantive law governing the dispute; namely, whether a statement is necessary to the reasoning that derives the result of the case from prior precedents. In the inherent power context, the focus is primarily procedural: whether the statement is necessary to the orderly and efficient resolution of disputes.

This Article proposes that a slight change in the focal points of the two tests would provide a useful structure to help distinguish appropriate loud rules from inappropriate ones. Specifically, it suggests that the guide for distinguishing dictum and holding should recognize a procedural element, giving full precedential force both to a statement necessary for an opinion's substantive reasoning, and to one that says how to effectively implement that reasoning. Similarly, the test for the proper use of the inherent power to sanction should include a substantive element, in which the use of that power is seen as most appropriate when it is tied to the core substantive issues in a case. This Article suggests that this framework can help courts make effective use of the powerful device of loud rules, while steering clear of potentially dangerous excesses.

II. LOUD RULES

A. Definition of a "Loud Rule"

Statements of substantive law are often accompanied by a warning that the statement is particularly significant and should not be lightly challenged. The clearest example comes from a case in which sanctions are not just threatened, but awarded. The straightforward state court matter of *Transport Indemnity Co. v. Orgain, Bell & Tucker*[10] provides a clear illustration. The holding on the merits was simple. A corporate plaintiff, with a net worth of more than $25 million, sued under a deceptive trade practices statute.[11] Since the statute expressly forbade suit by a plaintiff with a net worth of more than $25 million, the court found that the plaintiff had no claim under

10. 846 S.W.2d 878 (Tex. Ct. App. 1993).
11. *Id.* at 879, 882.

the statute.[12] The second holding of the court analyzed whether counsel should have brought the suit at all under these circumstances, and affirmed the lower court's award of sanctions for having done so.[13]

In a case where sanctions are actually imposed, the danger of chilling vigorous advocacy if the line is drawn incorrectly is well-recognized.[14] The result is a body of case law that seeks to define the point at which argument becomes sanctionable.[15] As a result, as in *Transport Indemnity*, cases in which sanctions are awarded have two holdings: one establishing that the result is not what the losing party wanted, and a second that the losing party's contention was so far afield as to be sanctionable.[16] Both the substantive holding, as well as the part of the opinion that emphasizes the strength of the substantive holding, are constrained by a body of precedent.

These guidelines become blurrier when sanctions are not actually litigated, but threatened if the decided issue is relitigated. A good example comes from a suit to recover denied benefits under an employer ERISA plan. In *Tolson v. Avondale Industries*,[17] the Fifth Circuit affirmed a summary judgment against a plaintiff suing for ERISA benefits, holding that the administrator had properly interpreted the ERISA plans at issue.[18] The court went on to state:

> [W]e assess costs of this appeal to [plaintiff] and caution him – and future ERISA plan participants and beneficiaries similarly situated – that fomenting and prosecuting litigation of this ilk in the face of plan provisions vesting administrators with discretion to interpret provisions of ERISA plans and entitlement to benefits under such plans, could result in sanctions more severe than mere assessment of costs . . . .[19]

The holding in this case—an administrator given discretion by a plan can deny benefits—was accompanied by a statement calculated to discourage testing of the rule by litigants in later cases.[20]

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12. *Id.*

13. *Id.* at 883.

14. *See, e.g.*, Nagle v. Alspach, 8 F.3d 141, 145 (3d Cir. 1993) ("We are well aware that injudicious awards of [sanctions] may have the potential to chill the zeal for pursuing novel questions and difficult appeals.").

15. *See generally* GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTIVE MEASURES (Richard G. Johnson ed. 3d ed. 2004).

16. *See Transport Indemnity Co.*, 846 S.W.2d at 883.

17. 141 F.3d 604, 605-06 (5th Cir. 1998).

18. *Id.* at 609, 611.

19. *Id.* at 611.

20. *Id.* 609-11.

Another example of a similar admonition appears in *United States v. Burleson.*[21] In this case, the Fifth Circuit held that the district court did not err in refusing a downward departure from the sentencing guidelines.[22] After announcing the holding, the court went on to say: "This appeal borders on being frivolous. We caution counsel. Federal Public Defenders are like all counsel subject to sanctions. They have no duty to bring frivolous appeals; the opposite is true."[23] The holding—a court does not abuse its discretion in refusing to depart under certain circumstances—was accompanied by a statement to not challenge it.[24]

Similarly, courts frequently combine their holdings with more subtle threats of sanctions by characterizing an argument as "frivolous," which is the touchstone for the imposition of sanctions.[25] For example, in *Highlands Insurance v. National Union Fire Insurance*,[26] the court rejected several subtle challenges to a jury charge that were raised for the first time on appeal and noted: "There is nothing obvious about these errors so much so that a contrary contention borders on the frivolous."[27]

Finally, courts often make comments that, although not actually threatening sanctions, imply that any contrary argument has no reasonable basis and that sanctions would likely result. Some frequently-used phrases remind how "all" or "every reported case," or the "great majority" or "great weight" of authority support the result.[28] Similarly, characterizing the law

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21. 22 F.3d 93 (5th Cir. 1994).

22. *Id.* at 94.

23. *Id.* at 95. This statement was supported by citation to an earlier opinion making a nearly identical observation after affirming an appeal that had challenged a sentence based on a certain amount of contraband. United States v. Thomas, No. 93-3558, 1994 U.S. App. LEXIS 13748 (5th Cir. May 18, 1994). A similar sentencing issue appeared in *United States v. Fernandez*, 127 F.3d 277, 286 (2d Cir. 1997).

24. *See also* Pucci v. Comm'r, 49 T.C.M. (CCH) 415 (1984) ("We caution petitioner and other similarly situated taxpayers that given the ever-increasing caseload of this Court," proper documentation of transactions is essential); Frankel v. Comm'r, 47 T.C.M. (CCH) 1208 (1984) ("We admonish petitioner and similarly situated potential tax lawyers to heed the age-old advice offered to another group of professionals: 'Physician, heal thyself.'").

25. *See, e.g.*, FED. R. CIV. P. 11(b)-(c) (allowing for sanctions if an attorney's "claims, defenses, and other legal contentions" are not "warranted by existing law or by a *nonfrivolous* argument for the extension, modification, or reversal of existing law or the establishment of new law") (emphasis added).

26. 27 F.3d 1027 (5th Cir. 1994).

27. *Id.* at 1032. *See also* United States v. Balzano, 916 F.2d 1273, 1297-98 (7th Cir. 1990) ("In an era of burgeoning federal court case loads, it is a senseless drain on judicial resources for us to be required to devote the time necessary to a complete consideration of issues on appeal which are entirely lacking in substance.").

28. *See, e.g., In re:* Sealed Case No. 98-3077, 151 F.3d 1059, 1072 (D.C. Cir. 1998) ("Indeed, we have been hard pressed to find any case in which a Rule 6(e)(2) proceeding has been conducted in such a manner; in all reported cases brought to our attention, *in camera* and/or *ex parte*

as "clear" or "settled" can also serve as a warning to litigants that a contrary argument is untenable.[29] While not at the level of a threat, there is a clear connotation that a litigant urging a contrary position is pursuing the wrong path.

To summarize, some cases accompany their statements of substantive law with comments on how much deference the statements should later receive.[30] They are most apparent in sanctions cases and cases in which a frustrated court is toying with the sanctioning power, but also appear in cases where a court makes comments about the strength of a litigant's arguments. In sanctions cases, those comments proceed in accordance with established principles and precedent.[31] For other situations, however, particularly in cases such as *Tolson* where sanctions are threatened but not imposed, the guidelines for such statements are less clear.[32]

It is on this category of cases—where sanctions are not imposed but are explicitly or implicitly threatened—that this Article focuses. This Article refers to the combination of a statement of substantive law with a threat of sanctions if the issue is relitigated as a "loud rule."

B. Incidence of Loud Rules

Not surprisingly, loud rules most often appear in cases involving subject matters that are frequently litigated, such as criminal appeals, tax appeals, and appeals of denials of employment benefits. Additionally, loud rules are issued most frequently in connection with arguments that, despite being repeatedly rejected by the courts, are asserted by numerous litigants. Courts clearly seem to use loud rules as a device to impose order on unruly dockets.

For example, appellate courts in California were apparently inundated with appeals based on the argument that the "reasonable doubt" instruction contained in a California statute was defective because it allowed a jury to convict a defendant on a standard of guilt less than the required standard.[33] The court in *People v. Hearon* characterized this argument as "the soup du jour of appellate advocacy in criminal cases"[34] and warned: "The time has come for appellate attorneys to take this frivolous contention off their

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proceedings have been the norm."); Don Rose Oil Co. v. Lindsley, 206 Cal. Rptr. 670, 673-74 (Ct. App. 1984) ("Shell's position is . . . a concept so outrageous that extensive and computer-assisted research of all reported cases in all 50 states and in all federal courts has not located a single case where such an argument has been advanced.").

29. *See, e.g.*, Trowbridge v. Dimitri's 50's Diner L.L.C., 208 F. Supp. 2d 908, 910 (N.D. Ill. 2002) ("[I]t has been clear for more than four years that the place of organization and principal place of business of a limited liability company are irrelevant . . . .").

30. *See supra* notes 12-15 and accompanying text.

31. *See supra* notes 17-18 and accompanying text.

32. *See supra* notes 19-29 and accompanying text.

33. People v. Hearon, 85 Cal. Rptr. 2d 424 (Ct. App. 1999).

34. *Id.* at 425.

menus."[35] In *People v. Miller*,[36] another court warned counsel not to relitigate this issue: "Since this point has been unequivocally resolved in numerous published authorities, we expect appellate counsel to restrain themselves from raising this baseless contention in future appeals, thereby conserving both their time and ours, as well as the taxpayers' money."[37]

Courts have expressed a similar frustration with a perceived deluge of weak tax appeals. For example, in *Hatfield v. Commissioner*,[38] the court recognized the detrimental effect that duplicative and meritless tax appeals have on the court's function:

> In recent times, this Court has been faced with numerous cases, such as this one, which have been commenced without any legal justification but solely for the purpose of protesting the Federal tax laws. This Court has before it large number of cases which deserve careful consideration as speedily as possible, and cases of this sort needlessly disrupt our consideration of those genuine controversies.[39]

In fact, the Sixth Circuit has twice issued loud rules related to arguments made in tax appeals. In *Perkins v. Commissioner*,[40] the court stated:

> Litigants are warned that in future cases in which the lower court has clearly explained, as it has here, the frivolous nature of the taxpayers' claim that earned income is not taxable, we will not hesitate to award actual attorney fees to the Commissioner under Rule 38 as it has been uniformly construed.[41]

In another tax appeal, where the litigant argued that an income tax is properly characterized as an excise tax, the court rejected the argument as "baseless" and warned: "In future such cases this court will not hesitate to award damages when the appeal is frivolous, or taken merely for purposes of delay, involving an issue of issues already 'clearly resolved.'"[42]

Tax appeals have led other courts to make similar statements: "We have decided not to impose such damages in this case, but if tax protestors

35. *Id.*
36. 81 Cal. Rptr. 2d 410 (Ct. App. 1999).
37. *Id.* at 425.
38. 68 T.C. 895 (1977).
39. *Id.* at 899.
40. 746 F.2d 1187 (6th Cir. 1984).
41. *Id.* at 1188-89.
42. Martin v. Comm'r, 756 F.2d 38, 40 (6th Cir. 1985).

continue to bring such frivolous cases, serious consideration should be given to imposing such damages;"[43] also, "The Court of Appeals for this Circuit has warned litigants that, in future cases which assert the frivolous claim that wages are not taxable-income, it will not hesitate to award attorneys' fees to the United States, and this Court now sounds a similar warning."[44] Finally, the Fifth Circuit warned:

> Appellants' contentions are stale ones, long settled against them . . . . Bending over backwards, in indulgence of appellants' pro se status, we today forbear the sanctions of Rule 38, Fed. R. App. P. We publish this opinion as notice to future litigants that the continued advancing of these long-defunct arguments invite such sanctions, however.[45]

As a final example, when issuing the loud rule in the ERISA benefits dispute at issue in *Tolson*, the Fifth Circuit recognized that cases addressing the denial of benefits constitute a "burgeoning jurisprudence in this circuit and elsewhere."[46] The Court warned future litigants to be wary of "mount[ing] attacks such as Tolson's in the face of such an established body of law."[47] In another ERISA case, a district court similarly cautioned "plaintiff or others similarly situated that . . . they should carefully consider the evidentiary record before seeking judicial review of a plan administrator's decision."[48]

C. *Effect of Loud Rules*

The effect of a loud rule is difficult to underestimate. Speaking directly to a lawyer's own self-interest in not being sanctioned, as compared to speaking more obliquely through the language of precedent, may have an especially chilling effect on innovative advocacy.[49] The effect of a strong, direct address to the bar is also likely to have a substantial impact on the development of the law outside of the courtroom. This impact arises because the great majority of civil cases are resolved through settlement discussions, which draw upon the bar's understanding of and resolution of

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43. *Hatfield*, 68 T.C. at 900.

44. Hill v. United States, 599 F. Supp. 118, 123 (M.D. Tenn. 1984).

45. Lonsdale v. Comm'r, 661 F.2d 71, 72 (5th Cir. 1981).

46. Tolson v. Avondale Indus., 141 F.3d 604, 611 (5th Cir. 1998).

47. *Id.*

48. Perri v. Reliance Standard Life Ins. Co., No. 97-1369, 1997 WL 688813 at *6 (E.D. Pa. Oct. 23, 1997).

49. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 265 (4th ed. 1992) ("The economic theory of law is a theory of law as deterrence, and a threat that is not communicated cannot deter.").

the law rather than what courts say to those particular litigants.[50] A loud rule thus speaks not only to an audience with a strong interest in the message, but with an audience that has great influence if and when it heeds the message.

In addition to the power of such a statement as a threat, it also has power by simply being pithy. Few would dispute that there are a great, and increasing, number of cases in today's legal system,[51] which in turn produces a great deal of law.[52] The effect of this increase in the sheer amount of available law is magnified because modern research technology makes this law increasingly available.[53] In the face of this abundance of precedent, the strong "sound bite" offered by a loud rule can be attractive to a litigant as a way to distinguish its precedent from the great mass,[54] or for that matter to a lower court as a guide for how a superior court would resolve an analogous issue in the future.[55]

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50. Over 90% of filed civil cases settle without trial. *See* Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 1 n.1 (1999) (summarizing empirical studies).

51. *See, e.g.*, Office of Judges Programs, Statistics Division, Administrative Office of the United States Courts, Federal Judicial Caseload Statistics (2005) (calculating a 29.3% increase in the number of cases filed in the Courts of Appeals since 1996; a 5.2% increase in the number of civil cases filed in the district courts since 1996; and a 48.5% increase in the number of criminal cases filed in the district courts since 1996); Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 13-16 (1998) (examining caseload statistics and concluding that "[b]y any measure, the courts of appeals of today are handling more cases, and more work, than their predecessor courts"); THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 31-51 (1994) (summarizing studies showing an increasing caseload in the federal appeals courts).

52. *See* Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405, 407 (1994) ("In 1962, thirty-nine shelf miles of books was a noticeable but bearable weight on the shoulders of the profession. Three decades later, the weight of the law is oppressive."). Opinions themselves are longer. *See id.* at 408; Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357-58 (1988) ("The fact that opinions have also become longer – sometimes, encyclopedic – is not a court secret either."). Moreover, there is a considerable amount of "unwritten" law. *See* Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 546-52 (1992). There is also substantial law generated by administrative tribunals. *See generally* 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 1.3 (2d ed. 1997).

53. *See* Selya, *supra* note 52, at 408 ("As cases remotely on point become ever easier to find, the expectations for research rise, courts crank out more opinions, lawyers write more briefs (citing more opinions), and opinions cite more opinions."). *See generally* SUSAN W. BRENNER, PRECEDENT INFLATION (1992).

54. *See* Selya, *supra* note 52, at 407-08; *see also* Schauer, *supra* note 3, at 683 ("For in the lower courts, application of a pithy statement, a summary of a holding, or a three-part test is likely to look very much like application of a statute.").

55. In the same way that loud rules risk chilling innovative advocacy, they conceivably could encourage lower courts to apply the rules loudly proclaimed even in distinguishable circumstances. Although there is academic debate over the force possessed by the "predictive" model of how lower court judges view case law from higher courts, it is unlikely that a lower court would reverse. *See*

And, the force that causes courts to use loud rules in the first place—a perceived problem with a large docket of cases—is only likely to continue to grow. Judicial caseloads continue to expand, even while courts face budget challenges.[56]

Despite loud rules' undeniable potential for a chilling effect on the bar, their apparent attractiveness as a citation, and the rising need for docket control devices, no clear rules guide courts on when a loud rule is an appropriate exercise of judicial authority. If courts become more inclined to issue loud rules in other oft-litigated areas of law, they risk expanding the reach of these potent weapons in the judicial arsenal without the benefit of clear standards for their usage or precedential value.

This lack of clarity has particular impact on attorneys who must balance their obligation to zealously represent clients with their duties as officers of the court.[57] An attorney could conceivably dismiss a loud rule as dicta and advance a contrary argument on behalf of a client, only to be sanctioned by a court relying on the earlier loud rule. By the same token, an attorney could be dissuaded by a loud rule from asserting a good faith argument on behalf of a client, only to discover later that subsequent courts are not relying on the loud rule.

III. DICTUM VERSUS HOLDING

An examination of the distinction between dicta and holdings is useful in establishing guidelines for the appropriate issuance of loud rules by courts, and for the proper deference to be afforded loud rules by subsequent courts and litigants. These traditional common law principles help illuminate the contours of the modern development of the loud rule.

Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 2-5 (1994). Moreover, the impact of loud rules is magnified by the sheer number of lower courts involved. Sanford V. Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 844 (1993) ("The behavior of the roughly 100 circuit judges and 500 district judges is, for most citizens most of the time, far more likely to count as 'the law' than the pronouncements of the nine denizens of the Supreme Court . . . .").

56. *See supra* note 51 and accompanying text (compiling statistical studies showing increasing caseloads); *see generally* James P. George, *Jurisdictional Implications in the Reduced Funding of Lower Federal Courts*, 1 REV. LITIG. 1 (2006).

57. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3, cmt. 1 (2002) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); MODEL CODE OF PROF'L RESPONSIBILITY, Canon 7 ("A lawyer should represent a client zealously within the bounds of the law."); MODEL CODE OF PROF'L RESPONSIBILITY, EC 7-1 ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations.").

A. Background

Perhaps the most basic lesson of the first year of law school is that the "holding" of a case has precedential force.[58] "Dicta," on the other hand, a mildly embarrassing set of "expressions . . . beyond the point involved,"[59] generally do not.[60] A middle category of statements called "judicial dicta" is also recognized, which "may be followed if sufficiently persuasive."[61]

Two reasons are generally recognized for distinguishing holding and dictum.[62] One is a concern for full consideration.[63] In the words of Chief Justice Marshall: "The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely

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58. *See, e.g.*, Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 3 (1989); *see generally* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 198 (1921) ("Judicial Precedents . . . are former decisions which courts respect and follow because made by judicial tribunals.").

59. Humphrey's Executor v. United States, 295 U.S. 602, 626 (1935). *See also* Cerro Metal Prods. v. Marshall, 620 F.2d 964, 978 (3d Cir. 1980) (stating that another court's statement "was not the sort of passing reference or overly generalized statement that causes courts to assign little, if any, weight to dictum").

60. *See, e.g.*, Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend . . . ."); *Humphrey's Executor*, 295 U.S. at 627-28.

61. *Humphrey's Executor*, 295 U.S. at 627-28. *See* Comment, *Dictum Revisited*, 4 STAN. L. REV. 509, 513 (1952) ("Judicial dicta are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to decision. A judicial dictum may have great weight.") [hereinafter "*Dictum Revisited*"]; *see also* Hawks v. Hamill, 288 U.S. 52, 58 (1933) (describing another court's statement as "something less than a decision," but nevertheless having "capacity . . . to tilt the balanced mind toward submission and agreement" because "it is a considered dictum, and not comment merely *obiter*"); BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE, 275 (2d ed. 1995) ("Thus *judicial dictum* differs from *obiter dictum* because it results from considered controversy, whereas *obiter dictum* is more in the nature of a peripheral, off-the-cuff judicial remark."); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1294 n.153 (1994) (contrasting the reliability of judicial dicta with that of statements made on the floor of a legislature).

62. *But see generally Dictum Revisited*, *supra* note 61, at 516-18 (describing the term "dicta" as a label for the application of certain "policies in the law of precedent"); Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431, 442 (1989) ("[M]any different issues are packed into the distinction between holding and dictum . . . .").

63. *See* Sarnoff v. Am. Home Prods. Corp., 798 F.2d 1075, 1084 (7th Cir. 1986) (defining dicta as "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it"); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994) ("Dicta are less carefully considered than holdings, and, therefore, less likely to be accurate statements of law.").

investigated."[64] The second is a broad concern about the limits on judicial power. Dictum arguably usurps the power of other governmental branches by going beyond the resolution of cases, the task traditionally seen as the appropriate one for the judiciary.[65]

Courts typically implement these rationales by asking whether a statement is "necessary" to the result. While the set of "unnecessary" expressions can be defined quite broadly,[66] it is usually held to consist of statements "not necessarily involved in the case nor necessary to a decision thereof."[67] The concept of a "necessary" statement serves as a proxy for good reasoning and judicial propriety, since a necessary statement will presumably be thoughtful and appropriate.

Lines defined by the concepts of "full consideration," "judicial power," and "necessity" are flexible and porous.[68] This leads some to question

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64. Cohens v. Virginia, 19 U.S. 264, 399-400 (1821).

65. *See* Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. Rev. 541, 559 (1989) ("In a democratic society, treating statements . . . as non-binding dicta helps confine the lawmaking powers of judges to the minimum necessary to serve the values underlying the doctrine of precedent."); Reed Dickerson, *Statutes and Constitutions in an Age of Common Law*, 48 U. PITT. L. REV. 773, 788-89 (1987) (criticizing judicial forays into "polycentric" decisions, the traditional province of the legislature); Dorf, *supra* note 63, at 2069 (urging that "sensitivity to the concerns underlying Article III" should affect the definitions of dicta and holding); *see also* Gene R. Shreve, *Rhetoric, Pragmatism and the Interdisciplinary Turn in Legal Criticism--A Study of Altruistic Judicial Argument*, 46 AM. J. COMP. L. 41, 49 n.31 (1998) (contending that the legitimacy of dicta is "in limbo"). *Cf.* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605, 648 (1992) ("It is clear that dicta – whether or not courts deem it to constitute an 'advisory opinion' – run afoul of no constitutional or jurisdictional barrier.").

66. Arguably, everything past the result (*i.e.*, "Plaintiff won") is extraneous material. *See Dictum Revisited*, *supra* note 61, at 509 ("The only statement in an appellate opinion strictly necessary to the decision of the case is the order of the court."). Such a view is not widely accepted, largely because of concern that decisions without reasons seem less legitimate than those that explain their results. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634-38 (1995).

67. 21 C.J.S. *Courts* § 142, at 167 (1990). *See also* GRAY, *supra* note 58, at 261 ("Judicial Precedent . . . must be an opinion the formation of which is necessary for the decision of a particular case; in other words it must not be *obiter dictum*."); GARNER, *supra*, note 61, at 274, 405 (defining dictum as "a nonbinding, incidental opinion on a point of law given by a judge in the course of a written opinion delivered in support of a judgment" and holding as "a determination of a matter of law that is pivotal to a judicial decision"). The Supreme Court often states this view. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). *See also* Sheet Metal Workers v. EEOC, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring) ("Although technically dicta, . . . an important part of the Court's rationale for the result [that] it reache[s] . . . is entitled to greater weight . . . ."). Footnotes draw particular animus. *See* Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 647 (1985); *Ex parte* Alexander, 861 S.W.2d 921, 922 (Tex. Crim. App. 1993) ("This Court is not bound by dicta in footnotes.").

68. As Karl Llewellyn elegantly summarized, a skillful judge always has two tools to apply precedent. *See* K. N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 66-69 (1960). The first is to adhere strictly to the distinction between holding and dicta, confining a prior case so tightly to its facts that it "holds only of redheaded Walpoles in pale magenta Buick cars." *Id.* at 67. The second is to sweep broadly to any attractive language in the opinion, "[n]o matter how broad the statement, no matter how unnecessary on the facts or the procedural issues, if that was the

whether dicta and holding can meaningfully be distinguished,[69] and various scholars have noted the significant role value judgments can play in their application,[70] as well as advocated alternative approaches to the interpretation of precedent.[71]

The line between dicta and holding is further clouded by the presence of a middle ground, labeled "judicial dicta." Judicial dictum is generally defined as "[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision."[72] Statements of judicial dicta are technically "dicta" because they are not necessary to the holding of a case. They do not, however, implicate to the same degree as ordinary dicta the concern of "full consideration," which is one of the rationales for treating dicta and holdings differently.[73] Unlike ordinary dicta, judicial dicta is, by definition, well-reasoned and stated only after the court has investigated an issue with care.

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rule the court laid down, then that the court has held." *Id.* at 68. *See generally* Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769, 784 (1998) ("In reality, the weight given to dicta ranges on an inexact, non-linear scale from rejection, to indifference, to persuasion, to deference, to compulsion. Where particular dicta fall on this scale for a court that is faced with it depends on many factors . . . .").

69. *See* Dorf, *supra* note 63, at 2003 ("[N]o universal agreement exists as to how to measure the scope of judicial holdings. Consequently, neither is there agreement as to how to distinguish between holdings and dicta."); *Dictum Revisited*, *supra* note 61, at 512 ("Dictum describes many different types of statements of law. It describes so much that it can truthfully be said to describe nothing."); *see also* Mark M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. REV. 371, 419 n.55 (1991) ("[O]ne person's advisory opinion is another person's dicta."). A classic debate about whether dicta can be identified by reference to the "material facts" of an opinion is summarized in Alexander, *supra* note 58, at 18-19 n.21.

70. *See* MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 53 (1988) ("[B]ecause every material fact in a case can be stated at different levels of generality, each level of generality will tend to yield a different rule, and no mechanical rules can be devised to determine the level of generality intended by the precedent court."); *see also Dictum Revisited*, *supra* note 61, at 509 (suggesting that the word "dictum" may mean nothing more than "I do not have to follow this case"). *See generally* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 112-17 (1991); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1067-68 (1990).

71. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 240-50 (1986); Brian Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent*, 1 OXFORD ESSAYS ON JURISPRUDENCE 148, 164-75 (1961). These perspectives have been subjected to philosophical and practical criticism. *See* Alexander, *supra* note 58, at 34-48; Dorf, *supra* note 63, at 2029; Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 299-301 (1989).

72. BLACK'S LAW DICTIONARY 465 (7th ed. 1999); *see* Hawes v. Luhr Bros., Inc., 816 N.E.2d 345, 349 (Ill. 2004) ("Since the issue was briefed and argued by the parties, the court's pronouncement is judicial *dicta*, rather than mere *obiter dicta*."); State v. Rainier, 103 N.W.2d 389, 396 (Minn. 1960) (characterizing a prior court's "expression of opinion on a question directly involved and argued by counsel though not entirely necessary to the decision" as obiter dictum).

73. *See supra* notes 53-54 and accompanying text.

Accordingly, courts afford judicial dicta greater deference than ordinary dicta, treating judicial dicta almost like holdings.[74]

Despite the presence of a middle ground between dicta and holdings and despite critiques that the distinction between dicta and holdings is meaningless, there is little question that there are many easily-identified holdings[75] that courts make serious efforts to identify and define.[76] Because of this practical reality, and because, at the very least, the labels of dictum and holding serve as a convenient shorthand for useful "policies in the law of precedent,"[77] these concepts provide a useful framework for analyzing the appropriate precedential role of a loud rule.

B. Application to Loud Rules

The "loud" part of a rule is not strictly necessary to the opinion. By definition, sanctions are not actually imposed when a court proclaims a loud rule, and thus the threat of sanctions is superfluous to the holding.[78] The admonishment to future litigants that they risk sanctions by testing the announced rule is not necessary to the stated result. Indeed, the examples cited earlier all show that the identical rule of law could be stated with no accompanying adjunct, loud or soft.[79] This sort of statement thus has a weak link to the threshold question of necessity and falls within the technical definition of "dicta."[80]

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74. *Hawes*, 816 N.E.2d at 349 ("Judicial *dicta* have the force of a determination by a reviewing court and should receive dispositive weight in an inferior court."); *Rainier*, 103 N.W.2d at 396 (stating that judicial dictum is "entitled to much greater weight than mere obiter dictum and should not be lightly disregarded"); Chase v. America Cartage Co., 186 N.W. 598, 599 (Wis. 1922) ("[W]hen a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum*, but is a judicial act of the court which it will thereafter recognize as a binding decision.").

75. *See, e.g.*, Kress, *supra* note 71, at 296-97 ("[I]n writing the first paragraph of this Article, I did not commit assault and battery on George Bush. Nor did I slander Gore Vidal."); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 414 (1985) ("I have equivalent confidence that I will not receive a notice in the mail informing me that I must house members of the armed forces in my spare bedroom . . . ."); *see* Alexander, *supra* note 58, at 53-54.

76. *See* Greenawalt, *supra* note 62, at 433 ("[M]ost judges take with some seriousness the idea that they should follow precedents, and the effort to determine the scope of precedents is important for them."); Alexander, *supra* note 58, at 53 n.69 ("Lower courts surely follow some version of the rule model."). *See generally* United States Nat'l Bank of Oregon v. Indep. Ins. Agents, 508 U.S. 439, 413 n.11 (1993) (noting that various past statements on an issue "contain a valuable reminder about the need to distinguish an opinion's holding from its dicta").

77. *Dictum Revisited*, *supra* note 61, at 516-18.

78. *See supra* note 25 and accompanying text.

79. *See supra* notes 13-22, 25-39 and accompanying text.

80. A more nuanced holding-dictum distinction is proposed in Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065 (2005) ("A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta."). Under this test, loud rules are characterized as dicta because the court steps off the decisional path when stating a loud rule.

Whether the underlying policy concerns with dicta are implicated, however, depends on the proposition for which the loud rule is later cited and on the characterization of the underlying statement of law as dicta or a holding. A loud rule contains two statements for which it can be cited: "the substantive law is 'X'"; and "any argument to the contrary of 'X' is sanctionable."[81] Moreover, the statement that "the substantive law is 'X'" is itself either dictum or a holding of the case in which the loud rule is pronounced. In sum, there are four possible scenarios:

(1) "X" is a statement of dicta, and a subsequent court cites the loud rule as authority for "X";

(2) "X" is a holding, and a later court cites the loud rule as authority for "X";

(3)"X" is a statement of dicta, and a later court cites the loud rule as authority for the proposition that an argument contrary to "X" is sanctionable; and

(4) "X" is a holding, and a later court cites the loud rule for the proposition that an argument contrary to "X" is sanctionable.

Each of these scenarios has different policy implications.

If a loud rule is cited for a proposition of substantive law (i.e., cited for "X"), the analysis of whether policies underlying the dictum-holding distinction are implicated turns on whether the statement of substantive law is itself a holding of the first case. If the statement of substantive law is mere dicta, then the addition of a loud component simply transforms the statement into strident dicta, and the concerns of full consideration and judicial limits are, if anything, accentuated.[82]

If, however, the threat of sanctions is attached to the holding of a case and the loud rule is cited for that holding, the concerns underlying the distinction between dicta and holdings are less apparent. In this scenario, the proposition of substantive law for which the loud rule is cited was fully considered by the court and thus, like judicial dicta, does not implicate the

81. For example, the loud rule in *Tolson* contained the following two statements: (1) the plan administrator did not abuse its discretion; and (2) any argument to the contrary is sanctionable. Tolson v. Avondale Indus., 141 F.3d 604, 611 (5th Cir. 1998).

82. *See supra* notes 52-55 and accompanying text.

concern about the court's degree of consideration.[83] Moreover, since the court's holding was within the court's judicial power when issued, the concern with the limits of judicial power is weakened.[84] The loud rule more closely resembles aggressive stare decisis than traditional dicta.

If a loud rule is cited for the proposition that any argument contrary to the holding of a case is sanctionable, the analysis again turns on whether the statement of law is holding or dictum. If the underlying statement of law is itself dicta, the concerns of full consideration and judicial limits are doubly implicated if the loud portion of the rule is cited since neither the statement of law nor the threat of sanctions is fully considered or necessary.[85]

If the underlying statement is a holding of the first case and the loud rule is cited for the proposition that a contrary argument is sanctionable, the policies underlying the differentiation of dicta and holding appear, at first glance, to be implicated. Since the first court did not actually consider in the case before it whether to impose sanctions, the court's pronouncement that an argument is sanctionable arguably qualifies as judicial overreaching. Further, the "loud" part of the rule tends to be a short, succinct admonishment, suggesting that the court stating the rule did not engage in a thoughtful analysis of whether asserting a contrary argument rises to the level of sanctionable conduct.

If the issuance of a loud rule is examined in the context of a court's entire docket, however, rather than merely in the context of the case immediately before the court, this analysis changes dramatically. As discussed above, courts are issuing loud rules in often litigated areas of law about arguments that are continually re-urged, despite overwhelming contrary authority.[86] In this broader context, a court's determination that an argument is sanctionable—even if expressed in a succinct statement—is more deliberate.[87] Moreover, in this context, the court's issuance of a loud rule more closely resembles docket control rather than judicial overreaching.[88]

C. Treatment by Courts

Ample evidence suggests that courts in fact find their earlier, "louder" proclamations to be persuasive for the underlying statement of law, rather than dicta. In *Towers v. City of Chicago*,[89] for example, the Seventh Circuit affirmed the dismissal of a due process claim arising from a forfeiture,

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83. *See supra* notes 62-64 and accompanying text.
84. *See supra* note 55 and accompanying text.
85. *See supra* notes 52-55 and accompanying text.
86. *See supra* notes 26-39 and accompanying text.
87. *See supra* notes 52-54 and accompanying text.
88. *See supra* note 41-46, 55 and accompanying text.
89. 173 F.3d 619 (7th Cir. 1999).

observing that the Supreme Court had earlier recognized "a long and unbroken line of cases" rejecting similar claims.[90] In the same vein are *Smith v. Cromer*,[91] in which the Fourth Circuit rejected an argument about a federal employee's obligation to testify because of that court's previous recognition of "an unbroken line of authority" to the contrary;[92] and *United States v. Lewis County*,[93] finding that no exhaustion of remedies was required when earlier precedent had held to the contrary "in accord with an unbroken line of authority and convincing evidence of legislative purpose."[94]

The Eleventh Circuit was particularly certain in its reasoning in *Rosen v. Cascade International*,[95] where the threshold choice of law issue was found to be settled by an earlier opinion's recognition of "long-settled federal law."[96] Reaching the merits, the Eleventh Circuit again relied on an earlier court's pronouncement about the clarity of the law: "[I]t is entirely settled by a long and unbroken line of Florida cases that . . . there is simply no judicial authority [for the requested relief] . . . ."[97]

Courts are also finding their earlier, "louder" proclamations to be persuasive for the propriety of imposing sanctions for an argument contrary to that expressed in the earlier loud rule. For example, in *Cohn v. Commissioner*,[98] the Seventh Circuit sanctioned an overly creative plaintiff who failed to recognize earlier precedent about the "long and unbroken line of cases upholding the constitutionality of the sixteenth amendment."[99] In *Sawukaytis v. Commissioner*,[100] the Sixth Circuit imposed sanctions, relying on its earlier loud rules that warned future litigants that the court would not hesitate to impose sanctions for future appeals based on a taxpayer's claim

90. *Id.* at 626 (quoting Bennis v. Michigan, 516 U.S. 442, 446-50 (1996)).

91. 159 F.3d 875 (4th Cir. 1998).

92. *Id.* at 879 (quoting Boron Oil Co. v. Downie, 873 F.2d 67, 70 (4th Cir. 1989)).

93. Nos. 95-35332 / 95-35415, 1996 WL 468651 (9th Cir. Aug. 7, 1996).

94. *Id.* at *1 (quoting Dep't of Employment v. United States, 385 U.S. 355, 357-58 (1966)).

95. 21 F.3d 1520 (11th Cir. 1994).

96. *Id.* at 1530-31 (quoting Granny Goose Foods, Inc. v. Bhd. of Teamsters, 415 U.S. 423, 436 n.10 (1974)).

97. *Id.* at 1531 (quoting Konover Realty Assocs., Ltd. v. Mladen, 511 So. 2d 705, 706 (Fla Dist.. Ct. App. 1987)). Examples come from other levels of the judicial system as well. *See, e.g.*, Williamsburg Fair Hous. Comm. v. Ross-Rodney Hous. Corp., 599 F. Supp. 509, 523 (S.D.N.Y. 1984) ("Every reported case to address the issue has held that interest is available on an award of attorney's fees under [42 U.S.C.] § 1988" (quoting Preston v. Thompson, 565 F. Supp. 294, 297 (N.D. Ill. 1983)).).

98. No. 96-2035, 1996 WL 681340 (7th Cir. Oct. 31, 1996).

99. *Id.* at *1 (quoting Miller v. United States, 868 F.2d 236, 241 (7th Cir. 1988)).

100. No. 02-2431, 2004 WL 1376612 (6th Cir. June 16, 2004).

that earned income is not taxable.[101] Similarly, the Fifth Circuit imposed sanctions in a tax appeal, noting that its earlier loud rule had been disregarded: "Our warning has been ignored. We now invoke the sanctions of Fed. R. App. P. 38 and assess appellants with double costs."[102]

Courts also cite their earlier, more pointed observations about the state of the law. In recent years, the Fourth Circuit has twice rejected an argument about the operation of a particular sentencing guideline by citing to an earlier case rejecting the argument as one that "borders on the frivolous."[103] A similar fate awaited the claim in *Mykjaaland v. Burch*,[104] where the Fourth Circuit held that it was unconstitutional for a bar association to make background checks, which the Supreme Court itself had held to "border on the frivolous."[105] The court also rejected the argument in *Jane L. v. Bangerter*,[106] to the District of Utah, that laws against abortion violated the Thirteenth Amendment's prohibition of involuntary servitude, which that same court had rejected a year before with the same language.[107]

In sum, courts do not seem to treat their earlier loud rules as dicta. Rather, courts cite them as authority both for the underlying statement of law and for the proposition that an argument to the contrary is sanctionable. While this use of the technique may technically qualify as relying on dictum, it does not present the same policy concerns as other forms of dictum.

IV. INHERENT POWER

A. Background

The authority to make statements to control a docket has a foundation in a vague but fundamentally coherent set of principles often referred to as a court's "inherent power."[108] In the Third Circuit *en banc* opinion of *Eash v.*

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101. *Id.* at *3-*6 (relying on loud rules pronounced in Martin v. Comm'r, 756 F.2d 38 (6th Cir. 1985) and Perkins v. Comm'r, 746 F.2d 1187 (9th Cir. 1993)). *See also* Sisemore v. United States, 797 F.2d 268, 271 (6th Cir. 1986) (awarding sanctions because the court's earlier warnings in *Martin* and *Perkins* were disregarded); White v. United States, No. 3:02-0417, 2003 WL 21771053, at *6 (M.D. Tenn. June 12, 2003) (relying on the Sixth Circuit's loud rule in *Perkins* as authority to award sanctions for a taxpayer's contrary argument).

102. Parker v. Comm'r, 724 F.2d 469, 472 (5th Cir. 1984).

103. United States v. Hunt, 117 F.3d 1414 (4th Cir. 1997) (table), 1997 WL 381859, at *2; United States v. Tanner, 917 F.2d 1302 (4th Cir. 1997) (table), 1990 WL 173801, at *2 (both quoting United States v. Gordon, 895 F.2d 932, 936-37 (4th Cir. 1990)). *See also* United States v. Burleson, 22 F.3d 93, 94 (5th Cir. 1994) (reiterating the caution against frivolous appeals that it had earlier stated in *Thomas*, No. 93-3558, 1994 U.S. App. LEXIS 13748).

104. 953 F.2d 1383 (4th Cir. 1992) (table), 1992 WL 17934.

105. *Id.* at *2 (quoting Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 160 (1971)).

106. 828 F. Supp. 1544 (D. Utah 1993).

107. *Id.* at 1554 (quoting Jane L. v. Bangerter, 794 F. Supp. 1537, 1549 (D. Utah 1992)).

108. *See* Eash v. Riggins Trucking, Inc., 757 F.2d 557, 561 (3d Cir. 1985) (noting that the concept

Riggins Trucking, the most thorough recent judicial discussion of inherent power, the Third Circuit observed that three "tiers" of inherent power have been identified: (1) irreducible powers derived from Article III, which exist despite contrary legislative direction;[109] (2) essential powers that "arise from the nature of the court," which can be legislatively regulated but not abrogated;[110] and (3) powers that are necessary only in the sense of being useful, which exist absent legislation to the contrary.[111] Under all three tiers, a court's inherent powers are generally defined as to those "necessary to permit the court to function."[112]

The concept of inherent power has been cited in support of a wide range of activities, including the power to sanction litigants for bad-faith conduct,[113] to grant relief beyond a prayer for relief[114] (but not to enforce a

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of inherent power "has been described as nebulous, and its bounds as 'shadowy'"); *see also* David Moore, *Invoking the Inherent Powers Doctrine to Compel Representation of Indigent Civil Litigants in Federal Court*, 10 REV. LITIG. 769, 780 (1991) (stating that the "doctrine of inherent powers is vague in terms of its scope"); Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts – A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1017, 1022-23 (1924) (observing that because "judicial power" is not a self-defining term such as the terms "jury" or "grand jury," "[t]he accumulated weight of repetition behind such a phrase as 'inherent powers' of the lower Federal courts is a constant invitation to think of words instead of things"); *accord* Stephen B. Burbank, Comment, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1004-06 (1983) (describing sometimes-cited errors of history about inherent power doctrine).

109. *Eash*, 757 F.2d at 562. *See also* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 847 (2001) ("Article III's grant of express authority to federal judges implies that they must have ancillary powers that are absolutely essential to exercise their enumerated ones.").

110. *Eash*, 757 F.2d at 562-63; FELIX F. STUMPF, INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY 8 (1994) ("All courts must have . . . 'from structural necessity' the inherent powers to do those things that are reasonable and necessary for the administration of justice . . . .").

111. *Eash*, 757 F.2d at 563.

112. Young v. United States *ex rel.* Vuitton et Fils, S.A., 481 U.S. 787, 819-20 (1987) (Scalia, J., concurring). *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) ("Certain implied powers must necessarily result to our courts of justice from the nature of their institution . . . which cannot be dispensed with in a court, because they are necessary to the exercise of all others."); Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (stating that inherent powers are "those which 'are necessary to the exercise of all others'" (quoting United States v. Hudson, 3 L. Ed. 259 (1812))); Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962) (noting that inherent powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"); *see also* STUMPF, *supra* note 110, at 3 ("Statements of 'inherent powers' abound, but they are usually phrased rather broadly to cover powers thought essential to the existence, dignity, and functions of the court because it is a court or for the orderly, efficient, and effective administration of justice.").

113. *Chambers*, 501 U.S. at 46.

114. Hamlin v. Warren, 664 F.2d 29, 30 (4th Cir. 1981).

settlement),[115] to punish contempts,[116] to set aside fraudulently obtained judgments,[117] to dismiss for want of prosecution,[118] to exclude unruly people from the courtroom,[119] to notice jurisdictional defects,[120] to award attorneys fees under limited circumstances,[121] to appoint counsel for the indigent,[122] and to order parties to nonbinding mediation.[123]

A court's inherent power, while derived from the concept of necessity, is also strictly limited by the necessity test.[124] The Supreme Court has advised that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion."[125] Other courts have called them a tool of last resort,[126] the use of which must be in some way indispensable to the resolution of the matter at hand.[127] As with the exercise of Rule 11 sanctioning power[128] (and inherent powers are often invoked in the sanctioning context), there is respect for the potential to quash zealous advocacy by overusing the regulatory power. In sum, a legitimate "inherent" power has long been recognized to use sanctions and sanction-like powers to impose order on a court's docket, but only when necessary to do so.[129]

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115. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 380-81 (1994).

116. *See Ex parte* Robinson, 86 U.S. 505, 510 (1874) ("The power to punish for contempts is inherent in all courts.").

117. *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 249-50 (1944); Universal Oil Prods. Co. v. Root Refining Co., 328 U.S. 575, 580 (1946).

118. Link v. Wabash R.R., 370 U.S. 626, 629 (1962). *See generally* FEDERAL CIVIL PROCEDURE BEFORE TRIAL – 5TH CIRCUIT § 16 (Hon. George P. Kazen et al. eds. 1996).

119. Illinois v. Allen, 397 U.S. 337, 342-43 (1970).

120. Fleck v. Spannaus, 421 F. Supp. 20, 21 (D. Minn. 1976).

121. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 (1975).

122. *See* Moore, *supra* note 108, at 775-80 (compiling cases).

123. *In re* Atl. Pipe Corp., 304 F.3d 135, 138 (1st Cir. 2002); *see* Amy M. Pugh & Richard A. Bales, *The Inherent Power of the Federal Courts to Compel Participation in Nonbinding Forms of Alternative Dispute Resolution*, 42 DUQ. L. REV. 1, 14-19 (2003).

124. Degan v. United States, 517 U.S. 820, 823 (1996) ("Principles of deference counsel restrain in resorting to inherent power . . . and require its use to be a reasonable response to the problems and needs that provoke it.").

125. Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)).

126. Young v. United States *ex rel.* Vuitton et Fils, S.A., 481 U.S. 787, 801 (1987).

127. *See, e.g.*, ITT Comm. Devel. Corp. v. Barton, 569 F.2d 1351, 1360 (5th Cir. 1978) ("Action taken by a federal court in reliance on its inherent powers must somehow be indispensable to reaching a disposition of the case."); Natural Gas Pipeline Co. v. Energy Gathering, Inc., 86 F.3d 464, 468 (5th Cir. 1996) ("[T]he ultimate touchstone of inherent power is necessity." (citation omitted)); *see also* Conner v. Travis County, 209 F.3d 794, 800 (5th Cir. 2000) (reversing an award of sanctions pursuant to a court's inherent power because "the court below . . . possessed means other than sanctions of efficiently managing its docket").

128. FED. R. CIV. P. 11.

129. *See* Kendall Coffey, *Inherent Judicial Authority and the Expert Disqualification Doctrine*, 56 FLA. L. REV. 195, 200 (2004) ("[W]hile inherent authority has evolved over almost two centuries as a permanent dimension of the judicial tapestry, it is a fabric threaded with caution.").

B. Application to Loud Rules

Courts pronouncing loud rules have not cited any authority for their power to do so, but they are surely drawing upon their inherent power to control their docket, whether consciously or not. From this perspective, the argument would be that loud rules are necessary to prevent a court's docket from being clogged with cases asserting duplicative and unmeritorious positions.[130]

To comport with the necessity test as stated for other applications of inherent power, the loud rules should address arguments, such as those repeatedly asserted in often litigated areas of law, that truly risk disrupting the court's function.[131] Powers found necessary for the court to function—such as the power to exclude unruly people from the courtroom or to appoint counsel for the indigent—are ordinarily necessary for the smooth operation of a *particular case*, rather than of an entire docket.[132] A broad application of the necessity test to a court's *entire docket* is not without precedent, however. For example, a court has the inherent power to establish local rules, which enable a court's entire docket to operate smoothly.[133] Therefore, the use of loud rules necessary to the smooth operation of a court's docket is likely within the confines of a court's inherent power.

V. VOLUME CONTROL

Loud rules can skew the process of making common law, chilling litigants and exalting sound bites.[134] Carefully controlled, however, they can serve as a useful and appropriate docket tool for controlling troublesome categories of cases.[135] The question is how to channel the influence of these kinds of statements in positive directions. This part of the Article proposes

130. *See supra* notes 25-39, 101 and accompanying text.

131. *See supra* notes 113-16 and accompanying text.

132. *See supra* notes 102-12 and accompanying text.

133. Whitehouse v. U.S. Dist. Ct., 53 F.3d 1349, 1355 (1st Cir. 1995) ("[T]he Supreme Court has long recognized that district courts have certain inherent rule-making powers arising from the nature of the judicial process."); STUMPF, *supra* note 110, at 17 ("[I]n the past fifty years state appellate courts, largely subsequent to the promulgation of the Federal Rules of Civil Procedure and usually on separation of powers grounds, have increasingly held that they have the inherent and exclusive power of adopting procedural rules.").

134. *See supra* notes 39-45 and accompanying text.

135. *See* Jack B. Weinstein, *Rendering Advisory Opinions – Do We, Should We?*, 54 JUDICATURE 140, 143 (1973) (noting that Townsend v. Sain, 372 U.S. 293 (1963) and Miranda v. Arizona, 384 U.S. 436 (1966) "lay[] down general principles for the future and avoid[] the necessity of hundreds of appeals spelling out the rules in detail"). *See generally* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1711-22 (1998); Kannan, *supra* note 68, at 791-95.

that some slight modifications in the concept of "necessity" currently used by courts, both in distinguishing dictum from holding, and in justifying the use of inherent power, would help achieve that end while potentially adding depth to the application of the concept of "necessity" in other related contexts.

The earlier look at loud rules reveals a parallel between the two inquiries, albeit one based on one of the more flexible words in legal parlance.[136] The basic test for distinguishing whether a statement is dictum or holding looks to the "necessity" of the statement to the result of the opinion.[137] Similarly, the guideline for the exercise of a court's inherent power to sanction or otherwise impose order in a case is whether that action is "necessary" to achieve the desired end.[138] This parallel is rooted in the similar policies behind the two tests. Both concepts are grounded in the idea that courts do good work when they take "necessary" action, be it to effectively explain the rationale of a holding, or to clarify what is expected of the advocates in a particular case.

Despite the common ground shared by these principles, they are not entirely at peace with each other.[139] A thoughtful, "loud" comment that is necessary from the perspective of docket management may not be a "necessary" part of the substantive reasoning of a case.[140] Because the same parsing of precedent would reach the same destination, with or without the loud rule, the statement is tarnished as "dicta" and thus has less force as a precedent.

This result shows an oversight in the "necessity" guideline for distinguishing holdings and dicta. Each of the policies behind the distinction between dicta and holdings—accuracy and legitimacy—is advanced by giving force to an appropriately tailored statement that helps implement the opinion. If the statement is carefully reasoned and focuses on the proper operation of a court docket, it is almost surely the appropriate prerogative of a court to speak to that subject. The rubric of "necessity," then, to the extent it gives short shrift to such statements, may sweep too broadly.[141]

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136. *See* BLACK'S LAW DICTIONARY 1059 (8th ed. 2004) (defining "necessity" in contexts as diverse as "military necessity," "physical necessity," and "public necessity").

137. *See supra* notes 56-57 and accompanying text.

138. *See supra* note 101 and accompanying text.

139. An interesting example of this tension appears in *Tate v. Dobucki*, 1998 WL 299479 (N.D. Ill. May 28, 1998). In *Tate*, the court held:

> Tate is hereby advised that he has now had two called 'strikes' . . . . That counsels the need for Tate to exercise caution in the future before he considers bringing any other litigation . . . . This should not be misunderstood as a ruling by this Court – it is rather a cautionary note for Tate to consider.

Id. at *2 n.2. Then what is it?

140. *See supra* notes 68-70 and accompanying text.

141. Perhaps these statements could be called "judicial dicta." *See supra* notes 62-64 and accompanying text. While that categorization may place them in a higher level of limbo, it is still a subordinate status.

A slight recalibration of the guideline would more closely align it with the underlying policies. If the definition of "necessary" in the dictum-holding context recognized a procedural element in addition to a wholly substantive one, it would be more likely to give appropriate weight to beneficial loud rules.[142] In other words, the doctrine should recognize the practical reality that it is not enough simply to state necessary components of results, if those results cannot be effectively implemented. To recognize that reality, the concept of "necessity," as applied to decide whether a statement is dictum or holding, should consider whether the statement is necessary to the effective implementation of the announced rule, as well as whether it was an appropriate part of the substantive analysis of precedent.

The addition of a procedural necessity component to the dicta-holding analysis is based on a recognition that opinions have practical docket control consequences independent of the "pure" legal reasoning of the opinion. Courts have intuitively recognized this feature of opinion drafting for some time. A particularly instructive line of authority comes from a group of old cases holding that courts have inherent power to determine how to structure and phrase their written opinions.[143]

In *Houston v. Williams*,[144] for example, the California Supreme Court struck down a statute requiring it to write out its opinions, reasoning that the statute made the court unable to conduct business because its opinions would become elephantine.[145] The statute would require the court to write "expressions of opinion on incidental questions, too strong and unqualified"[146] or, in other words, dicta.[147] The decision about what to emphasize was thus held to be in the "absolute" discretion of the courts.[148]

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142. *See generally* DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE § 4.02, 278-79 (2d ed. 1992) (describing different approaches to distinguishing "procedure" and "substance" for purposes of the *Erie* doctrine).

143. *See* Selya, *supra* note 52, at 411 n.22; *see also* A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 29-33 (1958). *See generally* Annotation, *Power of Court to Prescribe Rules of Pleadings, Practice or Procedure*, 110 A.L.R. 22 (1937).

144. 13 Cal. 24 (1859).

145. *Id.* at 25.

146. *Id.* at 27.

147. *See supra* notes 56-57 and accompanying text; *see also* Willets v. Ridgway, 9 Ind. 349, 352 (1857) (describing forced dicta as "the bane" of good opinion writing).

148. *Houston*, 13 Cal. at 26 (citing Lord Coke's Commentaries). *See also* Vaughan v. Harp, 4 S.W. 751, 752 (Ark. 1887) (striking down as unconstitutional a statute requiring all supreme court opinions to be "reduced to writing" and to resolve "all points presented in error that legitimately arise in the case"); *accord* Ocampo v. Cabangis, 15 Phil. 626 (Pa. 1910); Speight v. People, 87 Ill. 595 (1877). Incidentally, California now has a constitutional provision to the same effect. CAL. CONST. art. VI § 14 ("Decisions of the Supreme Court and courts of appeal that determine causes

In the same vein, courts have held that they cannot be required by statute to prepare a syllabus of opinions, as a judge's function differs fundamentally from that of a reporter of decisions,[149] or to produce written opinions within statutory deadlines.[150]

Similarly, courts have historically incorporated the practical consequences of their holdings into their reasoning by relying on "policy" arguments. Courts commonly justify a particular reading of precedent with reference to the consequences of that reading.[151] If this argument structure is legitimate, it should be equally legitimate when the policy argument relates to the effective operation of the court system with reference to a specified category of cases.[152]

Moreover, the concept of procedural necessity is not alien to the dicta-versus-holdings framework. Judicial dicta, which is accorded more deference than ordinary dicta, is specifically fashioned to provide guidance to the bench and bar.[153] Often, this guidance consists of practical tips on how to implement the court's holding on remand.[154] Other times, judicial dictum is used to guide lower courts following a major change in the law.[155] The procedural benefit of affording deference to judicial dicta weighs in favor of treating judicial dicta as highly persuasive, if not binding.[156]

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shall be in writing . . . ."). *See generally* Max Radin, *The Requirement of Written Opinions*, 18 CAL. L. REV. 486 (1930).

149. *In re* Griffiths, 20 N.E. 513, 513-14 (Ind. 1889).

150. Coate v. Omholt, 662 P.2d 591, 593 (Mont. 1983).

151. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991) (delineating six modalities of constitutional argument: historical, textual, structural, doctrinal, ethical, and prudential).

152. *See generally* Weinstein, *supra* note 135.

153. *See* Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI-KENT L. REV. 655, 713-14 (1999) ("[J]udicial dicta are those statements of the court which, while not part of the holding, are nevertheless set forth with the deliberate intent of not merely exploring the legal issue but instructing the bench and bar."); *see also* United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975) (characterizing a court's "construction of a statute to guide the future conduct of inferior courts" as judicial dictum).

154. *See* Chase v. Am. Cartage Co., 186 N.W. 598, 599 (Wis. 1992) ("Thus it frequently happens that a negligence case, for instance, may have to be reversed because the trial court erred in refusing to submit the question of contributory negligence to the jury. All that is absolutely necessary to fully dispose of the appeal is to so decide. But there may also be presented questions of pleadings, of evidence, of instructions to the jury, of whether defendant was guilty of gross negligence, etc. These the court will consider and decide for the future guidance of the trial court in that case upon a retrial; and for trial courts generally."). Similarly, while stating a rule, courts sometimes identify potentially useful future facts that could distinguish the stated rule or disrupt the analogical connection between a future case and the case at hand. *See generally* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

155. *See, e.g.*, United States v. Crosby, 397 F.3d 103 (2d Cir. 2005) (laying out a framework for district court sentencing and appellate review of sentences after the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005)); *see also* Piscottano v. Murphy, No. 3:04CV682, 2005 WL 1424394, at *3 (D. Conn. June 9, 2005) (characterizing the framework provided by the Second Circuit in *Crosby* as judicial dicta).

156. *See, e.g.*, *Piscottano*, 2005 WL 1424394, at *3.

In addition to providing an appropriate degree of recognition for helpful loud rules, the inclusion of a procedural component in the distinction between dicta and holding sheds some light on the operation of precedent in other contexts, although the full exploration of those areas is beyond the scope of this article. Most basically, it helps explain, albeit in a very simple way, why litigants expect reasons in appellate opinions and why appellate courts provide them: it is difficult to work without them. Unadorned conclusions, separated from the actual operation of the court system, are difficult to assess and "handicap" as the modern, settlement-oriented legal system demands.[157]

Further, the recognition that procedural concerns impact the statement of a substantive rule of law sheds some light on the ongoing debate over the extent to which legal statements should be expressed as rules or as standards.[158] When a legal statement is expressed so broadly that it becomes procedurally difficult to implement, as evidenced by a court's straining to be heard, a shift in generality may be worth considering. The procedural consequences of a legal statement may influence where the statement should be placed on the rule-standard continuum.

There are comparable benefits from a similar realignment of the concept of "necessity" as it is used to decide when to invoke a court's inherent power. The more a loud rule relates to a statement that is important to the result of the case, the more legitimacy it gains. If the holding was "X" and the loud rule related to "Y," the comment would seem so far afield that it would lose credibility and not be an effective use of inherent power, much less a meaningful part of the opinion.[159] In other words, the more the exercise of inherent power reckons with the accepted framework for parsing the substantive statements in opinions, the more effective it will likely be

157. *See* Schauer, *supra* note 66, at 654-58.

158. *See* EINSENBERG, *supra* note 70, at 53. Some statements of law are rigid, categorical "rules" to be followed in a defined factual context, regardless of whether the rule's application is consistent with the policy underlying the rule. Others take the form of broad "standards" to be applied in every factual situation that arises, in an effort to conform the result in every case with the governing rationale. *See* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) ("A legal directive is 'rule'-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. . . . A legal directive is 'standard'-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.").

159. For example, if the loud rule in *Tolson* related to ERISA preemption rather than a plan administrator's abuse of discretion, the loud rule could lose its legitimacy. *See* Tolson v. Avondale Indus., 141 F.3d 604, 611 (5th Cir. 1998).

and the fewer collateral consequences it will likely have. The definition of "necessity" in the context of deciding when to use inherent power should recognize this reality.

VI. CONCLUSION

The holding of an opinion is often accompanied by guidance about how quick a litigant should be to challenge, question, or distinguish the announced rule.[160] If used indiscriminately, this kind of guidance can be a particularly pernicious form of dicta, judging cases before they are ready to be judged, in a manner with particular impact on the bar.[161] At the same time, however, this kind of statement can help control crowded dockets. Indeed, if a court can sanction a litigant for a poor argument, it seems both necessary and desirable that the court be able to admonish its litigants before sanction issues actually come to a head.[162] Both the perils of this technique, and its benefits, are likely to grow in influence in a world in which there is an increasing amount of law and the identification of truly meaningful precedents becomes an increasing challenge.

This Article's application of the dictum-holding analysis and the inherent powers doctrine to loud rules presents two basic guidelines for the appropriate use of loud rules. First, the loud rule should relate to the holding of the case. Otherwise, the policy reasons underlying the dictum-holding distinction—consideration and legitimacy—are implicated.[163] Further, the court's inherent power risks being invoked in an ancillary and ultimately unimportant matter.[164] Second, the loud rule should relate to a frequently-asserted argument in an often litigated area of law. If this guideline is not followed, the court's succinct loud rule, rather than being educated by a consistent influx of cases before the court, risks being under-considered.[165] Further, rather than being motivated by the need to impose order on an unruly docket, the court's motivation is less clear and resembles judicial over-reaching.[166] Finally, if the loud rule does not relate to frequently litigated arguments, the loud rule is not truly necessary to the smooth operation of the court's docket, thus potentially exceeding the court's inherent power.[167]

Additionally, while statements in opinions are presently passed through a test of their "necessity" to the result to determine whether they deserve the

160. *See supra* notes 15-21, 23-38 and accompanying text.
161. *See supra* notes 39-45, 102-12, 118 and accompanying text.
162. *See supra* notes 24-28 and accompanying text.
163. *See supra* notes 73, 76 and accompanying text.
164. *See supra* note 148 and accompanying text..
165. *See supra* notes 77-78 and accompanying text..
166. *See supra* note 79 and accompanying text..
167. *See supra* notes 118-19 and accompanying text.

force of precedent as a "holding," this Article has proposed a slight modification of that filter to also give precedential force to statements, such as loud rules, that are necessary to help implement the result.[168] By giving force to principled, appropriate statements that might not be captured under the traditional test, this acknowledgment can help capture the beneficial aspects of loud rules while passing over incidental comments and stray remarks. This framework may also help resolve some issues about the level of generality at which to phrase case holdings.

Similarly, this Article has also proposed that use of the inherent power to sanction gains legitimacy if it focuses on the significant substantive issues at issue in the case, i.e., the ones that are "necessary" to the substantive result of the case.[169] This focus avoids the appearance, or perhaps even the reality, of sanctions motivated by trivial matters or judicial caprice. The end result of moving toward this focus, as well as the modification discussed above in the test for what constitutes a "holding," will hopefully be a more effective development of common law through wise use of the powerful device of the loud rule.

168. *See supra* notes 128-47 and accompanying text.
169. *See supra* note 148 and accompanying text.