


Summer 2009

The DNA of an Argument: A Case Study in Legal Logos

Colin Starger

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Colin Starger, The DNA of an Argument: A Case Study in Legal Logos, 99 J. Crim. L. & Criminology 1045 (2008-2009)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

THE DNA OF AN ARGUMENT: A CASE STUDY IN LEGAL *LOGOS*

COLIN STARGER*

This Article develops a framework for analyzing legal argument through an in-depth case study of the debate over federal actions for postconviction DNA access. Building on the Aristotelian concept of logos, this Article maintains that the persuasive power of legal logic depends in part on the rhetorical characteristics of premises, inferences, and conclusions in legal proofs. After sketching a taxonomy that distinguishes between prototypical argument logoi (formal, empirical, narrative, and categorical), the Article applies its framework to parse the rhetorical dynamics at play in litigation over postconviction access to DNA evidence under 42 U.S.C. § 1983, focusing in particular on the procedural controversy over using § 1983 instead of federal habeas to seek DNA testing (the so-called Heck problem). The essential competing logics in this debate are unpacked through close readings of the clashing opinions of Judge Luttig and Chief Judge Wilkinson in the Harvey II case. The logos of Judge Luttig's argument in support of § 1983 DNA-access actions is classified as formal because it presents itself as a deductive application of the Heck rule whereas the logos of Chief Judge Wilkinson's counter-argument is classified as narrative because it interprets Heck as part of a larger story about the "morality of process." Three primary claims are then advanced. First, based on an empirical review of all cases in the debate, it is argued that Judge Luttig's proof has exerted a singularly persuasive influence on the § 1983 DNA access discourse. Second, it is claimed that the rhetorical success of Judge Luttig's opinion derives from the formal logos of his Heck argument. Finally, the persuasive appeal of

* Acting Assistant Professor of Lawyering, New York University School of Law. J.D., Columbia Law School, 2002. The author was a Staff Attorney at the New York Innocence Project from 2003-2007. He expresses his gratitude to Ebony Coletu, Peggy Cooper Davis, Brandon Garrett, Sam Gross, Susan Haack, Aziz Huq, Jennifer Laurin, Jay Mootz, Lawrence Solum, Adam Zimmerman, and New York University Lawyering Faculty Scholarship Colloquium participants for their thoughtful comments on drafts of this Article. Of course, the author accepts full responsibility for all errors of fact, judgment, and analysis.

Luttig's formal logos is attributed to its resonance with the relevant Supreme Court doctrine, which also evinces a formal logos in its approach to jurisdictional line-drawing. As this Article was accepted for publication prior to the Court's decision in Osborne, a § 1983 DNA-access action, it used its rhetorical analysis to buttress an ex ante prediction that Heck would present no bar for William Osborne. In an ex post Epilogue, the (mostly vindicated) analysis is assessed.

I. INTRODUCTION**

Law inevitably pits arguments against one another. Some win, some lose. In a dispute where on-the-books law or on-the-ground facts clearly favor one side over another, argument rarely determines the outcome. But in closer cases, what accounts for the relative success of embattled legal arguments? Does an argument's logic explain its persuasive power? In this Article, I construct an answer to these questions by developing a rhetorical framework that distinguishes categories of argument logic. I maintain that legal arguments persuade differently depending on how their premises, inferences, and conclusions are logically constituted. I introduce this rhetorical framework through an in-depth case study of the federal court debate over postconviction access to DNA evidence. The Supreme Court is now set to rule on the *Osborne* case emerging from this debate,¹ and I use my framework to justify a partial prediction of what argument logic will prevail in the Court.²

Understanding the multi-faceted DNA access debate presented by *Osborne* initially requires a sifting through layers of argument. At its

** This Article was completed and accepted for publication in mid-March 2009, approximately three months before the Supreme Court handed down its June 18, 2009 decision in *District Attorney's Office v. Osborne*, 129 S. Ct. 2308 (2009). To preserve the integrity of the Article's ex ante prediction about *Osborne*, I have not altered the content of my argument in light of the actual decision. Rather, I explore how well my prediction fared in a separate Epilogue below. See *infra* Part V.

¹ *Osborne v. Dist. Attorney's Office*, 521 F.3d 1118 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 488 (2008). *Osborne* was argued and submitted on March 2, 2009. See Transcript of Oral Argument, *Osborne*, 129 S. Ct. 488 (No. 08-6). In the interest of full disclosure, I was counsel for respondent in this case for four years during litigation in the District Court of Alaska and Ninth Circuit Court of Appeals. I also appear on the Brief for Respondent in the Supreme Court. See Brief for the Respondent, *Osborne*, 129 S. Ct. 2308 (hereinafter *Osborne Respondent's Brief*). Although I have played an advocate's role in these proceedings, I tackle the rhetorical issues presented through a scholar's lens in this Article.

² The Court accepted certiorari on two questions—one procedural and one substantive. See *infra* note 7 and accompanying text. My prediction is partial because it is confined to the procedural question. See *infra* Part V.C. Though I focus on the procedural question, my analysis also fundamentally concerns the rhetorical stakes and logical consequences of attempting to sever the procedural question from its substantive counterpart.

highest level of abstraction, the current postconviction DNA access debate concerns how proof intersects with legal process. DNA's extraordinary forensic power to determine guilt or innocence has challenged traditional notions of finality for criminal convictions where proof was adduced "beyond a reasonable doubt." Postconviction DNA exonerations have shown that, however reasonable at the time, mistaken trial judgments of guilt can result in wrongful convictions.³ While DNA testing gained acceptance in the 1990s as a means of accurately identifying suspects with scientific certainty, providing postconviction access to this uniquely probative form of proof quickly became a major issue in criminal justice discourse.⁴ State legislatures began to enact postconviction DNA testing statutes and prisoners began litigating access claims under these statutes in an attempt to prove their innocence.⁵

Out of this general conversation about postconviction DNA access, a specific federal court discourse emerged. As the millennium turned, federal courts began to entertain a new type of DNA access action filed under 42 U.S.C. § 1983 (2006). Section 1983 provides a remedy for individuals whose constitutional and federal civil rights have been violated by persons acting "under color of" state law.⁶ Section 1983 DNA access suits are brought by convicted criminals against civil plaintiffs to gain access to biological evidence held by the state. The biological evidence sought relates to the crime for which the plaintiff was convicted. The plaintiff asserts that a forensic DNA test of this evidence would yield results proving the plaintiff's innocence. The basic argument asserts that the defendants

³ See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 73-120 (2008) (analyzing errors in trials and appeals of the first two hundred postconviction DNA exonerations).

⁴ One major force to press this issue was the U.S. Department of Justice (DOJ). In 1996, the National Institute of Justice issued a report detailing twenty-eight postconviction DNA exonerations and analyzing the arising implications. See EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996). The DOJ then published a highly influential report in 1999 that advocated allowing postconviction DNA testing. See NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, U.S. DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS iii (1999) ("The analysis offered by these recommendations applies DNA technology to the appeals process while recognizing the value of finality in the criminal justice system. Where DNA can establish actual innocence, the recommendations encourage the pursuit of truth over the invocation of appellate time bars.").

⁵ See Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1670-84 (2008) (analyzing forty-four state postconviction DNA statutes and discussing judicial rulings that interpreted them).

⁶ 42 U.S.C. § 1983 (2006).

violated the plaintiff's constitutional rights by refusing, under color of law, to allow access to potentially exculpatory DNA evidence.

This federal court discourse, in turn, implicates numerous doctrinal disputes over the propriety of § 1983 DNA access actions. Various strands of debate have percolated through the federal courts as prisoners with unique factual circumstances advanced alternate justifications for finding a substantive right and faced a myriad of procedural defenses. In *Osborne*, the Supreme Court is weighing in on two of these issues: (1) whether a postconviction DNA access claim is cognizable under the procedural vehicle of § 1983; and (2) whether a substantive constitutional right exists to access DNA evidence after conviction.⁷

In this Article, I extricate the logic of the competing arguments on the first question presented in *Osborne* and carefully analyze their relative persuasive power. In broad strokes, this specific procedural debate concerns whether prisoners are barred from bringing DNA access actions under § 1983 because of a line of Supreme Court cases that starts with *Preiser v. Rodriguez*⁸ and most prominently includes *Heck v. Humphrey*.⁹ Taken together, cases in the *Preiser-Heck* family police a boundary between § 1983 and the federal habeas corpus statute—the traditional avenue available for prisoners seeking postconviction relief in federal courts.¹⁰ Depending on how the logic of the *Preiser-Heck* cases is understood, § 1983 DNA access actions may or may not “necessarily imply” the invalidity of the prisoner’s criminal conviction and fall on the wrong side of this boundary.¹¹

⁷ I have attempted to neutrally state the questions presented. However, the State (technically, the regional District Attorney’s Office in Anchorage, Alaska) (petitioner) and *Osborne* (respondent) certainly contest the precise formulation of these questions. Compare, e.g., Petition for Writ of Certiorari at i, *Dist. Attorney’s Office v. Osborne*, 129 S. Ct. 2308 (2009) (No. 08-6) (“May *Osborne* use § 1983 as a discovery device for obtaining postconviction access to the state’s biological evidence when he has no pending substantive claim for which that evidence would be material?”) with *Osborne* Respondent’s Brief, *supra* note 1, at i (“Whether a state prisoner’s claim that he is entitled to obtain postconviction access to evidence for DNA testing may be brought in an action under 42 U.S.C. 1983.”).

⁸ 411 U.S. 475 (1973).

⁹ 512 U.S. 477 (1994).

¹⁰ See *Heck*, 512 U.S. at 486-87. The *Preiser-Heck* cases consciously engage in line drawing that prescribes the conditions under which substantive debate is possible. See, e.g., *Preiser*, 411 U.S. at 489 (“[D]espite the literal applicability of [§ 1983’s] terms, the question remains whether the specific federal habeas corpus statute . . . must be understood to be the exclusive remedy available in a situation like this where it so clearly applies.”); *Heck*, 512 U.S. at 480 (“This case lies at the intersection of the two most fertile sources of federal-court prisoner litigation—the Civil Rights Act of 1871[,] 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254.”).

¹¹ See *Heck*, 512 U.S. at 487 (“[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would

None of the existing scholarship on postconviction DNA testing employs a rhetorical approach to expose the underlying logic of competing doctrinal arguments. Some scholars have advanced doctrinal arguments in favor of finding a substantive constitutional right to postconviction DNA access.¹² Others have confronted the specific *Preiser-Heck* question that is my core concern and concluded that no procedural bar should apply to § 1983 DNA access actions.¹³ While this work elucidates the doctrinal landscape of the DNA argument, my contribution is a new meta-analysis of how persuasion functions within this landscape.

In order to analyze the persuasive power of competing arguments in the *Preiser-Heck* debate, I undertake a rhetorical case study analyzing which arguments have persuaded federal judges who have participated in § 1983 DNA access discourse. The first federal § 1983 DNA access

necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.”).

¹² See Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 241-311 (2008) (arguing for a constitutional right based on overruling of the Supreme Court’s decision in *Arizona v. Youngblood*); Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 547-617 (2002) (reviewing arguments of early § 1983 DNA access action pioneers for the existence of a constitutional right); see also Sophia S. Chang, Comment, *Protecting the Innocent: Post-Conviction DNA Exoneration*, 36 HASTINGS CONST. L.Q. 285, 291-94 (2009) (arguing for a constitutional right of access); Elizabeth A. Laughton, iBrief, *McKithen v. Brown: Due Process and Post-Conviction DNA Testing*, 2008 DUKE L. & TECH. REV. 7 (arguing against the existence of a constitutional right for plaintiff in *McKithen v. Brown*). Some student scholars have concluded that doctrinal uncertainty means that legislation is necessary to guarantee postconviction access to DNA testing. See J. Brent Alldredge, Comment, *Federal Habeas Corpus and Postconviction Claims of Actual Innocence Based on DNA Evidence*, 56 SMU L. REV. 1005, 1019-20 (2003); David A. Schumacher, Comment, *Post-Conviction Access to DNA Testing: The Federal Government Does Not Offer An Adequate Solution, Leaving the States to Remedy the Situation*, 57 CATH. U. L. REV., 1245, 1245-74 (2008); Rachel Steinback, Comment, *The Fight for Post-Conviction DNA Testing Is Not Yet Over: An Analysis of the Eight Remaining “Holdout States” and Suggestions for Strategies to Bring Vital Relief to the Wrongfully Convicted*, 98 J. CRIM. L. & CRIMINOLOGY 329, 329-61 (2007).

¹³ Student commentators advance these arguments. See Dylan Ruga, Comment, *Federal Court Adjudication of State Prisoner Claims for Post-Conviction DNA Testing: A Bifurcated Approach*, 2 PIERCE L. REV. 35, 35-55 (2004) (arguing that DNA access claims should be permitted under § 1983 and that exoneration claims should be permitted under federal habeas); Benjamin Vetter, Comment, *Habeas, Section 1983, and Post-Conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587, 588 (2004) (arguing that DNA access actions should be permitted under § 1983); see also Note, *Defining the Reach of Heck v. Humphrey: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 HARV. L. REV., 868, 875 n.49 (2008) (noting the *Preiser-Heck* problem in DNA access cases in context of the argument that § 1983 should be available to state court prisoners who are barred from seeking habeas relief).

decision was published on September 29, 2000 and involved an individual named James Harvey.¹⁴ The Supreme Court accepted review in William Osborne's case on November 3, 2008.¹⁵ During the intervening eight years, federal courts issued approximately three dozen decisions in § 1983 DNA access actions that were published in Federal Reporters or made available on Westlaw.¹⁶ These decisions record rulings from various stages of § 1983 actions brought by twenty-one different individuals.¹⁷ The opinions from these twenty-one separate controversies define the specific textual boundaries of this rhetorical case study.¹⁸

¹⁴ *Harvey v. Horan*, 119 F. Supp. 2d 581, 582 (E.D. Va. 2000). As explained below, at least one other federal court had considered a § 1983 DNA access action before this date, but no decision from this litigation was ever published. See *infra* note 97 (discussing Clyde Charles case).

¹⁵ *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 488 (2008) (mem.).

¹⁶ I counted thirty-eight of these decisions in this period. However, I decline to consider two cases filed by pro se litigants as part of this federal discourse because of their pronounced pleading deficiencies. See *Order of Dismissal, Bivins v. Contra Costa City*, No. 3:08-02570 (N.D. Cal. Sept. 26, 2008), 2008 WL 4407876, at *3 (dismissing action but granting leave to file amended complaint because "the Court does not understand" the nature of pro se plaintiff's action); *Order Dismissing Plaintiff's Complaint, Clifton v. Byrd*, No. 1:08-00193 (E.D. Cal. Apr. 18, 2008), 2008 WL 1805780 (dismissing action because pro se plaintiff sued wrong defendant but granting leave to refile complaint). For a list of the remaining thirty-six decisions, see *infra* note 18. In addition, I am not including in this analysis four district court decisions that were published after the Supreme Court's grant of certiorari in *Osborne*. See *Young v. Philadelphia County*, No. 08-3463, 2009 WL 27895 (E.D. Pa. Feb. 5, 2009) (barring action on statute of limitation grounds); *Clifton v. Cline*, No. 1:08-0193, 2009 WL 256548 (E.D. Cal. Feb. 4, 2009) (dismissing action for suing wrong defendant); *Yoris v. Ober*, No. 8:08-01202, 2009 WL 249975 (M.D. Fla. Jan. 30, 2009) (barring action on *Rooker-Feldman* grounds); *Ross v. Lehigh County*, No. 07-2329, 2008 WL 5234411 (E.D. Pa. Dec. 15, 2008) (barring action on statute of limitation grounds).

¹⁷ These twenty-one cases are discussed in thirty-six different decisions. Eleven cases have produced multiple opinions. See *infra* note 18.

¹⁸ In chronological order, the decisions are: *Harvey v. Horan*, 119 F. Supp. 2d 581 (E.D. Va. 2000); *Harvey v. Horan*, No. 00-1123, 2001 WL 419142 (E.D. Va. Apr. 16, 2001); *Godschalk v. Montgomery County*, 177 F. Supp. 2d 366 (E.D. Pa. 2001); *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002); *Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002); *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002); *Boyle v. Mayer*, 46 F. App'x 340 (6th Cir. 2002); *Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002); *Osborne v. Dist. Attorney's Office*, 423 F.3d 1050 (9th Cir. 2005); *Moore v. Lockyer*, No. 04-1952, 2005 WL 2334350 (N.D. Cal. Sept. 23, 2005); *Savory v. Lyons*, No. 05-2082, 2005 WL 3543833 (C.D. Ill. Dec. 28, 2005); *Alley v. Key*, 431 F. Supp. 2d 790 (W.D. Tenn. 2006); *Alley v. Key*, No. 06-5552, 2006 WL 1313364 (6th Cir. May 14, 2006) (not recommended for publication); *Osborne v. Dist. Attorney's Office*, 445 F. Supp. 2d 1079 (D. Alaska 2006); *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006); *Thompson v. Crist*, 200 F. App'x 895 (11th Cir. 2006); *Wade v. Brady*, 460 F. Supp. 2d 226 (D. Mass. 2006); *Savory v. Lyons*, 469 F.3d 667 (7th Cir. 2006); *Breest v. New Hampshire*, 472 F. Supp. 2d 116 (D.N.H. 2007); *Smith v. Worthy*, No. 4:07-10243, 2007 WL 295007 (E.D. Mich. Jan. 29, 2007); *McKithen v. Brown*, 481 F.3d 89 (2d Cir. 2007); *Harrison v. Dumanis*, No. 06-2470, 2007 WL 1159976 (S.D.

While the closed universe of twenty-one controversies provides the original data for this case study, the conceptual framework I use to analyze this data is rhetorical. In developing the framework, I consciously follow a tradition that begins with Aristotle¹⁹ and continues with neo-Aristotelian argument scholars like Stephen Toulmin²⁰ and Chaïm Perelman.²¹ Like these thinkers, I reject any pejorative understandings of rhetoric as mere flattery or devious sophistry.²² In my view, rhetoric is properly regarded as a hard-nosed affair where the practical art of persuasion collides with the abstract theory of how argument moves discourse.

In the following Parts of this Article, I elaborate my rhetorical framework and apply it to analyze the persuasive dynamics of competing *Preiser-Heck* arguments in § 1983 postconviction DNA access discourse.

Cal. Apr. 18, 2007); *Gilkey v. Livingston*, No. 3:06-1903, 2007 WL 1953456 (N.D. Tex. June 27, 2007); *Arthur v. King*, No. 2:07-319, 2007 WL 2381992 (M.D. Ala. Aug. 17, 2007); *Arthur v. King*, No. 2:07-319, 2007 WL 2539962 (M.D. Ala. Aug. 30, 2007); *Arthur v. King*, 500 F.3d 1335 (11th Cir. 2007); *Thompson v. McCollum*, 253 F. App'x 11 (11th Cir. 2007); *Breest v. New Hampshire*, No. 06-361, 2008 WL 183240 (D.N.H. Jan. 18, 2008); *McDaniel v. Suthers*, No. 08-00223, 2008 WL 591799 (D. Colo. March 3, 2008); *Wambolt v. Chittenden County*, No. 2:07-167 (D. Vt. Mar. 7, 2008), 2008 WL 682588; *Osborne v. Dist. Attorney's Office*, 521 F.3d 1118 (9th Cir. 2008); *Gilkey v. Livingston*, 275 F. App'x 273 (5th Cir. 2008) (per curiam); *Morgan v. Satz*, No. 08-80379, 2008 WL 2694745 (S.D. Fla. May 29, 2008); *McKithen v. Brown*, 565 F. Supp. 2d 440 (E.D.N.Y. 2008); *Moore v. Brown*, 295 F. App'x 176 (9th Cir. 2008); *McDaniel v. Suthers*, No. 08-00223, 2008 WL 4527697 (D. Colo. Oct. 2, 2008). After the Supreme Court's grant of certiorari in *Osborne*, the Eleventh Circuit issued a decision in the *Bradley* case cited in this footnote. See *Bradley v. King*, 556 F.3d 1225 (11th Cir. 2009), *sub nom.* *Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002), *cert. denied*, 129 S. Ct. 1306 (2009).

¹⁹ See generally ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE (George A. Kennedy trans., 2d ed. 2007) (hereinafter RHETORIC—KENNEDY TR.). Aristotle's *On Rhetoric* has proved the most influential and enduring treatise in rhetoric and also "often is considered the foundation of the discipline of communication." SONJA K. FOSS ET AL., CONTEMPORARY PERSPECTIVES ON RHETORIC 7 (3d ed. 2002).

²⁰ See generally STEPHEN E. TOULMIN, THE USES OF ARGUMENT (updated ed. 2003); ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING (1988); STEPHEN TOULMIN, RETURN TO REASON (2001). For a useful overview of Toulmin's work and biography, see FOSS ET AL., *supra* note 19, at 117-53.

²¹ See generally CH. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT (John Petrie trans., 1963); CH. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION (John Wilkinson & Purcell Weaver trans., 1969); CH. PERELMAN, JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING (John Petrie et al. trans., 1980); CH. PERELMAN, THE REALM OF RHETORIC (William Kluback trans., 1982). See also FOSS ET AL., *supra* note 19, at 81-115 (providing an introduction to the work of Perelman and his important collaborator, Lucie Olbrechts-Tyteca).

²² Chaïm Perelman describes this pejorative understanding of rhetoric as arising from the "great tradition of Western metaphysics which Parmenides, Plato, Descartes, and Kant represent[, and which] has always contrasted the search after truth . . . to the techniques of the rhetoricians and Sophists." PERELMAN, THE REALM OF RHETORIC, *supra* note 21, at 5.

Although I focus on the procedural question raised by § 1983 and *Preiser-Heck*, I also unpack the rhetorical connection between procedure and substance in the debate over whether there exists a constitutional right of access to postconviction DNA evidence.

In Part II, I introduce the critical concept that anchors my rhetorical framework—*logos* (plural *logoi*). *Logos* is a rhetorical term of art that Aristotle famously employed to describe argument based on reason.²³ In that Part, I explore the relationship between logic and *logos* and offer my own understanding of *logos* as the reasoned progression from premises to a conclusion supported by inference. Here, I also develop an original taxonomy that distinguishes between formal, empirical, narrative, and categorical types of *logos*. I briefly explain how formal, empirical, narrative, and categorical *logoi* operate as entirely different modes of proof in argument.

In Part III, I advance my first major claim about the federal postconviction DNA access debate. I maintain that one particular opinion emerging from this discourse has influenced federal judges confronting § 1983 DNA access questions more than any other—the concurrence of Judge Michael Luttig in a decision known as *Harvey II*.²⁴ To contextualize this claim, I first tell the litigation story of James Harvey, which gave rise to the *Harvey II* decision, and contrast it with the parallel tale of Harvey's § 1983 contemporary, Bruce Godschalk. I then argue that empirical review of citation patterns of the nineteen post-*Harvey II* controversies in the case study provide prima facie evidence that Judge Luttig's *Harvey II* opinion has exerted profound sway over the postconviction DNA access debate.

In Part IV, I begin the argument that the remarkable persuasive impact of Judge Luttig's *Harvey II* opinion derives from the particular *logos* of his *Preiser-Heck* argument. Part IV explains this claim in two basic steps. First, I describe how *Harvey II* effectively pitted Judge Luttig against his ostensibly concurring colleague Chief Judge Harvie Wilkinson III.²⁵ I closely parse both Luttig's and Wilkinson's opinions to isolate their operative premises and inferences and suggest that their arguments perfectly capture the competing *logoi* of the doctrinal conflict over *Preiser-Heck*. Second, I apply the categories that I developed in Part II and classify the formal *logos* of Luttig's argument as compared to the narrative *logos* of Wilkinson's argument. Luttig argues that the formal letter of the so-called

²³ See RHETORIC—KENNEDY TR., *supra* note 19, at 38.

²⁴ See *Harvey v. Horan (Harvey II)*, 285 F.3d 298, 304-26 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc).

²⁵ Compare *Harvey II*, 285 F.3d at 298-304 (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc), with *id.* at 304-26 (Luttig, J., respecting denial of rehearing en banc).

“Heck rule” should render DNA access actions cognizable under § 1983, whereas Wilkinson argues that the narrative spirit of *Preiser-Heck* should lead to the opposite conclusion.

In Part V, I describe how federal courts analyzed the *Preiser-Heck* question after *Harvey II* and how this conversation was impacted by the Supreme Court decision in *Wilkinson v. Dotson*.²⁶ I argue that *Dotson* effectively vindicated Luttig’s formal *logos* and helped persuade federal courts of the propriety of Luttig’s formal reading of the *Heck* rule. In that Part, I advocate a theoretical conception of *logos* as “discursive coherence” that links the persuasive power of an argument to its resonance with the *logos* of the underlying discourse. Because I see Luttig’s *logos* as resonating with the *logos* of the *Preiser-Heck* discourse, I hazard a prediction that his view will prevail at the Supreme Court in *Osborne*.

I conclude the Article by exploring some implications of my analysis of the postconviction DNA access debate and suggesting useful avenues for the application and development of my rhetorical framework.

II. LOGIC, *LOGOS*, AND LEGAL ARGUMENT

The proper role of logic in law has long been contested. As Justice Oliver Wendell Holmes memorably observed:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.²⁷

In opposing law and logic, Holmes attacked the Formalist view that saw legal outcomes as logically determined through the deductive application of prior principles to present facts.²⁸ Of course, Holmes’s basic point that law does not operate as “a logic of rigid demonstration”²⁹ remains axiomatic in the legal academy.³⁰

²⁶ 544 U.S. 74 (2005).

²⁷ OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

²⁸ For an insightful exploration of Holmes’ critique, see John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 20-22 (1924). Dewey accepted that “the formal theory of the syllogism” does not fit well with law because it improperly “implies that for every possible case which may arise, there is a fixed antecedent rule already at hand; that the case in question is either simple and unambiguous, or is resolvable by direct inspection into a collection of simple and indubitable facts.” *Id.* at 21-22.

²⁹ See Dewey, *supra* note 28, at 21.

³⁰ See Marin Roger Scordato, *Reflections on the Nature of Legal Scholarship in the Post-Realist Era*, 48 SANTA CLARA L. REV. 353, 373 (2008) (“At the heart of realism lies the belief that many, if not most, interesting cases cannot be definitively resolved through the purely logical application of existing precedent and generally accepted legal principle.”). 1

Though pure formal logic seems inapplicable, commentators since Holmes have struggled to understand whether other non-formal types of logic play a legitimate role in legal reasoning. John Dewey, for example, proposed long ago that law might be viewed as an empirical “logic of prediction of probabilities rather than one of deduction of certainties.”³¹ Dewey’s insight that plural logical types exist in law is certainly useful.³² However, a recalcitrant problem has been one of definition and categorization. Contemporary legal commentators do not agree on just what logic means in legal reasoning and what kinds of logic are at play in legal argument.³³

To bypass this longstanding semantic confusion, I orient my inquiry into legal argument to *logos* rather than logic. From the original Greek, the word *logos* may be translated as “discourse,” “speech,” “word,” or “reason.”³⁴ As a rhetorical term of art, *logos* is “a mode of proof . . .

cautiously classify this insight as “axiomatic” because it now appears as a self-evident, if not a priori, truth. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 21, at 13 (axioms are self-evident premises considered valid without proof).

³¹ See Dewey, *supra* note 28, at 26. Dewey’s logic of predicting possibilities might be thought of as *inductive* as opposed to *deductive* logic. In a move that anticipated both the Realists and modern Empirical Legal Studies, Dewey advocated conceiving of law as a collection of “general legal rules and principles [that] are working hypotheses, needing to be constantly tested by the way in which they work out in application to concrete situations.” *Id.* at 26; cf. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 831 (2008) (“We are in the midst of a flowering of ‘large-scale quantitative studies of facts and outcome,’ with numerous published results. The relevant studies have produced a New Legal Realism—an effort to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets.”).

³² See Dewey, *supra* note 28, at 21 (discussing “the need of another kind of logic” and observing that “there are different logics in use”).

³³ This lack of consensus partially derives from a lack of debate over foundational terms. Commentators sympathetic to logic’s application in law usually proceed as if the meaning of the term was self-evident. For example, Judge Ruggero Aldisert does not define “logic” in his influential introductory primer on legal logic. See RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 1-2 (3d ed. 1997) (offering his text as a “modest attempt to fill th[e] void” of books about “legal logic” and stating only that he uses that term “interchangeably with legal reasoning.”). Even more sophisticated scholars tend to offer only oblique definition. See, e.g., NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* 54 (2005) (describing the gap between “logic as a specialist discipline” and the “applied logic” of law, which is loosely presented as “the kind of syllogistic reasoning that is at the kernel of legal reasoning”). But see Vern R. Walker, *Discovering the Logic of Legal Reasoning*, 35 HOFSTRA L. REV. 1687, 1688 n.1 (2007) (explicitly defining “logic” as “the study of the methods and principles used to distinguish correct reasoning from incorrect reasoning”) (quoting IRVING M. COPI & CARL COHEN, *INTRODUCTION TO LOGIC* 3 (10th ed. 1998)).

³⁴ 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1654 (1971) (hereinafter “OED”).

understood as rational argument or appeal[] based on reason.”³⁵ *Logos* is also the etymological root of “logic.”³⁶

Considering the familial meanings of *logos* and the term’s etymological relationship to logic, *logos* may be rightly regarded as “rational argument logic.” *Logos* concerns how “reason” proves arguments in “discourse.” As the translations of *logos* suggest, the primary “discourse” of *logos* is “speech” and “word.” While symbolic or mathematical “logic” may be thought of as a very specialized subset of *logos*, the more central meaning of *logos* is reason-based proof in natural language.

Given the law’s inherent preoccupation with rational argument in natural language, *logos* provides a resonant heading under which legal proof may be discussed. Though initially unfamiliar, *logos* also seems a preferable term to logic, which retains conflicting and troublesome connotations within the legal academy. Though certainly not beyond controversy itself,³⁷ *logos* presents a relatively clean slate on which to write about legal argument.

A. *ETHOS*, *PATHOS*, AND *LOGOS*

In his classic treatise, *On Rhetoric*, Aristotle categorizes rhetoric as an art,³⁸ and defines it as “an ability, in each [particular] case, to see the available means of persuasion.”³⁹ Aristotle famously identified three fundamental artistic proofs in rhetoric—*ethos*, *pathos*, and *logos*.⁴⁰ All

³⁵ JAMES JASINSKI, SOURCEBOOK ON RHETORIC: KEY CONCEPTS IN CONTEMPORARY RHETORICAL STUDIES 350 (2001).

³⁶ OED, *supra* note 34, at 1653 (1971) (cross-referencing entry on *logos*). According to the Oxford English Dictionary, the elliptical form of *logos* that became “logic” is first found in Cicero. Cicero was a Roman lawyer and is considered—along with Aristotle and Quintilian—to be a founder of classical forensic rhetoric. See MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 2-3 (2005). Even though some would drive a wedge between logic and rhetoric, logic’s own etymology reveals that it was in fact born from rhetoric.

³⁷ While the modern legal reader will likely find logic a more controversial term than *logos*, it is certainly true that *logos* has a long and contested history in philosophy and theology. See 16 ENCYCLOPEDIA BRITANNICA 919-21 (11th ed. 1911); ENCYCLOPEDIA OF RHETORIC 456-67 (Thomas O. Sloane ed. 2001); ENCYCLOPEDIA OF RHETORIC AND COMPOSITION 410-14 (Theresa Enos ed. 1996); JASINSKI, *supra* note 35, at 350-51.

³⁸ RHETORIC—KENNEDY TR., *supra* note 19, at 31 (“[Rhetoric] is the activity of an art [*tekhnē*].”).

³⁹ *Id.* at 37.

⁴⁰ *Id.* *Ethos*, *pathos*, and *logos* are called artistic proofs because they are intrinsic to the art of rhetoric. Aristotle also recognized kinds of proof as extrinsic to rhetoric and so called them “non-artistic.” *Id.* at 38. The conceptual difference between artistic and non-artistic *pisteis* rests on *invention*. Advocates do not invent non-artistic *pisteis*; they are externally

three of these proofs seek to gain the acceptance by an audience of a speaker's theses or proposed judgment. Proof by *ethos* persuades by building up the character of the speaker and conveying that the speaker's theses are worthy of credence.⁴¹ Proof by *pathos* disposes the audience to feel emotions conducive to accepting the proposed judgment.⁴² Finally, proof by *logos* derives from the argument itself and shows the truth or apparent truth of the proposition asserted.⁴³

Aristotle classified *ethos*, *pathos*, and *logos* as types of *pistis*—a word that can be translated either as “proof” or as “means of persuasion.”⁴⁴ Using the same word to connote “proof” and “means of persuasion” may unnerve strict positivists, but the unifying conception makes perfect sense in legal discourse where argument “proves” truth and the “truth” that matters is that which a judge, jury, or other fact-finder accepts as persuasive.⁴⁵ Criminal adjudications provide a quintessential example of the dual meanings of *pistis* in action: the truth of a “guilty” verdict is backed by proof calibrated directly to the “reasonable doubt” of an individual jury. *Proof* is what *persuades*.

In Aristotle's formulation of proof and persuasion functioning through *ethos*, *pathos*, and *logos*, we see the ancient origins of the familiar modern conception of the communication triangle. In a communication triangle, speaker and audience and subject matter are joined in language.⁴⁶ In a

provided, and advocates *use* them to prove their case. *Id.* Aristotle identified several extrinsic proofs such as “witnesses”, “testimony of slaves taken under torture”, and “contracts.” *Id.* In broad strokes then, non-artistic proofs concern evidence rather than argument.

⁴¹ RHETORIC—KENNEDY TR., *supra* note 19, at 38-39.

⁴² *Id.* at 39. Note that my use of the word *pathos* here differs slightly from Aristotle's use. He did not actually use the term *pathos* for the proof of disposing the audience in some way. See ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 37-38 n.40 (George A. Kennedy trans., 1991). This is because *pathos* is an attribute of a person (feeling emotion), not of speech. However, the *ethos-pathos-logos* formulation is a widely used and convenient shorthand for the three artistic modes of persuasion. *Id.* (Please note that here I cite to the first edition of the Kennedy translation of *On Rhetoric*. Unfortunately, the second edition that I generally refer to in this Article omits this useful footnote and discussion of *pathos*.)

⁴³ RHETORIC—KENNEDY TR., *supra* note 19, at 39.

⁴⁴ *Id.* at 31 n.11.

⁴⁵ As one commentator puts it, “[L]egal argumentation is not concerned with proof of absolute truths, but acknowledges that it is always possible to argue for or against a particular claim.” Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 3 J. ASS'N LEGAL WRITING DIRECTORS 164, 165 (2006). Professor Saunders explicitly connects Aristotle's notion of practical argumentation to legal reasoning and the modern argument studies of Chaïm Perelman and Stephen Toulmin. *Id.* at 166-76.

⁴⁶ There are many ways to represent a communication triangle, but all distinguish between the medium of discourse and the three points of contact—speaker, audience, and topic. See, e.g., EDWARD P.J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR

typical legal argument, a communication triangle links litigants (speakers) to a judge or jury (audience) concerning a case or controversy (subject matter). Arguments seeking to establish a conclusion in a legal discourse may be regarded as rooted in the credibility of a litigant (*ethos*), the disposition of the judge or jury (*pathos*), or the reason in the case itself (*logos*).

By casting legal arguments as communication triangles, I aim to emphasize that such arguments unfold in natural language. Within the law, judicial and statutory texts constitute the specific language of authority. These texts, in turn, imply communication's context. Like one of Wittgenstein's "language-games," a legal argument "consist[s] of language and the actions into which it is woven."⁴⁷ Depending on the discursive frame employed, arguments within the law involve distinct actors and institutions, norms and conventions, and other kinds of practices and actions.

While I focus on *logos*-based proof, it is certainly true that any given argument may combine logical (*logos*), ethical (*ethos*), and pathetic (*pathos*) appeals in intertwining ways that cannot be neatly separated. However, as doctrine evolves on a specific issue, the individual litigants arguing the issue and judges deciding it necessarily change. In this more abstracted discourse, over time, particularized appeals to *ethos* and *pathos* become less significant. As various district and appellate courts moot a particular legal issue, one hopes that *logos* becomes more prominent.

Of course, I do not deny the reality that legal actors and institutions may harbor biases and prejudices that are not governed by reason. At the same time, I reject the notion that rationality plays no role in legal adjudication.⁴⁸ Indeed, what strikes me as particularly compelling about the debates at the center of this case study is precisely how much of the conflict

THE MODERN STUDENT 2 (4th ed. 1999) (describing a communication triangle in the medium of text linking speaker/writer, listener/reader, and subject matter); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089, 1091 (1986) (citing J. KINNEAVY, A THEORY OF DISCOURSE 19 (1971)) (describing a communication triangle in the medium of signal (language) linking encoder (writer), decoder (reader), and reality); see also Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 J. LEGAL WRITING INST. 57, 67 (2000).

⁴⁷ LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS pt. I, § 7, at 5 (G.E.M. Anscombe trans., 2d ed., Basil Blackwell & Mott, Ltd., 1958) (1953). For Wittgenstein, there is no meaningful boundary between language and action—they are discursively joined. See *id.* pt. I, § 23, at 11 ("[T]he term 'language-game' is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life.").

⁴⁸ See Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 9 (1986) (charging critical legal studies with rejecting rationality in law). I share in Professor Fiss' view that a total rejection of law's claim to rationality is ill-advised and that we must sometimes "take the law on its own terms." *Id.* at 2.

finds direct expression in reasoned argument. In both the broader disputes about how DNA intersects with legal proof and the narrower question of whether DNA access actions are cognizable under § 1983, *logos* appears to matter.

B. TAXONOMY OF ARGUMENT *LOGOS*

In order to analyze the competing *logoi* of the postconviction DNA access debate, I first build on the rhetorical understanding of *logos* that has its origins in Aristotle. On my account, *logos* can be further specified as the reasoned progression in argument from premises to a conclusion supported by inference. This formulation allows me to disaggregate the building blocks of *logos* by reference to the component parts of an argument. From this understanding, variations in how arguments logically constitute premises, inferences, and conclusions become variations in types of argument *logos*.

I distinguish between four types of argument *logos*: *formal*, *empirical*, *narrative*, and *categorical*. The purpose animating the taxonomy is to provide a new vocabulary that distinguishes between modes of proof in legal argument. My working assumption is that discrete kinds of legal arguments may be receptive to different modes of logical proof.⁴⁹

This scheme is not posited as a precise categorization based on strict definition.⁵⁰ Rather, the different argument *logoi* I identify are related through kinship; they bear “family resemblances” to each other.⁵¹ I therefore describe the prototypical characteristics of formal, empirical, narrative, and categorical arguments while recognizing that some arguments may resist pigeonholing. Building from *logos*, I seek to bring new rigor and

⁴⁹ In suggesting that discrete kinds of legal arguments exist, I follow Toulmin’s notion of argument “fields” governed by different logical types. See TOULMIN, *THE USES OF ARGUMENT*, *supra* note 20, at 14 (“Two arguments will be said to belong to the same field when the data and conclusions in each of the two arguments are, respectively, of the same logical type: they will be said to come from different fields when the backing or the conclusions in each of the two arguments are not of the same logical type.”). While Toulmin does not use the term *logos*, his conception of “logical type” is similar.

⁵⁰ The boundaries between different types of argument *logoi* are diffuse because modes of proof constantly intersect and overlap in the real-world debate. In this way, argument *logos* is a language game, just like argument itself. See *supra* note 47 and accompanying text (describing legal argument as a language game). As Wittgenstein observed, it is quite impossible to describe the concept of “game” with “definition[al] exactness” because the concept itself has “blurred edges.” WITTGENSTEIN, *supra* note 47, pt. I, § 69, at 33 & § 71, at 34.

⁵¹ See *id.* § 67 (describing “family resemblances” among games and words).

terminology to the essential business of understanding proof and persuasion in law.⁵²

1. Formal Logos

This category describes the familiar type of proof that Holmes associated with syllogism.⁵³ In formal *logos*, premise is literally everything.⁵⁴ Premises of formal argument are known and explicit and are themselves beyond debate.⁵⁵ Formal premises are thus accepted a priori or ex concessis—they are true either by definition or by dint of incontrovertible authority.⁵⁶ From formal premises, necessary conclusions follow deductively.

In its strictest sense, formal *logos* does not describe a mode of argument at all, but rather the chains of reasoning in analytic demonstration.⁵⁷ It is the Cartesian logic of self-evidence and necessity

⁵² I do not mean to suggest that the rhetorical tradition is not already rigorous. Indeed, in addition to his status as a founder of rhetoric, Aristotle is also the acknowledged inventor of that most rigorous of philosophical disciplines—formal logic. See *The Great Ideas: 1, in 2 GREAT BOOKS OF THE WESTERN WORLD 720-27* (Mortimer J. Adler & William Gorman eds., 31st prtg. 1989) (entry on “Logic”). Interestingly, Aristotle never used the word “logic,” *logos*, or any of its cognates to describe the science or art of the syllogism. *Id.* Rather, the syllogism belonged to the science of *apodeixis*, which is usually translated as “demonstration.” See RHETORIC—KENNEDY TR., *supra* note 19, at 33 n.20.

⁵³ A syllogism proceeds deductively from two premises, major and minor, to a necessary conclusion. The canonical example of a syllogism is “All men are mortal, Socrates is a man, so therefore Socrates is mortal.” In this example, the general proposition about man’s mortality is the major premise while Socrates’ inclusion in the class of men is the minor premise. The conclusion that Socrates is mortal is formally entailed by the syllogism’s antecedent premises.

⁵⁴ In formal logic, conclusions are wholly entailed by premises; formal conclusions state nothing new. For this reason, Perelman and Olbrechts-Tyteca observe that “on the level of formal logic[,] the accusation of begging the question is meaningless. It could indeed be maintained that any formally correct deduction consists of a *petitio principii* and the principle of identity, affirming that any proposition implies itself, then becomes a formalization of the *petitio principii*.” PERELMAN & OLBRECHTS-TYTECA, *supra* note 21, at 112.

⁵⁵ For Aristotle, the syllogism leads to a necessary conclusion because it proceeds from explicit and universally true premises. See CORBETT & CONNORS, *supra* note 46, at 53. Aristotle actually gave a different name to arguments formed like syllogisms but where premises were implied (rather than explicit) or probable (rather than necessary)—enthymeme. *Id.*; see also RHETORIC—KENNEDY TR., *supra* note 19, at 41-42 & n.55.

⁵⁶ *A priori* (“what is before”) and *ex concessis* (“in view of what has already been accepted”) both describe propositions beyond dispute. See generally BLACK’S LAW DICTIONARY 111, 607 (8th ed. 2004). *A priori* can also describe the process of deductively reasoning itself. *Id.* at 111.

⁵⁷ See PERELMAN, THE REALM OF RHETORIC, *supra* note 21, at 2 (“Since truth is a property of the proposition and is independent of personal opinion, analytical reasoning is

embodied by the proofs of Euclidean geometry.⁵⁸ However, when the context changes from pure axiomatic systems to more practical discourses, such as law, formal *logos* describes the consistent application of rules.⁵⁹ In practical argument, formal *logos* captures the ideal of unambiguous deduction from clear definition.⁶⁰

2. Empirical Logos

Like their formal counterparts, premises in empirical arguments are also usually known and explicit.⁶¹ However, empirical premises are only accepted a posteriori and always remain subject to experimental revision.⁶² Arguments here proceed by induction and concern probable rather than

demonstrative and impersonal.”); see also *supra* note 52 (defining *apodeixis* as Greek term for demonstration).

⁵⁸ See JONSEN & TOULMIN, *supra* note 20, at 24-29; PERELMAN & OLBRECHTS-TYTECA, *supra* note 21, at 1-4.

⁵⁹ See Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: 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.”) (citing Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381 (1985)). Sullivan does not use the phrase “formal *logos*”, but her definition of a rule “associates rules with legal formality or ‘formal realizability.’” *Id.* at 58 n.232. The literature on the application of rules in law is, of course, immense. In addition to Sullivan’s excellent introduction, see generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE* (1991); MACCORMICK, *supra* note 33, at 32-77 (analyzing role of syllogism and deduction in law); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

⁶⁰ Here, I use “deduction” in the sense of “set procedure[] of computation by which to pass from data to a conclusion.” See TOULMIN, *THE USES OF ARGUMENT*, *supra* note 20, at 112. Toulmin notes that though this use of the term may offend formal logicians, it is the sense in which eminently rational beings—from Sherlock Holmes to astronomers—use the word, and one that is therefore eminently reasonable. *Id.* at 112-13. See also MACCORMICK, *supra* note 33, at 49-77; Sullivan, *supra* note 59, at 58 n.232.

⁶¹ As mentioned, my proposed distinctions between categories of *logos* are fluid rather than rigid. I readily concede that much of empirical science operates according to highly formalized mathematical rules and models. However, I hope here to stress the difference between formal arguments anchored in idealized axiomatic systems and empirical arguments anchored in experimental observation.

⁶² *A posteriori* (“from what comes after”) can also refer to inductive reasoning itself. See BLACK’S LAW DICTIONARY, *supra* note 56, at 105. The fact that empirical premises can always be challenged by future data leads to the so-called “problem of induction.” See Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L.J. 485, 493-94 (1996). However, though it presents a thorny problem from a formal point of view, the problem disappears in practical reasoning. See TOULMIN, *THE USES OF ARGUMENT*, *supra* note 20, at 151-53.

necessary conclusions.⁶³ Empirical *logos* describes the “logic of prediction of possibilities” celebrated by Dewey and most commonly associated with experimental science.⁶⁴

The use of forensic DNA testing to identify a suspect as the source of biology recovered at crime scenes serves as a paradigmatic example of an argument employing empirical *logos*. Premises include both theoretical assumptions from population genetics⁶⁵ and evidentiary assumptions about the reliability of technological processes that isolate, amplify, and interpret allele sequences on biological samples.⁶⁶ Given these assumptions, DNA laboratories make claims about whether suspects can be included as a potential source of crime-scene evidence based on a matching DNA profile and what the frequency of isolated genetic profiles are in the general population.⁶⁷ Based on these empirical claims, prosecutors will in turn urge the conclusion that suspects are “beyond a reasonable doubt” the sources of crime scene evidence.⁶⁸

⁶³ See CORBETT & CONNORS, *supra* note 46, at 32 (tracing deductive and inductive logic to the *Prior* and *Posterior Analytics* of Aristotle’s *Organon*); see also *id.* at 60-61 (describing induction).

⁶⁴ See *supra* note 31 and accompanying text.

⁶⁵ See David H. Kaye, *The Role of Race in DNA Statistics: What Experts Say, What California Courts Allow*, 37 SW. U. L. REV. 303, 304-06 (2008); JOHN M. BUTLER, *FORENSIC DNA TYPING* 465-96 (2d ed. 2005) (describing principles of population genetics and STR population database analyses).

⁶⁶ See William C. Thompson & Rachel Dioso-Villa, *Turning a Blind Eye to Misleading Scientific Testimony: Failure of Procedural Safeguards in a Capital Case*, 18 ALB. L.J. SCI. & TECH. 151, 160-08 (2008) (describing the interpretive process in making DNA calls in the context of a suspect call in *Lovitt v. Commonwealth*, 537 S.E.2d 866 (Va. 2000)); BUTLER, *supra* note 65, at 68, 313-86 (describing stochastic effects of PCR process and analyzing STR technology and interpretative issues in genotyping).

⁶⁷ Crime scene evidence could include “biological tissues such as saliva, skin, blood, hair, or semen [] left at a crime scene.” NAT’L COMM’N ON THE FUTURE OF DNA EVIDENCE, *supra* note 4, at 1. If a person is excluded as the source of DNA, that DNA exclusion is definite and not given a “random match probability” or “likelihood ratio.” However, if DNA includes a suspect, these quantities may be stated in “such mind-boggling figures as ‘one in nine hundred and fifty sextillion African Americans.’” Kaye, *supra* note 65, at 304.

⁶⁸ It is possible to conflate empirically grounded *random-match probability* claims legitimately made by DNA laboratories (which detail the chances that a person chosen at random would share the genetic profile that matches the suspect and crime-scene evidence) with non-empirical *source-probability claims* (which purport to detail the chances that a certain person is in fact the source of crime-scene evidence). This conflation is commonly known as “the prosecutor’s fallacy.” See William C. Thompson & Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor’s Fallacy and the Defense Attorney’s Fallacy*, 11 LAW & HUM. BEHAV. 167, 169-71 (1987); David J. Balding & Peter Donnelly, *The Prosecutor’s Fallacy and DNA Evidence*, 1994 CRIM. L. REV. 711, 716.

3. Narrative Logos

Where empirical *logos* generally governs highly quantified debates over causality and connection in the empirical world,⁶⁹ narrative *logos* enters into more qualitative contests over preferable courses of action in the normative world.⁷⁰ The premises of narrative arguments are not necessarily known and explicit as they are in formal and empirical arguments; neither are they necessarily accepted as a priori or a posteriori truths. Rather, the starting points for narrative arguments depend on how the story is told. Narrative *logos* is thus the logic of storytelling.⁷¹ The conclusions of narrative arguments justify certain endings as the “moral of the story”—the preferable or appropriate result given what came before.⁷²

If formal *logos* describes the logic of rules in legal argument, then narrative *logos* tracks the logic of standards.⁷³ Narrative inferences are the

⁶⁹ I repeat once again that my categories are not rigid and concede that empirical and formal considerations join together to create theories about causality. Conversely, what I term narrative *logos* could be divided between narratives about human agency and normative-religious accounts. Though formulated differently, my thinking with respect to theory, narrative, and categories is strongly influenced by the work of Anthony Amsterdam and Jerome Bruner. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 32 (2000) (“If theories are about causes and connections in the natural world, and if narratives are about human agency and its vicissitudes in the enterprises of life, then normative-religious accounts are about human origins, human destiny, human responsibilities, and human plights.”).

⁷⁰ In his seminal work on the connection between narrative and normativity, Robert Cover used another Greek word, *nomos*, to describe the concept of a “normative universe.” See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-10 (1983). As I see it, narrative *logos* shares a familial connection to *nomos*, but concerns more specifically the use of narrative in argument. Narrative *logos* helps structure debates about *nomos*.

⁷¹ Though scholars have not used the phrase “narrative *logos*,” there is of course a vast literature that explores the connection between storytelling and legal argument. See generally LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul D. Gewirtz eds., 1996); LEWIS H. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* (1995). For useful collections of citations in the field applying narrative theory to law, see AMSTERDAM & BRUNER, *supra* note 69, at 355-56 n.1; John B. Mitchell, *Evaluating Brady Error Using Narrative Theory: A Proposal for Reform*, 53 DRAKE L. REV. 599, 608-13 (2005); Eleanor Swift, *Narrative Theory*, FRE 803(3), and *Criminal Defendants’ Post-Crime State of Mind Hearsay*, 38 SETON HALL L. REV. 975, 980 n.17 (2008).

⁷² See Cover, *supra* note 70, at 5 (“[E]very narrative is insistent in its demand for its prescriptive point, its moral.”). Aesop’s famous fables might thus be regarded as a pure expression of narrative *logos*. To take but one of many possible examples: in order to justify a claim that “[s]low and steady wins the race,” Aesop tells the story of the Hare and the Tortoise. See AESOP, *AESOP’S FABLES* 113-14 (D.L. Ashliman ed., V.S. Vernon Jones trans., Barnes & Noble Classics 2003) (1912).

⁷³ See Sullivan, *supra* note 59, at 56-60, 66-67 (discussing logic of standards). For sources discussing the logic of rules in law, see *supra* note 59.

inferences of equity; they concern the spirit of the law rather than its letter.⁷⁴ Narrative *logos* is also implicated in arguments using etymology to establish meanings of words or genealogy to establish legitimacy of authority.

4. Categorical Logos

Finally, categorical *logos* operates in arguments over classification.⁷⁵ Premises here are familial groupings of all manners of words, concepts, and objects in a discourse.⁷⁶ Categorical premises will often take the form of taxonomies that may or may not be made explicit in argument. Without question, all argument—formal, empirical, or narrative—uses, invokes, and contests categories.⁷⁷

Though categories underlie all argument, categorical *logos* can be distinguished from other logical modes of argument based on its use of inference by analogy.⁷⁸ Categorical *logos* justifies class membership by comparison to a prototypical example⁷⁹ rather than through appeal to definition or history.⁸⁰ This *logos* of analogy thus underlies much of the

⁷⁴ See AMSTERDAM & BRUNER, *supra* note 69, at 134 (“Rhetorical narratives use a story rather than a set of *propositional* assertions to *prove* something persuasively.”).

⁷⁵ The fluidity of *logos* categories applies with special force to the very category of categorical *logos*. This is because categories are a necessary part of every argument—formal, empirical, narrative—as they are in all facets of human existence. See AMSTERDAM & BRUNER, *supra* note 69, at 19-53. However, I propose a separate kind of argument *logos* here to stress the peculiar mode of “proof by comparison to prototypical example.” See *infra* note 78-79.

⁷⁶ See AMSTERDAM & BRUNER, *supra* note 69, at 20-23. Familial groupings of categories are sometimes formalized as taxonomies. Of particular salience to the value conflict in the postconviction DNA debate are what Albert Jonsen and Stephen Toulmin call “moral taxonomies.” See JONSEN & TOULMIN, *supra* note 20, at 14 (“One indispensable instrument for helping to resolve moral problems in practice, therefore, is a detailed and methodical map of morally significant likenesses and differences: what may be called a *moral taxonomy*.”).

⁷⁷ Categories may be defined formally or constituted through narrative. See AMSTERDAM & BRUNER, *supra* note 69, at 32 (“These, then, are the main sources from which category systems are drawn: the natural theoretical, the human narrative, and the super-natural religious.”).

⁷⁸ I use “inference by analogy” in the same sense that Jonsen & Toulmin refer to “arguing from analogy” in clinical diagnostic arguments. See JONSEN & TOULMIN, *supra* note 20, at 41 (emphasis in original omitted). My broad use of “analogy” here would also include much of what Perelman and Olbrechts-Tyteca call argumentation by example, illustration, and model. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 21, at 350-98.

⁷⁹ Prototypes derive their salience from their ability to capture the nature of the discourse that produces them. See AMSTERDAM & BRUNER, *supra* note 69, at 41 (“We tend toward the view that prototypes are somewhat like tropes: they function *tropo-logically* to capture the nature of the *system* from which a set of categories emerges or is derived.”).

⁸⁰ Categorization based on definition and history would be characteristic of formal and narrative *logos* respectively. Though I recognize the potential for confusion in my naming

reasoning of casuistry⁸¹ and precedent in common law.⁸² Categorical *logos* also concerns conclusions about relevance and what renders analogies material in a discourse.⁸³

Figure 1

Prototypical Logos Characteristics

| | Formal | Empirical | Narrative | Categorical |
|-------------------|--------------|--------------|------------|-------------|
| Premises | ex concessis | a posteriori | historical | familial |
| ↓ | | | | |
| Inference | deductive | inductive | moral | analogical |
| ↓ | | | | |
| Conclusion | necessary | probable | preferable | relevant |

The prototypical characteristics of different argument *logoi* are summarized in Figure 1 above. As I have stressed, the categories are not intended as formal definitions dividing exclusive, natural, or transcendent classes. Rather, I offer this taxonomy as a useful generalization concerning the varying roles played by premises, inferences, and conclusions in argument. Modes of proof and the reach of justification vary from

convention, I call categorization based on prototypical example categorical *logos* because I think it is the most natural (prototypical) form of categorization. See AMSTERDAM & BRUNER, *supra* note 69, at 50 (organizing “natural-kind” categories prototypically rather than definitionally).

⁸¹ In their compelling work, Jonsen and Toulmin seek to reclaim and redeem casuistry as a model for practical (as opposed to theoretical) thinking about ethical issues. See JONSEN & TOULMIN, *supra* note 20, at 23-46. Initially, they compare moral reasoning to medical diagnosis: “In moral as in medical practice, the resolution of practical problems draws on a central taxonomy of type cases, and the pattern of argument by paradigm and analogy is once again at work.” *Id.* at 42. Later, they show that “common law” and “common morality” share a casuistical ancestry. See *id.* at 403 n.29, 89-175.

⁸² See Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 781 (“[Reasoning by analogy] may even be said to be the central feature of the common law method . . .”).

⁸³ As with rules, standards, and narratives, the academic literature on analogy in law is also extensive. For useful discussions, see generally LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* (2005); MACCORMICK, *supra* note 33, at 205-13; Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925 (1996).

discourse to discourse depending on how premises are anchored, what kinds of inferential leaps are made, and the modality of conclusions reached.⁸⁴

III. ORIGINS AND INFLUENCE IN § 1983 POSTCONVICTION DNA ACCESS DISCOURSE

With the basic contours of my conceptual framework established, I now return to the data of this case study. In Part III(A), I tell two litigation stories that lie at the earliest roots of the postconviction DNA access discourse's genealogy—the tales of James Harvey and Bruce Godschalk. In Part III(B), I take a first step in proving my argument that Judge Michael Luttig's concurring opinion in *Harvey II* has exerted a singular rhetorical influence over the postconviction DNA access debate by undertaking an empirical review of citation patterns in all federal § 1983 DNA access cases published after *Harvey II*. I maintain that the quantity and quality of cites to Luttig provide prima facie evidence of his influence over the debate.

A. HARVEY AND GODSCHALK: TWIN STRANDS IN A DNA DEBATE

James Harvey and Bruce Godschalk both filed § 1983 complaints seeking access to DNA evidence in 2000. The district court opinions in *Harvey* and *Godschalk* are the first published decisions in this study's case universe.⁸⁵ Both prisoners ultimately obtained DNA testing;⁸⁶ however, the litigation paths that led to testing—and the post-litigation outcomes—differ in critical respects.

James Harvey and a co-defendant were convicted of rape and forcible sodomy on April 30, 1990 after a jury trial in Fairfax County, Virginia.⁸⁷ At the time of conviction, forensic testing of smears and swabs taken from the victim's rape kit revealed the presence of spermatozoa presumably originating from the perpetrator(s) of the crime.⁸⁸ Using conventional serological testing—commonly known as A-B-O blood typing—neither

⁸⁴ Here I follow Stephen Toulmin's use of "modality." See TOULMIN, THE USES OF ARGUMENT, *supra* note 20, at 17 (arguing that modal terms like "'possible', 'necessary' and the like . . . are best understood . . . by examining the functions they have when we come to set out our arguments"). Toulmin usefully distinguishes between the "force" and "criteria" of modal conclusions and maintains that the force of any modality is invariant across argument fields but that the criteria for establishing modal conclusions are field-dependent. See *id.* at 28-36; see also *supra* note 49 (discussing Toulmin's concept of argument field).

⁸⁵ See *Godschalk v. Montgomery County*, 177 F. Supp. 2d 366 (E.D. Pa. 2001); *Harvey v. Horan*, 119 F. Supp. 2d 581 (E.D. Va. 2000). At least one other prisoner, Clyde Charles, had filed a § 1983 DNA access action before *Harvey* or *Godschalk*, but this litigation ended without a published decision. See *infra* note 97.

⁸⁶ See *infra* notes 113-16 and accompanying text.

⁸⁷ *Harvey*, 119 F. Supp. 2d at 582.

⁸⁸ *Id.*

Harvey nor his codefendant could be excluded as the source of this sperm recovered from the victim.⁸⁹ Harvey, however, maintained his innocence and contended that DNA testing could prove it.

Bruce Godschalk was convicted of two rapes after a 1987 trial in Montgomery County, Pennsylvania.⁹⁰ The prosecution's case turned on the identification of Godschalk by one of the victims as well as on Godschalk's own detailed audiotaped confession to the police.⁹¹ In addition, the prosecution introduced evidence that Godschalk's A-B-O blood type matched that of the semen recovered from the first victim's rape kit.⁹² Godschalk asserted that more accurate DNA testing of the semen evidence from the rape kits could exonerate him.

After many years of unsuccessful attempts to secure testing,⁹³ James Harvey, in 2000, filed a § 1983 action in the Eastern District of Virginia suing for access to the victim's rape kit evidence.⁹⁴ The district court first denied a motion to dismiss by the State⁹⁵ and then granted summary judgment to Harvey.⁹⁶ In the first decision of its kind,⁹⁷ the court found that

⁸⁹ *Id.* The discriminating power of A-B-O blood typing is comparatively weak. See Dale D. Dykes, *The Use of Frequency Tables in Parentage Testing*, in PROBABILITY OF INCLUSION IN PATERNITY TESTING 15, 20, 29 (Herbert Silver et al. eds., 1982) (40% of the Caucasian population is type A, 11% type B, 45% type O, and 4% type AB). This pales in comparison to STR DNA testing, which can generate "likelihood ratios" or "random match probabilities" that are effectively unique in the human population. See *supra* note 68.

⁹⁰ See *Godschalk*, 177 F. Supp. 2d at 367.

⁹¹ *Id.* at 367-69. Godschalk unsuccessfully sought to suppress his confession at his trial. *Id.* at 367-68.

⁹² See Kreimer & Rudovsky, *supra* note 12, at 548-49.

⁹³ Harvey first sought testing through federal litigation in 1994. See *Harvey*, 119 F. Supp. 2d at 582. Through counsel, he also sought testing on consent of the Fairfax County Commonwealth Attorney's office. *Id.*

⁹⁴ *Id.*

⁹⁵ *Harvey*, 119 F. Supp. 2d at 584. Defendant was Robert Horan, Jr., the Commonwealth's attorney for Fairfax County. Although not so phrased, Horan had sought dismissal on *Preiser-Heck* grounds, arguing that Harvey's § 1983 petition was a collateral attack on conviction properly brought as a writ for habeas corpus. *Id.* Of course, the *Harvey* I court reversed the district court precisely on *Preiser-Heck* grounds. See *infra* notes 104-07 and accompanying text.

⁹⁶ *Harvey v. Horan*, No. 00-1123-A, 2001 WL 419142, at *6 (E.D. Va. Apr. 16, 2001).

⁹⁷ At least one prisoner, Clyde Charles, had successfully litigated a § 1983 DNA access action prior to the *Harvey* district court decision, which ultimately led to the prosecutor consenting to DNA testing and Charles' total exoneration. See *Charles v. Greenberg*, No. 00-958, 2000 WL 1838713, *3 (E.D. La. Dec. 13, 2000) (post-exoneration civil litigation that refers to previous § 1983 DNA access litigation). However, no decision from the Charles DNA access litigation is published or available on Westlaw. *Id.* Interestingly, in his summary judgment decision in *Harvey*, Judge Bryan actually cited to the *Charles* court as having previously noted a "constitutional basis for access to biological evidence." *Harvey*, 2001 WL 419142, at *5 (citing *Charles*, 2000 WL 1838713, at *3). However, in

“pursuant to *Brady v. Maryland*, the plaintiff has a due process right of access to the DNA evidence . . . , as such evidence could constitute material exculpatory evidence.”⁹⁸ The State appealed this decision.⁹⁹

Like Harvey, Bruce Godschalk was also unsuccessful in his initial attempts to secure DNA testing through state courts.¹⁰⁰ Godschalk also petitioned a federal court in 2000 for relief under § 1983.¹⁰¹ On summary judgment, the district court also cited to *Brady v. Maryland* as well as to the *Harvey* decisions and similarly found that Godschalk had a “due process right of access to the genetic material for the limited purpose of DNA testing.”¹⁰² However, unlike in the *Harvey* proceedings, the State in *Godschalk* did not pursue an appeal.¹⁰³ Before turning to the results of Godschalk’s DNA tests, then, the remainder of the *Harvey* litigation story needs to be told.

In a case now known as *Harvey I*, a Fourth Circuit panel reversed the lower court judgment in James Harvey’s case.¹⁰⁴ Writing for the majority, Chief Judge Harvie Wilkinson noted that “Harvey is seeking access for one reason and one reason only—as the first step to undermine his conviction.”¹⁰⁵ Harvey’s § 1983 action thus amounted to “a situation where a criminal defendant seeks injunctive relief that necessarily implies the invalidity of his conviction.”¹⁰⁶ This violated the Supreme Court’s admonition from *Heck v. Humphrey* that “a convicted criminal defendant cannot bring a § 1983 action that would ‘necessarily imply the invalidity of his conviction or sentence.’”¹⁰⁷ (The competing arguments over this precise

that *Charles* decision, Judge Berrigan was actually citing the earlier *Harvey* decision on the motion to dismiss. See *Charles*, 2000 WL 1838713, at *3 n.12 (citing *Harvey*, 119 F. Supp. 2d at 581). In other words, the *Charles* court cited *Harvey* as establishing the right, and then the *Harvey* court cited the *Charles* court as establishing the right. These circular attributions indicate reluctance to be viewed as creating a new right out of whole cloth. The circularity is also evidence of a paradigm-level argument. See *infra* note 247 (discussing the role of circularity in paradigm debates).

⁹⁸ *Harvey*, 2001 WL 419142, at *5 (citation omitted) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

⁹⁹ See *Harvey v. Horan (Harvey I)*, 278 F.3d 370 (4th Cir. 2002).

¹⁰⁰ See *Commonwealth v. Godschalk*, 679 A.2d 1295, 1296 (Pa. Super. Ct. 1996).

¹⁰¹ See *Godschalk v. Montgomery County*, 177 F. Supp. 2d 366, 366-67 (E.D. Pa. 2001). Godschalk sued both the Montgomery County District Attorney’s Office and the District Attorney, Bruce L. Castor.

¹⁰² See *id.* at 368-70.

¹⁰³ See *Kreimer & Rudovsky*, *supra* note 12, at 550 n.11.

¹⁰⁴ *Harvey I*, 278 F.3d at 381.

¹⁰⁵ *Id.* at 375.

¹⁰⁶ *Id.* at 375 (citing *Edwards v. Balisok*, 520 U.S. 641, 648-49 (1997)).

¹⁰⁷ *Id.* at 374 (quoting *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994)). In addition to finding a *Heck* bar, Wilkinson also noted that Harvey had no underlying constitutional right

question—whether *Heck v. Humphrey* should bar § 1983 DNA access actions—constitute the primary focus of Parts IV-V of this Article).

At the time Harvey filed his § 1983 action, Virginia had no state statute providing a mechanism for prisoners to apply for postconviction DNA testing. However, such legislation coincidentally came into effect in Virginia during Harvey's federal litigation.¹⁰⁸ Leaving no stone unturned, Harvey both petitioned for rehearing en banc in federal court after *Harvey I* and also filed a postconviction DNA application in state court under the new law. On March 1, 2002, the state court ordered Virginia's Division of Forensic Science to test the DNA obtained from Harvey, Harvey's codefendant, and the victim.¹⁰⁹

With the DNA testing issue rendered moot, the Fourth Circuit denied Harvey's petition for rehearing en banc on March 28, 2002 in a case known as *Harvey II*.¹¹⁰ Even though he agreed that the testing issue was moot, in *Harvey II*, Judge Michael Luttig nonetheless proffered an extensive opinion arguing *Harvey I* was incorrectly decided.¹¹¹ This provoked Chief Judge Harvie Wilkinson III to respond with a spirited defense of his *Harvey I* opinion.¹¹²

When the litigation ended in both Godschalk's and Harvey's cases, DNA testing proceeded. In February 2002, DNA tests demonstrated that a single rapist had committed both Montgomery County rapes and that Bruce Godschalk was absolutely excluded as being that assailant.¹¹³ After fifteen years of wrongful incarceration, Godschalk was fully exonerated.¹¹⁴ On the other hand, when James Harvey finally got his DNA test in October 2002, the results included Harvey as a potential source of sperm recovered from

of access. *Id.* at 378-80 & n.3. The lack of a constitutional right formed the basis for a concurrence by Judge Robert King. *Harvey I*, 278 F.3d at 381-88 (rejecting majority's *Heck* ruling but finding that no right of access existed under *Brady v. Maryland*) (King, J., concurring).

¹⁰⁸ See VA. CODE ANN. § 19.2-327.1 (West 2008) (effective May 2, 2001).

¹⁰⁹ See *Harvey v. Warden of Coffeewood Corr. Ctr.*, 597 S.E.2d 58, 59 (Va. 2004).

¹¹⁰ *Harvey v. Horan (Harvey II)*, 285 F.3d 298, 298 (4th Cir. 2002).

¹¹¹ See *id.* at 304-26 (Luttig, J., respecting denial of rehearing en banc).

¹¹² See *id.* at 298-304 (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc). The conflicting opinions of Luttig and Wilkinson provide the primary texts for analyzing the competing *logoi* of the *Preiser-Heck* debate in the following Parts of this Article. See *infra* Part IV.A-B.

¹¹³ See Kreimer & Rudovsky, *supra* note 12, at 550; see also Sara Rimer, *Convict's DNA Sways Labs, Not a Determined Prosecutor*, N.Y. TIMES, Feb. 6, 2002, at A14.

¹¹⁴ See *id.*

the victim.¹¹⁵ In plainer terms, DNA effectively confirmed Harvey's actual guilt of the rape for which he was convicted.¹¹⁶

While Godschalk's victory seems unassailably complete, the curious tale of James Harvey dramatically demonstrates the discourse-dependent nature of assessing what it means to win legal arguments. We might ask: Did Harvey win or lose his legal argument?¹¹⁷ Certainly, the simple conclusion that Harvey lost because the DNA included him would improperly obscure his legacy of providing the impetus behind the single most influential case in the § 1983 DNA access discourse.

Though Bruce Godschalk's personal victory undoubtedly inspired wrongfully convicted prisoners and their attorneys to file subsequent § 1983 access actions,¹¹⁸ my claim is that no case in the closed universe of this study has influenced the reasoning of other courts participating in the discourse as much as *Harvey*.¹¹⁹ The unequalled pull of *Harvey*—and

¹¹⁵ See Josh White, *DNA Tests Confirm Conviction of Rapist; Inmate Claimed Innocence in '89 Case*, WASH. POST, Oct. 10, 2002, at T1.

¹¹⁶ Postconviction DNA testing that confirms guilt is a lesser known but certainly significant phenomenon. See generally Garrett, *Judging Innocence*, *supra* note 3, at 71-72 (2008) (describing a "DNA confirmation group" of sixty-three individuals who had been inculpated by postconviction DNA testing). Professor Garrett notes the scarcity of information concerning DNA confirmation cases: "District attorneys often do not publicize such results, and the news media provide less coverage of inculpations than they do of exonerations. After all, inculpatory test results merely confirm the jury verdict." *Id.* at 72. In our universe of § 1983 DNA access actions, DNA testing also inculpated Robert Breest. See News Release, N.H. Dep't of Justice, *State v. Robert Breest: DNA Test Results in 1971 Concord Homicide*, (Mar. 28, 2008), available at <http://www.doj.state.nh.us/publications/nreleases2008/032708breest.html>. In addition, Danny Joe Bradley was included on some DNA evidence in the early stages of § 1983 litigation aimed to uncover other potentially exculpatory evidence. See *Bradley v. King*, 56 F.3d 1225 (11th Cir. 2009).

¹¹⁷ Harvey "won" in federal district court, "lost" in the federal circuit court, and then "won" in state court at the trial level. This state court victory mooted his federal appeal but also subsequently destroyed his innocence claim.

¹¹⁸ Godschalk's story almost certainly helped the Pennsylvania legislature pass its postconviction DNA testing law. See Annie Parnes, *Schweiker Signs Law Letting Convicts Seek DNA Testing*, PHILA. INQUIRER, July 11, 2002, at B1 (noting passage of Pennsylvania's postconviction DNA statute and citing to Godschalk's exoneration five months earlier). From my own experience litigating § 1983 DNA access cases at the Innocence Project, I can attest that Godschalk's success and Kreimer and Rudovsky's article about potential sources for the existence of a postconviction right were very influential among advocates. See generally Kreimer & Rudovsky, *supra* note 12.

¹¹⁹ Thus, I am not claiming that the *Harvey* cases are more influential than U.S. Supreme Court cases around which the DNA debate revolves. These cases are part of a larger discourse not included in our closed universe of federal cases addressing § 1983 DNA access actions. Of course, I readily concede that the Supreme Court's pronouncements in *Heck v. Humphrey* (and related cases) have had more weight over the *Heck* debate than any argument advanced by Luttig or Wilkinson in *Harvey II*. Furthermore, I fully expect that after the Supreme Court decides *Osborne*, that decision will instantly redefine the § 1983

especially of Judge Michael Luttig's concurring opinion in *Harvey II*—can be illustrated by an empirical review of citation patterns in opinions from this Article's case study.

B. JUDGE LUTTIG'S INFLUENCE: A PRIMA FACIE CASE

After *Harvey II*, federal courts issued thirty-one opinions in cases involving nineteen different individuals.¹²⁰ The *Harvey* litigation was cited in all but five of these nineteen controversies.¹²¹ Of these five apparent exceptions, all but one occurred in relatively recent litigation controlled by a previous decision in the circuit that had itself cited *Harvey*.¹²² In other words, where the question was one of first impression, courts almost invariably looked to *Harvey*.¹²³

DNA access discourse. My observations thus concern the dynamics of persuasion before the rhetorical nine hundred pound gorilla enters the conversation.

¹²⁰ See *supra* note 18. Of course, the time frame for this claim is also bounded by the Supreme Court's grant of certiorari in *Osborne* on November 3, 2008. See *supra* note 1.

¹²¹ *Harvey* cites appear in eighteen decisions from actions involving fourteen different individuals. See, e.g., *McKithen v. Brown*, 481 F.3d 89, 106-08 (2d Cir. 2007) (remanding case to district court with instructions to follow Luttig's due process framework); *Savory v. Lyons*, 469 F.3d 667, 671 (7th Cir. 2006) (citing *Harvey I* and *Harvey II*); *Grayson v. King*, 460 F.3d 1328, 1342 (11th Cir. 2006) (carefully distinguishing plaintiff's case from due process analysis described by Luttig); *Osborne v. Dist. Attorney's Office*, 423 F.3d 1050, 1054-55 (9th Cir. 2005) (agreeing with Luttig's analysis); *Bradley v. Pryor*, 305 F.3d 1287, 1291 (11th Cir. 2002) (stating agreement with Luttig); *Kutzner v. Montgomery County*, 303 F.3d 339, 341 (5th Cir. 2002) (describing *Harvey I* as "strongly persuasive"); *McDaniel v. Suthers*, No. 08-00223, 2008 WL 4527697, at *8 (D. Colo. Oct. 2, 2008) (citing *Harvey* debate); *Breest v. New Hampshire*, No. 06-361, 2008 WL 183240, at *3 (D.N.H. Jan. 18, 2008) (citing debate between "highly respected judges" in *Harvey II*); *Gilkey v. Livingston*, Nos. 3:06-1903, 3:06-1904, 3:06-1905, 2007 WL 1953456, at *5 (N.D. Tex. June 27, 2007) (calling *Harvey I* "strongly persuasive"); *Harrison v. Dumanis*, No. 06-2470, 2007 WL 1159976, at *6 (S.D. Cal. Apr. 18, 2007) (citing Ninth Circuit's analysis of Luttig); *Smith v. Worthy*, 4:07-10243, 2007 WL 295007, at *1 (E.D. Mich., Jan. 29, 2007) (citing *Harvey I*); *Wade v. Brady*, 460 F. Supp. 2d 226, 244-49 (D. Mass. 2006) (relying heavily on Luttig); *Alley v. Key*, 431 F. Supp. 2d 790, 799-802 (W.D. Tenn. 2006) (acknowledging plaintiff's repeated cites to Luttig); *Moore v. Lockyer*, No. 04-1952, 2005 WL 2334350, at *8 (N.D. Cal. Sept. 23, 2005) (describing Luttig's opinion as "undoubtedly correct"); see also *infra* note 124 (listing additional decisions quoting Luttig in controversies cited above).

¹²² These non-first-impression rulings are from 2007 or 2008. Three of them followed the Eleventh Circuit's decision in *Grayson* and one followed the Second Circuit's decision in *McKithen*. See, e.g., *Arthur v. King*, No. 2:07-319, 2007 WL 2381992, at *6-8 (M.D. Ala. Aug. 2007) (following direct authority of *Grayson*); *Thompson v. McCollum*, 253 F. App'x 11, 13 (11th Cir. 2007); *Wambolt v. Chittendon County*, No. 2:07-167, 2008 WL 682588, at *1-2 (D. Vt. Mar. 7, 2008) (following direct authority of *McKithen*); *Morgan v. Satz*, No. 08-80379, 2008 WL 2694745, at *3-4 (S.D. Fla. May 29, 2008) (following direct authority of *Grayson*).

¹²³ The single controversy apparently untouched by *Harvey* is represented by the Sixth Circuit's unpublished decision in *Boyle v. Maher*. See 46 F. App'x 340 (6th Cir. 2002).

Even more impressive is the fact that Judge Luttig's *Harvey II* concurrence was explicitly cited in fourteen decisions originating from eleven different individuals' § 1983 DNA access actions.¹²⁴ Again, these numbers must be placed in the context of the thirty-one decisions emerging from nineteen individual controversies after *Harvey II* and where only fourteen actions involved courts reaching procedural or constitutional questions as issues of first impression.¹²⁵ Most dramatically, in the eight controversies after *Harvey II* where courts reached the constitutional question as one of first impression, Luttig's constitutional analysis was cited in every case.¹²⁶ No other case from within the postconviction DNA discourse posts anywhere near these kinds of numbers.¹²⁷

However, as explained in *infra* note 266, *Boyle* truly is an outlier as its precedent was blatantly ignored by a district court within the Sixth Circuit.

¹²⁴ In addition to the eleven cases citing Luttig in *supra* note 121, Luttig has been repeatedly cited throughout the course of the *Osborne* and *McKithen* litigation. See *Osborne v. Dist. Attorney's Office*, 521 F.3d 1118, 1131 (9th Cir. 2008); *McKithen v. Brown*, 565 F. Supp. 2d 440, 447 (E.D.N.Y. 2008); *Osborne v. Dist. Attorney's Office*, 445 F. Supp. 2d 1079, 1081 (D. Alaska 2006). Given Luttig's prominence in the *Osborne* litigation at the district and appellate levels, his opinion has also played heavily in the advocates' briefs currently before the Supreme Court. See *Osborne Respondent's Brief*, *supra* note 1, at 4-43 (repeatedly citing Luttig); *Brief for Petitioners at 53*, *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308 (2008) (citing Luttig's opinion in *Harvey II*).

¹²⁵ See *supra* notes 121-22.

¹²⁶ The eight post-*Harvey II* controversies that reached the constitutional question as one of first impression are (in chronological order): *Moore v. Lockyer*, No. 04-1952, 2005 WL 2334350, at *8 (N.D. Cal. Sept. 23, 2005) (describing Luttig's opinion as "undoubtedly correct" but denying relief on estoppel grounds), *aff'd* 2008 WL 4430338 (9th Cir. Sept. 18, 2008); *Alley v. Key*, 431 F. Supp. 2d 790, 799-802 (W.D. Tenn. 2006) (acknowledging plaintiff's repeated cites to Luttig but denying existence of right), *aff'd* 2006 WL 1313364 (6th Cir. May 14, 2006); *Osborne v. Dist. Attorney's Office*, 445 F. Supp. 2d 1079, 1081 (D. Alaska 2006) (siding with Luttig's "particularly persuasive" constitutional analysis), *aff'd* 521 F.3d 1118 (9th Cir. 2008) (also citing Luttig), *cert. granted*, 129 S. Ct. 488 (Nov. 3, 2008) (No. 08-6); *Grayson v. King*, 460 F.3d 1328, 1342 (11th Cir. 2006) (finding no constitutional right but also agreeing with Luttig); *Wade v. Brady*, 460 F. Supp. 2d 226, 244-49 (D. Mass. 2006) (finding right and relying heavily on Luttig); *Harrison v. Dumanis*, No. 06-2470, 2007 WL 1159976, at *6 (S.D. Cal. Apr. 18, 2007) (finding no right for plaintiff but distinguishing district court in *Osborne* and citing Luttig); *Breest v. New Hampshire*, No. 06-361, 2008 WL 183240, at *3 (D.N.H. Jan. 18, 2008) (finding right and citing Luttig); *McKithen v. Brown*, 565 F. Supp. 2d 440, 456-82 (E.D.N.Y. 2008) (finding right and repeatedly citing Luttig).

¹²⁷ The second most cited opinion from within the discourse is *Godschalk*, which has been cited in seven decisions, each from a different individual's action. See *Osborne v. Dist. Attorney's Office*, 521 F.3d 1118, 1140 (9th Cir. 2008); *Grayson v. King*, 460 F.3d 1328, 1339 n.9 (11th Cir. 2006); *McKithen v. Brown*, 565 F. Supp. 2d 440, 450 (E.D.N.Y. 2008); *Breest v. New Hampshire Atty. Gen.*, 472 F. Supp. 2d 116, 120 (D.N.H. 2007); *Wade v. Brady*, 460 F. Supp. 2d 226, 230 (D. Mass. 2006); *Alley v. Key*, 431 F. Supp. 2d 790, 798 n.3 (W.D. Tenn. 2006); *Moore v. Lockyer*, No. 04-1952, 2005 WL 2334350, at *8 (N.D.

Skeptics might object that these statistics inherently reflect nothing other than the fact that the *Harvey* litigation produced the first decision from a federal appeals court in a § 1983 DNA access action. On this contrary account, the ubiquitous *Harvey* cites support no inference about *Harvey*'s persuasive effect on the discourse at all—the multiple references represent only subsequent courts' formal recitation of relevant authority.¹²⁸ While it is certainly true that mere citation is not conclusive evidence of rhetorical influence, I offer two considerations to support my claim regarding Luttig's sway on the debate.

First, the quality of citations bolsters the quantitative claim to prominence of Luttig's *Harvey II* opinion.¹²⁹ Courts have devoted considerable ink to analyzing various facets of Luttig's opinion, which they have praised as “undoubtedly correct,”¹³⁰ “particularly persuasive,”¹³¹ and “penetrating and insightful.”¹³² Even when courts have not followed Luttig, they tend to engage with his analysis rather than simply dismiss it.¹³³

Second, the high number of Luttig references comes despite the fact that his opinion is nothing but exhortative obiter dicta. His concurrence technically presents no challenge to the contrary and controlling authority of *Harvey I*.¹³⁴ Subsequent courts thus had no precedent-based reason to

Cal. Sept. 23, 2005). Again, I emphasize my claim about influence is restricted to cases from within § 1983 DNA discourse. See *supra* note 119.

¹²⁸ From this perspective, it is as if courts were merely “showing their work” by citing to the *Harvey* cases. They collected texts but were not influenced in their deliberations by those texts.

¹²⁹ I might have strengthened the quantitative case on its own terms had I counted the number of separate citations to Luttig and *Harvey*. For example, one judge included Luttig's name fifteen separate times in an opinion. See *McKithen v. Brown*, 565 F. Supp. 2d 440, 456-82 (E.D.N.Y. 2008). However, some courts made far more fleeting references to *Harvey*. See, e.g., *Smith v. Worthy*, No. 4:07-10243, 2007 WL 295007, at *1 (E.D. Mich., Jan. 29, 2007). In the end, rather than devise a system to weigh the number of citations and their importance, I limit the reach of my quantitative claim to making only a *prima facie* case.

¹³⁰ *Moore*, 2005 WL 2334350, at *8.

¹³¹ *Osborne v. Dist. Attorney's Office*, 445 F. Supp. 2d 1079, 1081 (D. Alaska 2006).

¹³² *McKithen*, 565 F. Supp. 2d at 477 n.43. Although Judge Gleeson is actually disagreeing with Luttig here, the rest of his opinion repeatedly follows Luttig's cues and reaches the same conclusions. See, e.g., *id.* at 458.

¹³³ See, e.g., *Grayson v. King*, 460 F.3d 1328, 1342 (11th Cir. 2006); *Alley v. Key*, 431 F. Supp. 2d 790, 800-02 (W.D. Tenn. 2006). The Eleventh Circuit's decision in *Grayson* is particularly dramatic in this regard in that while it declined to find that plaintiff had a right of access, it specifically explained that “Grayson's case does not fall within the limited class of cases described by [Luttig's] *Harvey* concurrence in the denial of rehearing.” *Id.*

¹³⁴ Luttig himself would not challenge this conclusion. See *Jones v. Buchanan*, 325 F.3d 520, 538 (4th Cir. 2003) (Luttig, J., dissenting). In *Jones*, Luttig criticized the majority's reliance on an opinion concurring in the denial of rehearing en banc, and noted that “these kinds of revisionist writings cannot be and are not the binding authority of the circuit.” *Id.*

recite Luttig's opinion, and yet cite him they did. The repeated invocation of Luttig despite this formal irrelevance suggests that his reasoning played some role in judicial deliberations in the § 1983 DNA access conversation.

From this discussion, I hope it is clear that my own claim concerning Luttig's influence is not an exacting empirical one. I do not pretend to have proved a strict causal relationship between Luttig's opinion and the outcomes in subsequent cases. Nor do I suggest that I have precisely quantified the measure of Luttig's discursive influence.¹³⁵ Rather, I present a *prima facie* case for Luttig's mark upon the debate that justifies further attention to his opinion. I suggest that Judge Luttig's opinion, and that of his foil, Chief Judge Wilkinson, capture essential competing *logoi* of the § 1983 DNA access controversy.

IV. RHETORIC AND *LOGOS*: LUTTIG V. WILKINSON IN *HARVEY II*

The *Harvey II* opinions of Chief Judge Harvie Wilkinson III and Judge Michael Luttig represent competing rhetorical poles of the § 1983 DNA access debate. Both ostensibly concurring *Harvey II* jurists agreed that *en banc* rehearing was irrelevant since James Harvey had found relief in state court.¹³⁶ Nonetheless, the judges authored two opinions that sprawled over twenty-eight pages of the Federal Reporter.¹³⁷ Judge Michael Luttig instigated the procedurally irrelevant argument with his twenty-two-page missive detailing why he thought *Harvey I* was incorrectly decided.¹³⁸ This

(emphasis in original omitted). Although Luttig directs his criticism at concurrences that seek to correct or clarify apparent errors in the original panel opinions (as Chief Judge Wilkinson might be accused of doing in his *Harvey II* concurrence), his observation about the lack of any binding authority clearly applies to his own *Harvey II* opinion.

¹³⁵ My intuition here is actually that the operative dynamics of persuasion could never be neatly reduced to numbers and calculations—a prerequisite to successful empirical induction.

¹³⁶ See *Harvey v. Horan (Harvey II)*, 285 F.3d 298, 298 (4th Cir. 2002) (Wilkinson, C.J., concurring in denial of rehearing and rehearing *en banc*) (“... the [*Harvey I*] panel opinion suggested that the state courts could order DNA testing And that is precisely what the state courts have now done.”); *id.* at 304 (Luttig, J., respecting denial of rehearing *en banc*) (“I concur in the court’s judgment to deny rehearing of this case *en banc* . . . because it appears that appellee Harvey will, pursuant to state court order entered after our panel’s decision, be afforded the chance [to conduct DNA testing].”).

¹³⁷ See *Harvey II*, 285 F.3d at 298-326.

¹³⁸ See *id.* at 304 (Luttig, J., respecting denial of rehearing *en banc*) (“So believing, and having no other opportunity to express my views on these important questions—the panel opinion now constituting the law of our Circuit—I set forth those views herein.”).

provoked a “puzzled” Chief Judge Wilkinson to pen his six-page response ardently defending *Harvey I*.¹³⁹

A. RHETORICAL PRESENTATION IN *HARVEY II*

1. Judge Luttig’s Opinion

Luttig approached his *Harvey II* opinion with careful attention to form, neatly arranging his twenty-two-page concurrence into Roman numeral parts with lettered subparts.¹⁴⁰ He organized his argument so that a general discussion of first principles preceded specific investigation into doctrine. This was followed by meticulous doctrinal analysis, refutation of potential objections, and then a conclusion.¹⁴¹

Luttig’s main framing principle was an appeal to the extraordinary power of DNA tests as forensic proof. Hailing the “scientific advances in the testing of deoxyribonucleic acid, particularly Short Tandem Repeat (STR) DNA testing,”¹⁴² he observed:

There is now widespread agreement within the scientific community that this technology, which requires literally cellular-size samples only, can distinguish between any two individuals on the planet, other than identical twins, the statistical probabilities of STR DNA matches ranging in the hundreds of billions, if not trillions. In other words, STR DNA tests can, in certain circumstances, establish to a virtual certainty whether a given individual did or did not commit a particular crime.¹⁴³

This new possibility of “objective proof” in criminal adjudication is “the evidentiary equivalent of ‘watershed’ rules of constitutional law.”¹⁴⁴

¹³⁹ See *id.* at 298 (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc) (“However, inasmuch as my colleague has undertaken an extended discussion of his own, I tender this brief response.”).

¹⁴⁰ The opinion actually opens with a two paragraph introduction explaining why he concurred in denying rehearing despite his disagreement with *Harvey I*. *Harvey II*, 285 F.3d at 304 (Luttig, J., respecting denial of rehearing en banc). Part I undertakes an exposition on DNA science and its impact on proof in law. *Id.* at 304-06. Part II systematically addresses the *Heck* question (in Subpart A), the existence-of-a-constitutional-right question (in Subpart B), and then engages in rebuttal (Subparts C-D). *Id.* at 306-25. Part III provides a brief restatement of his conclusion. *Id.* at 325-26.

¹⁴¹ In this structure, Luttig perfectly follows a classical rhetorical arrangement. See CORBETT & CONNORS, *supra* note 46, at 256-92 (detailing schema of arrangement “that the Greeks called *taxis* and the Latins called *dispositio*.”). The two paragraph opener and Part I work together as *exordium* (introduction) and *narratio* (statement of relevant facts). Parts II.A-B constitute the *confirmatio* (proof of case). Finally, Parts II.C-D engage in refutation (discrediting opposing views) and Part III is the *peroratio* (conclusion).

¹⁴² *Harvey II*, 285 F.3d at 304 (Luttig, J., respecting denial of rehearing en banc).

¹⁴³ *Id.* at 305.

¹⁴⁴ See *id.* at 306 (citing *Teague v. Lane*, 489 U.S. 288 (1989)). Luttig places the DNA’s objective power in the context of “our system of justice which, while insisting upon a very

Given the “law’s foundational concern for the determination of guilt and innocence,” Luttig urged “judicial recognition of this new science.”¹⁴⁵

Anticipating competing first principles, Luttig acknowledged both the “presumption of correctness rightly enjoyed by final judgments of conviction and the separate, indisputable interest in the finality of such judgments.”¹⁴⁶ However, he answered that prohibiting access to DNA where forensic testing “can definitely establish innocence . . . is simply to confer a sanctity upon finality that not even that concededly substantial interest deserves.”¹⁴⁷

In this introductory section, Luttig effectively created an interpretative lens through which his subsequent doctrinal analysis is seen. He did this by first associating his position with paradigm-changing DNA technology and the objective *ethos* of scientific progress.¹⁴⁸ More normatively, he also anchored his argument in what Chaïm Perelman would call a “hierarchy of values.”¹⁴⁹ Luttig identified two foundational values—let us call them “accuracy” and “finality”—as both vital to the criminal justice system; he

high degree of proof for conviction, does not, after all, require proof beyond all doubt, and therefore is capable of producing erroneous determinations of both guilt and innocence.” *Id.*

¹⁴⁵ *Id.* at 306.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ As one commentator has observed, DNA and DNA technology “legitimate[] legal decisions in a completely new way, a way that is identified with science. . . . DNA testing derives its power as ‘a gold standard for truth telling’ from its scientific *ethos*.” JENNIFER L. CULBERT, DEAD CERTAINTY: THE DEATH PENALTY AND THE PROBLEM OF JUDGMENT 118 (2008) (emphasis added) (quoting JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 121-22 (2000)). Though he trades in science’s *ethos*, at one point Luttig veers into *pathos*. He states that “current techniques [of STR testing] can often yield results from even a single cell.” *Harvey II*, 285 F.3d at 305 & n.1 (Luttig, J., respecting denial of rehearing en banc) (citing I. Findlay et al., *DNA Fingerprinting from Single Cells*, 389 NATURE 555 (1997)). Unfortunately, the study Luttig cites to justify his single-cell-testing proposition did not involve “current techniques” of forensic DNA testing, but rather an experimental method for DNA typing undertaken in a highly controlled laboratory setting. *See id.* at 555. In the forensic context, obtaining reliable results is extremely tricky when less than one hundred picograms of DNA are present (approximately seventeen cells’ worth) because of the ease of contamination and stochastic effects of the PCR amplification process. *See BUTLER, supra* note 65, at 68, 168-70. Then current techniques of forensic DNA testing could not obtain reliable results from a single cell.

¹⁴⁹ *See* PERELMAN & OLBRECHTS-TYTECA, *supra* note 21 at 80-83. For Perelman and Olbrechts-Tyteca, argument begins with the consideration of “what sort of agreement can serve as premises.” *Id.* at 66. Hierarchies (along with values themselves and other loci) are objects of agreement based on the “preferable”, as opposed to facts, truths, and presumptions which are objects of agreement based on the “real.” *Id.* The hierarchy of “accuracy” over “finality” would constitute a heterogeneous hierarchy akin to a hierarchy promoting the “true” over the “good.” *See id.* at 81. Value hierarchies play an essential role in “starting point of argumentation” because they allow for choices when values conflict. *Id.* at 81-82.

then urged that accuracy should always trump finality in the value hierarchy where science could unequivocally establish innocence.¹⁵⁰

From this starting point, Luttig took on the “threshold question of whether the assertion of such a right of access is a direct challenge to one’s conviction or, instead, an independent constitutional claim under 42 U.S.C. § 1983.”¹⁵¹ Here Luttig confronted the primary holding of the *Harvey I* majority, which had found James Harvey’s § 1983 action barred by the Supreme Court decisions in the *Heck v. Humphrey* family of cases.¹⁵² In *Harvey I*, the court found James Harvey’s § 1983 action barred, concluding that federal habeas corpus provided the sole remedy for a constitutional action seeking DNA testing to prove innocence.¹⁵³

Luttig’s attack on *Harvey I* was brief, direct, and self-contained. He began by identifying a single rule from “applicable Supreme Court precedent” that controlled the inquiry.¹⁵⁴ This is the so-called *Heck* rule, which bars any § 1983 action that “‘necessarily implies’ the invalidity of [a prisoner’s] conviction or sentence.”¹⁵⁵ Luttig carefully explained the rule as marking a bright line between habeas and § 1983: if Harvey’s action “necessarily implies” his conviction’s invalidity, then it “must be adjudicated in habeas”; “on the other hand, if [it] does not ‘necessarily imply’” his conviction’s invalidity but “is properly understood as independent of any attack on the underlying conviction,” then a § 1983 claim does indeed lie.¹⁵⁶

With this decision rule established, Luttig then asserted that permitting access to STR DNA testing “necessarily implies nothing at all about the plaintiff’s conviction.”¹⁵⁷ This is because:

¹⁵⁰ This value hierarchy placing accuracy over finality may also be thought of as a stating a “moral taxonomy.” See *supra* note 76 (discussing Jonsen’s and Toulmin’s concept of moral taxonomy).

¹⁵¹ *Harvey II*, 285 F.3d at 307 (Luttig, J., respecting denial of rehearing en banc).

¹⁵² See *Harvey v. Horan (Harvey I)*, 278 F.3d 370, 374-78 (4th Cir. 2002) (citing, *inter alia*, *Edwards v. Balisok*, 520 U.S. 641 (1997); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Hamlin v. Warren*, 664 F.2d 29 (4th Cir. 1981)); see also *supra* note 10 and accompanying text.

¹⁵³ *Harvey I*, 278 F.3d at 378 (“Under *Preiser* and *Hamlin*, Harvey’s sole federal remedy is a writ of habeas corpus.”). The majority then treated the action as sounding in habeas, and dismissed it “as a successive petition brought without leave of court.” *Id.* at 379.

¹⁵⁴ *Harvey II*, 285 F.3d at 307 (Luttig, J., respecting denial of rehearing en banc).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* Interestingly, in this opening description of the *Heck* rule, Luttig does not immediately cite *Heck*. Rather, he describes the “necessarily implies” rule in painstaking detail before he finally cites to the portion of *Harvey I*, which in turn quotes *Heck*. See *id.* This approach comports with his general strategy of relentless focus to make the “necessarily implies” inquiry the only one that controls.

¹⁵⁷ *Id.* at 308.

The results of any DNA tests that are eventually performed may be inconclusive, they may be insufficiently exculpatory, or they may even be inculpatory. That these scientific possibilities exist, in and of itself, suffices to establish that the asserted right of mere access is not a direct, or for that matter even an indirect, attack on one's conviction or sentence.¹⁵⁸

From here, Luttig quickly concluded that Harvey's § 1983 access action was cognizable "on the direct authority of *Heck*, which properly was actually a quite narrow decision."¹⁵⁹

The remainder of the argument in this section sought to justify Luttig's narrow reading of *Heck*. First, Luttig pointed out how Harvey's asserted right of access is "wholly unlike the claims in *Heck* for an assertedly illegal investigation and arrest."¹⁶⁰ This difference rests on the possibility that victory in Harvey's § 1983 action "may even prove the defendant's guilt beyond any question."¹⁶¹ Second, Luttig carefully parsed two of *Heck*'s footnotes where the Court provided hypothetical examples of permissible and impermissible actions under its new rule.¹⁶² From this close study, Luttig asserted that the "conclusion is inescapable" that Harvey's action does not "in any respect impl[y] the invalidity of [his] conviction."¹⁶³

Having thus disposed of this procedural issue, Luttig dove headlong into substantive waters with a zealous argument in favor of finding a constitutional postconviction right of access to DNA evidence.¹⁶⁴ In form and content, Luttig treated the *Heck* and constitutional arguments as logically distinct and subject to entirely separate analyses. As explored below, Wilkinson contested the practical severability of these arguments (though not in explicit terms).¹⁶⁵ While not endorsing his view, I will take Luttig at his word and so will not explore his constitutional arguments as I more closely parse the dynamics of the *Heck* debate.

2. Chief Judge Wilkinson's Opinion

Chief Judge Wilkinson's six-page "brief response" to Luttig is also divided by Roman numeral parts with lettered subparts.¹⁶⁶ Wilkinson also

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 308-09 (citing *Heck v. Humphrey*, 512 U.S. 477, 486 n.6, 487 n.7) (1994).

¹⁶³ *Id.* at 309. Luttig also attacks the reasoning of the *Harvey I* opinion as internally inconsistent. See *id.* at 309-10 (citing *Harvey v. Horan (Harvey I)*, 278 F.3d 370, 376 (4th Cir. 2002)).

¹⁶⁴ See *id.* at 310-26.

¹⁶⁵ See *infra* notes 210-212 and accompanying text.

¹⁶⁶ Like Luttig, Wilkinson also opens his concurring opinion with a two paragraph introduction that precedes the first lettered part. See *Harvey II*, 285 F.3d at 298 (Wilkinson,

began his opinion with a statement of framing principles that set up his subsequent analysis. However, in *Harvey II*, Wilkinson made less of an affirmative case for his position—a task undertaken more in *Harvey I*¹⁶⁷—and focused more on attacking and parrying Luttig's various arguments.

Wilkinson's own analysis proceeded from two starting points. First, he maintained that "[t]here is no doubt that Harvey should receive the biological evidence in this case" and emphasized that this "is precisely what the state courts have now done."¹⁶⁸ The success of state court based action in James Harvey's case is intimately connected with Wilkinson's second framing principle—"that claims of innocence should be entertained . . . in the first instance by the court, or at least by the court system, that initially heard the case."¹⁶⁹ Wilkinson labeled his guiding concern "the morality of process,"¹⁷⁰ and he rejected the institutional competence of the federal courts to entertain an issue so intertwined with state criminal procedure.¹⁷¹

Although he offered a spirited defense of finality in *Harvey I*,¹⁷² in *Harvey II* Wilkinson avoided portraying the conflict as one between accuracy and finality. He conceded that the "American justice system rightly sets the ascertainment of truth and the protection of innocence as its

C.J., concurring in denial of rehearing and rehearing en banc). Part I of Wilkinson's opinion is divided into Subpart A (setting up Wilkinson's interpretive frame based on the lack of institutional competence of the federal courts on this question) and Subpart B (asking a series of questions designed to show how impractical Luttig's schema is). *Id.* at 299-301. Part II details all of the then ongoing state legislative activity around provision of postconviction DNA testing. *Id.* at 301-03. Part III attacks Luttig's reasoning on *Heck*. *Id.* at 303-04. Finally, Part IV briefly restates his conclusion. *Id.* at 304.

¹⁶⁷ Wilkinson wrote the majority opinion in *Harvey I*. See *supra* notes 105-07 (quoting Wilkinson's *Harvey I* opinion).

¹⁶⁸ *Harvey II*, 285 F.3d at 298 (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc).

¹⁶⁹ *Id.* at 299.

¹⁷⁰ See *id.* (citing ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 123 (1975)).

¹⁷¹ See *id.* Although Wilkinson does not use the phrase "institutional competence," Alexander Bickel employed this concept in his critique of Warren Court activism in the pages immediately preceding those cited by Wilkinson. See BICKEL, *supra* note 170, at 120 ("More than once, and in some of its most important actions, the Warren Court got over doctrinal difficulties or issues of the allocation of competences among various institutions by asking what it viewed as a decisive practical question: If the Court did not take a certain action which was right and good, would other institutions do so, given political realities?"). Wilkinson plainly charges Luttig with activism here. See *Harvey II*, 285 F.3d at 303 (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc) ("To be sure, the displacement of elected officials by judicial authority always pleases some of the people some of the time. But with activism, what goes around comes around.").

¹⁷² See, e.g., *Harvey v. Horan (Harvey I)*, 278 F.3d 370, 376 (4th Cir. 2002) ("While finality is not the sole value in the criminal justice system, neither is it subject to the kind of blunt abrogation that would occur with the recognition of a . . . post-conviction [right of] access to DNA evidence.").

highest goals.”¹⁷³ However, he averred, “[o]ur system . . . does not allow any person to press a claim of innocence at any time, at any place, and in any manner.”¹⁷⁴ For Wilkinson, “the presumption of legitimacy” of state court convictions “would be lost if the court rendering the conviction could simply be disregarded and bypassed at will, which is what Harvey sought to do in fashioning his claim of innocence as a § 1983 suit.”¹⁷⁵

Having contested Luttig’s framing of the issue, Wilkinson then proceeded to attack the practical implications of finding a right of access. He asked “a myriad of questions” about the parameters of Luttig’s asserted federal right.¹⁷⁶ After expounding upon the difficulty inherent in having federal courts manage DNA access, Wilkinson surveyed the legislative activity in Congress and in the states to show how they were currently handling the DNA issue.¹⁷⁷ He concluded this line of argument with an upping of the rhetorical ante: “To constitutionalize this area, as the separate opinion would, in the face of all this legislative activity and variation is to evince nothing less than a loss of faith in democracy.”¹⁷⁸

When Wilkinson finally turned to the specific procedural debate over the propriety of Harvey’s action under § 1983, he notably failed to engage Luttig’s line-by-line exegesis of *Heck v. Humphrey*. Rather, he recast the debate as concerning the spirit of the law rather than its letter: “[T]he whole point of *Heck* was to keep a state prisoner from challenging his conviction in federal court in the first instance through an unexhausted habeas claim masquerading as a § 1983 claim.”¹⁷⁹

From here, Wilkinson invoked the “basic place in Supreme Court jurisprudence” of “the requirement that a state prisoner exhaust state remedies before challenging his conviction in federal court.”¹⁸⁰ Since

¹⁷³ *Harvey II*, 285 F.3d at 299 (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 300.

¹⁷⁶ *Id.* Wilkinson actually asks nine different questions in the space of two pages. *Id.* at 300-01. These include questions about the standard for getting testing, whether the state would have to pay for DNA, and what relief would follow from exculpatory results.

¹⁷⁷ *Id.* at 302-03 (discussing the federal Innocence Protection Act as well as postconviction DNA statutes from Virginia, New York, Florida, California, Maryland, and North Carolina).

¹⁷⁸ *Id.* at 303.

¹⁷⁹ *Id.* Wilkinson also suggests here that Luttig’s view runs counter to the spirit of the Fourth Circuit’s decision in *Hamlin v. Warren* and the Supreme Court’s foundational *Preiser v. Rodriguez* opinion. *Id.* (“The lesson of *Hamlin* and *Preiser* is that the state court should have the first chance to review challenges to a state judgment of conviction.”) (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Hamlin v. Warren*, 664 F.2d 29 (4th Cir. 1981)).

¹⁸⁰ *Id.* at 303-04 (citing *Rose v. Lundy*, 455 U.S. 509, 515 (1982)) (explaining that “[t]he exhaustion doctrine existed long before its codification by Congress in 1948”).

Luttig's approach would apparently circumvent this exhaustion requirement, Wilkinson characterized Luttig's reading of *Heck* as absurd: "It is inconceivable that *Heck* meant to displace this long line of Supreme Court precedent on the exhaustion requirement, or that it stands for the proposition that claims such as Harvey's may proceed *ab initio* in federal court."¹⁸¹

In his concluding paragraph, Wilkinson returned to the theme of institutional competence. On his account, *Harvey I* "respects the proper role of the federal courts" while Luttig's "separate opinion does just the opposite . . . disregard[ing] the roles of all the other actors in the American system."¹⁸² Wilkinson closed by charging that Luttig's approach to "determining the entitlements of individuals to the fruits of scientific advances" treats "both state legislatures and state court systems as junior partners with respect to their own trials and judgments."¹⁸³

B. COMPETING LOGOS IN *HARVEY II*

Based on these readings, it is apparent that Luttig and Wilkinson oriented their arguments to wholly different points of reference. Luttig posed the question as concerning accuracy over finality in criminal justice. Wilkinson characterized the same controversy as primarily implicating institutional competence. The jurists all but talked past each other; though engaged in the same fray, Luttig and Wilkinson defined the operative discourse(s) differently.

This discursive disconnect involved distinct modes of proof. The jurists reached opposite conclusions after starting from different premises. This situation resulted in a category of debate like that between what Thomas Kuhn has called "incommensurable" scientific paradigms.¹⁸⁴ Such debates "cannot be cast in a form that fully resembles logical or mathematical proof" where "premises and rules of inference are stipulated from the start."¹⁸⁵ In paradigm contests, the "debate is about premises, and

¹⁸¹ *Id.* at 304.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 198-200 (3d ed. 1996). Kuhn's central concept of paradigm is complex, but notably includes the idea of a constitutive framework in which debate occurs in particular communities. See, e.g., *id.* at 94 (describing paradigms as "modes of community life" and as circles bounding argument).

¹⁸⁵ *Id.* at 199. In a strict logical or mathematical dispute, "if there is disagreement about conclusions, the parties to the ensuing debate can retrace their steps one by one, checking each against prior stipulation. At the end of that process, one or the other must concede that he has made a mistake, violated a previously accepted rule." *Id.*

its recourse is to persuasion as a prelude to the possibility of [logical or mathematical] proof.”¹⁸⁶

While persuasion clearly functions differently in empirical science as compared to law,¹⁸⁷ the same principles that make scientific arguments persuasive—problem-solving ability, conceptual elegance, and overall coherence¹⁸⁸—also make legal arguments persuasive. The battle over premises between Luttig and Wilkinson was a conflict between incommensurable modes of proof; it was a conflict sounding in *logos*.

In Part II above, I distinguished four modes of *logos*—formal, empirical, narrative, and categorical. The debate between Luttig and Wilkinson involved a clash between formal and narrative modes of proof. While Chief Judge Wilkinson justified classifying DNA access actions as non-cognizable by elaborately plotting the narrative concerns of *Preiser v. Rodriguez* and its progeny, Luttig framed his argument formally through the deductive application of the rule from *Heck*.

Before further exploring these competing *logoi*, I pause briefly to consider the background roles of empirical and categorical logics in the debate. Initially, Wilkinson and Luttig both accepted the premise that forensic DNA testing possesses the empirical power to prove guilt or innocence definitively in certain classes of cases including James Harvey’s case. Thus, the facts that led to Harvey’s conviction or the potential of DNA testing to overcome the eyewitness testimony against him were not contested at all. Though dealing with the consequences of DNA’s empirical power looms large, no actual contest over empirical *logos* emerged in the dispute.

Similarly, categorical *logos* did not play a crucial role in the argument either. While it is certainly true that Wilkinson and Luttig clashed over whether Harvey’s action falls within a contested category—call it “*Heck*-barred action,” “*Preiser-Heck* inappropriate action,” or “non-cognizable § 1983 action”¹⁸⁹—both judges nonetheless agreed that the membership in

¹⁸⁶ *Id.*

¹⁸⁷ Though Kuhn convincingly argues that values and persuasion play a role in scientific debate, *see id.* at 93-95, 198-204, no offense should be taken at the suggestion that persuasion in law is more political. Statutes literally codify politics and lawyers are explicitly paid to persuade. Scientific inquiry is epistemologically distinct from legal advocacy. *See* Susan Haack, *What’s Wrong with Litigation-Driven Science? An Essay in Legal Epistemology*, 38 SETON HALL L. REV. 1053, 1070-71 (2008).

¹⁸⁸ *See* KUHN, *supra* note 184, at 153-57 (discussing considerations that persuade scientific communities to accept new paradigms including the ability to solve crisis-provoking problems and conceptual elegance).

¹⁸⁹ I offer multiple formulations, because each one could be contested. Calling the disputed category “*Heck*-barred action” validates Luttig’s approach because it emphasizes *Heck* to the exclusion of *Preiser*. Similarly, calling it “*Preiser-Heck* inappropriate” favors

the category turns on interpretation of the cases in the *Preiser-Heck* line. In other words, neither judge tried to analogize the issue to a different line of controlling cases; the relevance of *Preiser-Heck* was an accepted premise. Without conflict over relevance or analogy, no prototypical categorical *logos* entered into the argument equation.

1. Luttig's Formal Logos

In describing Luttig's argument as formal, I refer specifically to his *Heck* argument. Admittedly, Luttig's opening accuracy-versus-finality trope was rooted in a narrative about the progress of science and the fundamental values of our criminal justice system.¹⁹⁰ However, Luttig presented the "threshold procedural question" as entirely severable from the normative concerns of the constitutional debate.¹⁹¹ On this question, Luttig actually maintained that it is "not even arguable" that the *Heck* rule permits DNA actions to proceed under § 1983.¹⁹² From the outset, Luttig framed his proof as logical demonstration rather than interpretative dispute.

Although he did not take this step himself, the formal structure of Luttig's *Heck* argument means that it easily reduces to a syllogism:

Major Premise: All non-cognizable § 1983 actions necessarily imply the invalidity of the underlying conviction.

Minor Premise: Harvey's § 1983 action does not necessarily imply the invalidity of his underlying conviction.

Conclusion: Harvey's action is not a non-cognizable § 1983 action.¹⁹³

Wilkinson. "Non-cognizable § 1983 action" is more neutral as between Luttig and Wilkinson, but potentially creates problems of its own. See *infra* note 193.

¹⁹⁰ See *supra* notes 148-49 and accompanying text.

¹⁹¹ See *Harvey v. Horan (Harvey II)*, 285 F.3d 298, 308 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc). Luttig earlier states that he "would prefer not to have to address even the threshold, much less the fundamental constitutional, question." *Id.* at 307. However, in a tone of dutiful resignation, he concludes that because the procedural question is easy, he must address the "difficult and delicate" constitutional question. Thus, not only does Luttig frame the *Heck* question as logically prior to the constitutional one, he also characterizes it as infinitely easier to resolve.

¹⁹² *Id.* at 308.

¹⁹³ The reasoning described by this syllogism is set out in a single paragraph. See *id.* Here, it should be noted that my category of "non-cognizable § 1983 action" could be criticized as overinclusive. Other bars beyond *Preiser-Heck* may limit the practical cognizability of § 1983 actions. See, e.g., *Moore v. Brown*, 295 F. App'x 176 (9th Cir. 2008) (finding DNA access action barred by collateral estoppel); *Savory v. Lyons*, 469 F.3d 667, 672-74 (7th Cir. 2006) (finding DNA access action barred by statute of limitations). However, because of the concerns outlined in *supra* note 189, I prefer this formulation than one that refers directly to the contested doctrine.

Assuming the truth of his premises, Luttig's conclusion here certainly follows deductively. The rhetorical challenge, therefore, is to persuasively establish the truth of his premises.

Consider first Luttig's major premise. Stephen Toulmin would call this the "warrant" of Luttig's argument.¹⁹⁴ The "backing" for this warrant obviously originated from the "necessarily implies" language of *Heck*.¹⁹⁵ Though his argument turned on *Heck*'s relevance to the classification of non-cognizable § 1983 actions, Luttig proceeded as if *Heck*'s undisputed authority has already been established ex concessis. This move is certainly defensible since the *Harvey I* majority had stated its conclusion in *Heck*'s terms.¹⁹⁶ However, Luttig amplified this move through relentless narrowing and focus. First, Luttig confined his doctrinal analysis to *Heck* alone.¹⁹⁷ Then, he concentrated his interpretative inquiry on a single paragraph and two associated footnotes.¹⁹⁸ Finally, he drew the "fault line" on a single

¹⁹⁴ See TOULMIN, *USES OF ARGUMENT*, *supra* note 20, at 87-99. In constructing his argument model, Toulmin aimed to correct ambiguities in the syllogistic model of major premise/minor premise/conclusion. See *id.* at 100-05. Toulmin explains that "major premise" conflates into two distinct parts of an argument: (1) the "warrant" of an argument which is its "rule", "principle," and "inference license"; and (2) a warrant's "backing" which is the authority standing behind a warrant. See *id.* at 91, 95-96. I find the warrant/backing distinction elegantly captures the difference between a proposed legal rule (warrant) and the authority for the rule (backing). For a useful summary of Toulmin's model, see Kurt M. Sanders, *Law as Rhetoric, Rhetoric as Argument*, 3 J. ASS'N LEGAL WRITING DIRS. 166, 168-72 (2006).

¹⁹⁵ See *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). For an explanation of "backing" and "warrant," see *supra* note 194.

¹⁹⁶ See *Harvey v. Horan (Harvey I)*, 278 F.3d 370, 374 (4th Cir. 2002) (citing *Heck* as primary authority and quoting *Heck* rule).

¹⁹⁷ In this part of the opinion, Luttig cites only to one case besides *Heck*—*Brady v. Maryland*. See *Harvey II*, 285 F.3d at 308 (Luttig, J., respecting denial of rehearing en banc) ("[Access to DNA testing] certainly implies nothing more (and arguably a good deal less) than . . . an assertion of [a] constitutional right to . . . exculpatory [evidence] . . . under *Brady v. Maryland*, 373 U.S. 83 [] (1963), which has never been thought necessarily to imply the invalidity of the underlying conviction."). Luttig does not engage in any further analysis of *Brady* here, nor does he even mention any other case in the *Heck* line.

¹⁹⁸ See *id.* at 308-09 (citing *Heck v. Humphrey*, 512 U.S. 477, 486 n.6, 487, n.7 (1994)). Footnotes 6 and 7 in *Heck* provided prototypical examples of illicit and proper § 1983 actions by convicted criminals. Luttig analogizes the postconviction DNA access instance to these *Heck* examples using what I call categorical *logos*. However, Luttig shows his formalist stripes here when he states that "[t]he conclusion is inescapable from [*Heck*'s] examples (even if it were not from the reasoning of the opinion itself) that the claim of a right of access [does not imply] the invalidity of the claimant's conviction." *Id.* Luttig thus denies *Heck*'s examples the badge of "reason." On my account, reasoning by example (or analogy) is still reasoning—but merely employs categorical rather than formal *logos*. See *supra* note 77.

word, *necessity*, and used italics to highlight the Supreme Court's own "revealing italicization of the imperative" of necessity.¹⁹⁹

This bottom-line anchoring to necessity testifies to Luttig's formal *logos*. He understood necessity as logical entailment. Thus, he established his minor premise²⁰⁰—that Harvey's § 1983 action does not necessarily imply his conviction's invalidity—by pointing to other "scientific possibilities" that would not necessarily entail any threat to a conviction.²⁰¹ Such possibilities include DNA tests that return "inconclusive," "insufficiently exculpatory," or even "inculpatory" identification results.²⁰² Luttig did not consider the real-world *probability* of non-invalidating outcomes to be relevant; their formal existence alone "suffices to establish that the asserted right of mere access is not a direct, or . . . even an indirect attack on one's conviction or sentence."²⁰³

2. *Wilkinson's Narrative Logos*

Chief Judge Wilkinson's response to Luttig moved in the opposite rhetorical direction. Rather than sever and isolate the procedural question from the constitutional debate and then winnow the *Heck* rule down to a single word, Wilkinson folded *Heck* back into the context of the *Preiser* line of cases, presented the procedural question as inextricably intertwined with the substantive one, and linked the story of Harvey's successful bid for DNA testing in state court to the "morality of process."²⁰⁴ Wilkinson thus employed a narrative *logos* to transform Luttig's mechanical rule application into a morality play about the hubris of an activist federal judge.

Wilkinson's attention to narrative began with James Harvey's own tale (as far as it had been written).²⁰⁵ Whereas Luttig all but excluded Harvey from his formalistic inquiry into germane legal rules,²⁰⁶ Wilkinson

¹⁹⁹ *Id.* at 309.

²⁰⁰ Toulmin would call this the "data" for Luttig's argument. See TOULMIN, *USES OF ARGUMENT*, *supra* note 20, at 90. In this case, though, the data also needs to be established by preliminary argument—what geometers would call a *lemma*. See *id.*

²⁰¹ *Harvey II*, 285 F.3d at 308 (Luttig, J., respecting denial of rehearing en banc).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See *supra* notes 170-75 and accompanying text (analyzing Wilkinson's morality-of-process framework).

²⁰⁵ See *Harvey II*, 285 F.3d at 298 (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc) (opening opinion by stating that "[t]here is no doubt that Harvey should receive the biological evidence in this case for DNA testing").

²⁰⁶ Luttig does not even mention Harvey's name for the first three pages of his opinion; on the fourth page, his brief reference comes only when quoting the *Harvey I* majority. See *id.* at 303-06, 307 (Luttig, J., respecting denial of rehearing en banc). The story behind Harvey's struggle for DNA plays no role in Luttig's opinion.

repeatedly returned to the equities of the controversy at issue.²⁰⁷ He immediately conceded that Harvey deserves DNA testing and found a moral to the real world litigation story: “As Harvey’s case shows, state courts, if given a chance, can rise to their responsibilities.”²⁰⁸ Wilkinson then placed Harvey’s successful bid for testing in the context of widespread state and federal legislative activity aimed at providing access to postconviction DNA testing.²⁰⁹

When it comes to § 1983 doctrine, Wilkinson explicitly related the “threshold question posed by Harvey’s § 1983 action . . . to the nature of the constitutional right he asserts.”²¹⁰ The procedural issue was not logically prior to the substantive one for Wilkinson because they share the common theme of asserting innocence. On Wilkinson’s view, the contested “procedural right is the right to press and proclaim one’s innocence in a federal forum in the first instance when seeking access to DNA testing.”²¹¹ By conjoining the procedural and substantive question, Wilkinson was able to characterize Luttig’s entire analysis as seeking “to constitutionalize a right to postconviction DNA testing in federal court in the first instance.”²¹²

From this point, Wilkinson paid little heed to the literal wording of *Heck* but rather looked to the broader themes of the *Preiser-Heck* line of cases. Wilkinson suggested that Luttig has not learned “the lesson” of *Preiser* and that he misses “the whole point” of *Heck*.²¹³ The “fundamental doctrine” of giving state courts the first crack at these kinds of cases derives from considerations of federalism and comity, and would be frustrated by permitting state prisoners to evade state exhaustion “‘by the simple expedient’ of putting a § 1983 label on their pleadings.”²¹⁴ Because of these deeper narratives, Wilkinson suggested that Luttig’s reading of *Heck* is “inconceivable.”²¹⁵

In Wilkinson’s final analysis, the story of Harvey’s § 1983 complaint begins and ends with the assertion of innocence. Regardless of *Heck*’s technical command, Wilkinson categorized Harvey’s § 1983 action as non-cognizable because of Harvey’s obvious intent of attacking his state court

²⁰⁷ See *id.* at 298-99, 301-02, 304 (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc).

²⁰⁸ *Id.* at 299.

²⁰⁹ See *id.* at 301-03.

²¹⁰ *Id.* at 299.

²¹¹ *Id.*

²¹² *Id.* at 303.

²¹³ *Id.*

²¹⁴ *Id.* (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-92 & n.10 (1973)).

²¹⁵ *Id.* at 304.

conviction.²¹⁶ Consistent with his narrative *logos*, Wilkinson even charged Luttig with deviating from the received script for American democracy: "With little hesitation, my colleague disregards the roles of all the other actors in the American system."²¹⁷ Wilkinson effectively cast himself into this morality play as the vigilant watchdog calling out his brother Luttig, the activist judge.²¹⁸

V. LOGOS AND COHESION: POSTCONVICTION DNA TESTING AND THE HECK RULE

The *logos* framework I have developed and applied to the postconviction DNA testing discourse is purely descriptive. Based on an analysis of the progression of their arguments, I have described Luttig's *Heck* argument as employing a formal *logos* to justify a rule whereas Wilkinson's argument adopted a narrative *logos* to explain the impetus behind *Preiser-Heck*. On its own, this rhetorical model does not prescribe what arguments are "correct" in the *Heck* debate or predict which arguments will persuade any given audience.

At the same time, the framework can facilitate insight beyond description—whether normative, predictive, or some hybrid—through its characterization of conflicting modes of proof (formal versus narrative) in the narrow postconviction DNA debate. By applying a *logos* analysis to describe the premises and inferences of Supreme Court cases in the *Preiser-Heck* line, it becomes possible to compare the logic of Luttig's and Wilkinson's arguments with the logic of the controlling jurisprudential context. This comparison can justify claims about the fit between arguments and the surrounding law.²¹⁹

²¹⁶ *Id.* at 303 ("[Harvey's complaint] has all the earmarks of a deliberate attempt to subvert the exhaustion requirement of [federal habeas corpus].") (quoting *Hamlin v. Warren*, 664 F.2d 29, 32 (4th Cir. 1981)).

²¹⁷ *Id.* at 304. Wilkinson similarly accuses Luttig of making Congress "a subordinate player." *Id.*

²¹⁸ *See id.* at 303. This characterization may seem harsh, but it is certainly consistent with Wilkinson's rhetorical tone. He suggests that Luttig's view would "deaden the life force of democracy" and warns that "with activism, what goes around comes around. Today's merriment becomes tomorrow's mourning." *Id.* Wilkinson almost seems personally annoyed at Luttig for not requesting a poll on the suggestion for a rehearing en banc. *See id.* at 298.

²¹⁹ Here, I borrow Professor Dworkin's locution. *See* RONALD DWORKIN, *LAW'S EMPIRE* 215 (1986) ("Integrity as a political ideal fits and explains features of our constitutional structure and practice that are otherwise puzzling."). Arguments fit when they resonate. I justify my own claim of Luttig's success in *Heck* by arguing that his *logos* fits with the *logos* of the encompassing Supreme Court *Preiser-Heck* discourse. Again, using Dworkin's phrasing, Luttig's *logos* brings "coherence with fundamental principle." *Id.* at 220.

In this Part, I closely examine the Supreme Court's key *Heck*-line case of *Wilkinson v. Dotson*²²⁰ and evaluate its impact on the federal court conversation around the cognizability of § 1983 DNA access actions. On my account, *Dotson* vindicates Luttig's formal *logos* as the logic appropriate to the *Preiser-Heck* discourse. *Dotson* shows that Luttig read the *Heck* rule in an appropriately formal and literal manner. Because Luttig's *logos* resonated with the Supreme Court's § 1983 jurisprudence, Luttig successfully persuaded subsequent federal courts to adopt similar syllogistic reasoning. Accordingly, I predict that Luttig's *logos* will prevail at the Supreme Court on the *Preiser-Heck* question presented in the *Osborne* case.

A. PERSUASION IN THE FEDERAL COURTS

The rhetorical success of an argument ultimately depends on whether it secures adherence in the relevant decision-making audience. In Luttig's debate with Wilkinson, the relevant audience consists of federal judges who considered the propriety of pressing DNA access claims under § 1983 after *Harvey II*. From the perspective of persuading this audience, the rhetorical strategies adopted by Wilkinson and Luttig each have risks and shortcomings. Before evaluating the rhetorical success of their competing *logoi*, I consider these risks and shortcomings.

For his part, Luttig's formal reading risks ignoring the practical concerns that animate much of the relevant § 1983 discourse. Luttig's rule would not require exhaustion of state remedies and federal judges rightfully care about comity and exhaustion. The Supreme Court has certainly celebrated this theme from *Preiser* to *Heck* and beyond. Given this, perhaps the riskiest part of Luttig's rhetorical proof is his decision to not cite any Supreme Court opinion from *Heck*'s family tree except *Heck* itself. Luttig limited his genealogical justification to a single paragraph from a single case. While this strategy places a burning spotlight on the *Heck* rule, the relentless focus could also appear myopic.

At the same time, Chief Judge Wilkinson's failure to directly engage Luttig's textual analysis of the *Heck* rule seems jarring given his reliance on the same rule in *Harvey I*. The salience of this silence is compounded by Wilkinson's decision to make a charge of judicial activism. Luttig's meticulous reading of *Heck* and insistence on following its precedential command are certainly not hallmarks of judicial activism. At a more visceral level, the activism accusation—at least the accusation of pro-

Dworkin's central concept of "law as integrity" also resonates with my argument for *logos* as discursive coherence. See *infra* note 248.

²²⁰ 544 U.S. 74 (2005).

criminal defendant activism—rings hollow when levied against an individual whose Federalist Society bona fides are well-known.²²¹

So, what happened? In the immediate aftermath of *Harvey II*, the judicial audience split on its preferred *Heck* logos. Three months after *Harvey II* was decided, the Fifth Circuit dismissed a § 1983 DNA access complaint under *Heck*.²²² In a per curiam opinion citing *Harvey I* as “strongly persuasive,” the court noted that Richard William Kutzner’s DNA access action was “so intertwined” with an attack on his confinement that success would “‘necessarily imply’ revocation . . . of confinement.”²²³ A month later, the Sixth Circuit found *Heck* barred John Boyle’s DNA action.²²⁴ In an unpublished opinion that did not cite *Harvey*, the court held that Boyle “plainly challenged the validity of his criminal convictions . . . [and] that the exclusive federal remedy for his claims was . . . habeas corpus.”²²⁵ Finally, a week following *Boyle*, the Eleventh Circuit considered whether *Heck* barred Danny Joe Bradley’s § 1983 complaint.²²⁶ After discussing *Harvey I*, the court actually quoted Luttig’s *Heck* syllogism in its entirety before explicitly siding with him, holding that Bradley’s complaint did not “‘necessarily imply’ the invalidity of [his] conviction.”²²⁷

At this point in 2002, it seemed that neither Wilkinson nor Luttig had entirely dominated the discourse. No immediate consensus had coalesced over the appropriate *logos* governing the operation of *Heck* argument in the

²²¹ Luttig has conservative *ethos* or credibility. Because of his conservative credentials, Federalist Society stalwarts favored Judge Luttig’s nomination to the Supreme Court when Chief Justice William Rehnquist’s and Justice Sandra Day O’Connor’s retirements seemed imminent. See Stephen G. Calabresi, *Pirates We Be*, WALL ST. J., May 14, 2003, at A14 (Federalist society cofounder endorsing Luttig for associate justice); *The Week*, NAT’L REV., June 16, 2003 (expressing hope for a Supreme Court with Chief Justice Scalia with an Associate Justice Luttig).

²²² See *Kutzner v. Montgomery County*, 303 F.3d 339, 341 (2002).

²²³ *Id.* (citing *Harvey v. Horan (Harvey I)*, 278 F.3d 370, 378 (4th Cir. 2002); *Martinez v. Texas Court of Criminal Appeals*, 292 F.3d 417, 423 (5th Cir. 2002)). Kutzner was ultimately executed without DNA testing earlier on the same day that the opinion was published. See *id.* at 340 n.1.

²²⁴ *Boyle v. Mayer*, 46 F. App’x 340, 341 (6th Cir. 2002). The continuing viability of this unpublished decision is subject to question. See *infra* note 266.

²²⁵ *Id.* at 340. Boyle did not seek a writ of certiorari.

²²⁶ *Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002).

²²⁷ See *id.* at 1290-92. After years of litigation, Bradley’s § 1983 action was finally dismissed in early February 2009. See *Bradley v. King*, 556 F.3d 1225, 1231 (11th Cir. 2009) (dismissing § 1983 action on grounds that some DNA testing had been conducted and did not exclude Bradley, and no further discovery on missing evidence was necessary), *cert. denied*, 129 S. Ct. 1306 (2009). On February 12, 2009, Bradley was executed by lethal injection. Tom Gordon, *Bradley Executed for 1983 Murder: Spent 26 Years on Death Row*, BIRMINGHAM NEWS, Feb. 13, 2009, at 1, available at 2009 WLNR 2941510.

DNA access context. Federal courts had not been persuaded about just what the *Heck* rule meant and how the story behind *Heck* did or did not bear on interpretation of its rule. This situation changed in 2005, I suggest, after the Supreme Court issued its decision in *Wilkinson v. Dotson*.²²⁸ Before turning to *Dotson*, however, I wish to highlight one last gene in the rhetorical DNA of this argument.

I have classified the *Heck* rule as the major premise or inference-warrant of Luttig's syllogism.²²⁹ As noted, this rule bars any § 1983 action that "necessarily implies" the invalidity of a prisoner's conviction. I maintain that the actual semantic backing of this rule could vary depending on whether a formal or narrative *logos* is adopted. While Luttig rested his analysis on the formally resonant word "necessity," the rule might alternatively be read through the narratively resonant word "implies."²³⁰ Though DNA testing will not *necessarily* prove a conviction invalid (it could inculcate, after all), it could be argued that seeking DNA testing to prove innocence *implies* that the prisoner was wrongfully convicted. In other words, by filing a § 1983 action, the convict-plaintiff necessarily implies that he is innocent.

In this sense, the *Heck* rule is equivocal. If "implies" is understood by reference to a prisoner's subjective intent, DNA access actions become illicit attacks on state court convictions. Conversely, if the germane reference point for "implies" is the objective consequence of victory, these § 1983 actions are cognizable because inculpatory DNA results remain a formal possibility. The rhetorical contest between *Wilkinson* and Luttig thus pits *Heck*'s rule as turning on narrative context versus logical consequence.

B. *WILKINSON V. DOTSON* AND DISCURSIVE COHERENCE

Three years after *Harvey II*, the Supreme Court entered the realm of this rhetorical contest. In *Wilkinson v. Dotson*, the Court decided the consolidated appeal of two Ohio prisoners who had challenged parole procedures using § 1983.²³¹ Both prisoners alleged that the Ohio board had denied them parole using procedures that violated the Ex Post Facto

²²⁸ 544 U.S. 74 (2005).

²²⁹ See *supra* note 194 and accompanying text.

²³⁰ I label "necessary" as formally resonant because it is the word used to describe the conclusions of a valid syllogism (they are logically necessary). See *supra* Figure 1. I label "implies" as narratively resonant because "implication" suggests a non-explicit or context-dependent inference. What is implied depends on the story behind the implication.

²³¹ *Dotson*, 544 U.S. at 76-77. One respondent was William Dotson, the other was Rogerico Johnson.

Clause.²³² They sought injunctive relief in the form of access to a new parole hearing operated under adequate procedures.²³³ In both cases, the district court found that *Heck* barred the actions and that federal habeas provided the sole remedy for these challenges.²³⁴ The Sixth Circuit reversed and the Supreme Court granted certiorari.²³⁵

In its argument to the Court, the State of Ohio had insisted that the narrative context drove the interpretation of the *Heck* rule. As the Court summarized:

Ohio points out that the inmates in these cases attack their [parole proceedings] only because they believe that victory on their claims will lead to a speedier release from prison. Consequently, Ohio argues, the prisoners' lawsuits, in effect, collaterally attack the duration of their confinement; hence, such a claim may only be brought through a habeas corpus action²³⁶

However, the Court then explicitly rejected the logical inference of this argument: "The problem with Ohio's argument lies in its jump from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief)."²³⁷ To justify this characterization, the Court then surveyed its own case law from *Preiser* through *Heck* to a case called *Edwards v. Balisok*.²³⁸ Summarizing, the Court stated that the cases, "taken together, indicate that a state prisoner's § 1983 action is barred . . . if success in that action would necessarily demonstrate the invalidity of confinement or its duration."²³⁹

With this version of the *Heck* rule established as its major premise, the Court turned to its minor premise. Here the Court enumerated all the formal possibilities entailed by allowing respondents access to a new parole hearing:

²³² *Id.* For both Dotson and Johnson, the parole board used guidelines enacted after respondents began serving their prison terms. Johnson also complained that the parole board proceedings had too few members and denied him the opportunity to speak.

²³³ *Id.*

²³⁴ *Id.* at 77.

²³⁵ *Id.*

²³⁶ *Id.* at 78.

²³⁷ *Id.*

²³⁸ See *id.* at 78-81 (analyzing *Edwards v. Balisok*, 520 U.S. 641 (1997), *Heck v. Humphrey*, 512 U.S. 477 (1994), *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Preiser v. Rodriguez*, 411 U.S. 475 (1973)). In this review, the Court made good use of italics, just as it had done in *Heck*, to emphasize the difference between cases that "would not necessarily spell immediate or speedier release" and those "where success would necessarily imply the unlawfulness of a . . . conviction or sentence." *Id.* at 81 (characterizing the rule from *Wolff v. McDonnell*).

²³⁹ *Id.* at 81-82.

Success for Dotson does not mean immediate release from confinement or a shorter stay in prison; it means at most new eligibility review, which at most will speed consideration of a new parole application. Success for Johnson means at most a new parole hearing at which Ohio parole authorities may, in their discretion, decline to shorten his prison term.²⁴⁰

Because “neither prisoner’s claim would necessarily spell speedier release, neither lies at ‘the core of habeas corpus.’”²⁴¹

It should be apparent that the *Dotson* Court’s approach to *Heck* embraced a largely formal *logos*. First, the Court argued in a readily identifiable syllogistic structure. Admittedly, the Court backed its major premise (the *Heck* rule) by reference to “the legal journey from *Preiser* to *Balisok*.”²⁴² While this is a more narrative justification for its inference-warrant than Luttig’s single-minded parsing of *Heck* alone, the end result was a similar use of the language of logic—including an emphasis on the formally resonant term *necessity*. More than this, the Court actually backed away from a “necessarily implies” formulation of the *Heck* rule and moved to a “necessarily demonstrates” one.²⁴³ *Demonstration*, of course, is the technical term for a formal proof that is beyond argument.²⁴⁴ Even colloquially, the word “demonstration” carries none of the context-begging, narrative connotations of “implication.”

Perhaps the best indication of the Court’s formal *logos* in *Dotson* came in its answer to Ohio’s familiar argument that “a decision in favor of respondents would break faith with principles of federal/state comity by opening the door to federal court without prior exhaustion of state-court remedies.”²⁴⁵ Here the Court stated:

Our earlier cases, however, have already placed the State’s important comity considerations in the balance, weighed them against the competing need to vindicate federal rights without exhaustion, and concluded that prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement.²⁴⁶

²⁴⁰ *Id.* (citations omitted).

²⁴¹ *Id.* (citing *Preiser v. Rodriguez*, 411 U.S. at 489).

²⁴² *Dotson*, 544 U.S. at 81.

²⁴³ It should be noted that though Luttig focused on the “necessarily implies” formulation, *Heck* itself also used the “necessarily demonstrates” one. *See Heck*, 512 U.S. at 487 (“But if the district court determines that the plaintiff’s action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.”). However, I argue that until *Dotson* cleared it up, the use of both “implies” and “demonstrates” potentially rendered the *Heck* rule equivocal.

²⁴⁴ *See PERELMAN & OLBRECHTS-TYTECA*, *supra* note 21, at 13-14; *see also* RHETORIC—KENNEDY TR., *supra* note 19, at 33 n.20.

²⁴⁵ *Dotson*, 544 U.S. at 84.

²⁴⁶ *Id.*

Put differently, the Court asserted that the *Heck* rule already accounts for this “morality of process” concern.

Critics might decry the apparently circular reasoning of this response—the justification for the rule’s impact on comity is made by reference to the rule itself. However, this is not a “vicious” circularity;²⁴⁷ rather it is a rhetorical move that affirms the fundamental discursive coherence of the rule. The rule means exactly what it says, assured the Court, and it appropriately balances all the competing concerns in the discourse.

This notion of “discursive coherence” underlies and unites all of the different categories of *logos*. *Logos* is what makes a discourse rationally coherent. Coherence, in turn, describes whether collections of concepts—sets of ideas, words, propositions, and the like—“hang together” or “make sense” as a whole.²⁴⁸ Coherence may have formal,²⁴⁹ empirical,²⁵⁰ narrative,²⁵¹ categorical,²⁵² or other aspects.²⁵³ Depending on the moment, a

²⁴⁷ See KUHN, *supra* note 184, at 208 (describing a circular argument as non-“vicious”). Kuhn recognized that circular arguments are inevitable “[w]hen paradigms enter, as they must, into a debate about paradigm choice. . . . Each group uses its own paradigm to argue in that paradigm’s defense.” *Id.* at 94. There is nothing “wrong or even ineffectual” about such argument; but whatever its force, “the status of circular argument is only that of persuasion.” *Id.* Here, the *Dotson* Court is precisely justifying its own formal paradigm by reference to its own rule.

²⁴⁸ MACCORMICK, *supra* note 33, at 190. Coherence is considered a prerequisite for rational assessment of argument. See TOULMIN, *THE USES OF ARGUMENT*, *supra* note 20, at 158. Coherence might also be viewed as a “system of meaning” or evincing “integrity.” See DWORKIN, *supra* note 219, at 243 (“Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process”); JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 193 (1985) (“There are at least two respects in which the law can make sense or fail to do so, two kinds of coherence to look for: internal and external. We can ask, that is, whether the law is internally consistent—whether it makes sense on its own terms; and we can ask whether it fits in a coherent way with the other things we do, with the other conceptions we have of ourselves.”).

²⁴⁹ See generally *supra* notes 53-60 and accompanying text. Formal coherence, in my account, subsumes formal consistency (non-contradiction). See MACCORMICK, *supra* note 33, at 190. Though Professor MacCormick distinguishes consistency from coherence, I see both concepts as sounding in *logos*.

²⁵⁰ See generally *supra* notes 61-68 and accompanying text. See also Dewey, *supra* note 28, at 26.

²⁵¹ See generally *supra* notes 69-74 and accompanying text. See also MACCORMICK, *supra* note 33, at 229-36 (analyzing normative and narrative coherence in law).

²⁵² See generally *supra* notes 75-83 and accompanying text. Categorical coherence is vital to the success of paradigms, theories, or other accounts. In my view, it is no accident that the first book of Aristotle’s *Organon* concerns categories. See *Aristotle: I*, in 8 GREAT BOOKS OF THE WESTERN WORLD vii (Robert Maynard Hutchins et al., eds., 31st prtg. 1989) (*Organon* consists of six books: *Categories*, *On Interpretation*, *Prior Analytics*, *Posterior Analytics*, *Topics*, and *On Sophistical Refutations*). The Aristotelian concepts of *logos*,

different *logos* aspect may have greater relevance or resonance in the discourse.²⁵⁴ In *Dotson*, the Supreme Court made clear that a formal reading of the *Heck* rule made § 1983 discourse coherent. More precisely, the *Dotson* Court explained that a formal reading of *Heck* draws a coherent boundary between § 1983 and federal habeas.

The discursive coherence rendered by the Supreme Court's formal approach to the *Heck* rule might be usefully stated in formal vocabulary. The effort to dispel any residual ambiguity from the *Heck* rule can be seen as an attempt to make the rule *univocal*. A symbol, rule, or proposition is *univocal* if it admits but one possible meaning in a discourse. The search for "unquestionable univocity" lies at the very heart of formal logic because without univocity, formal systems cannot function coherently.²⁵⁵ Of course, law is not a formal logical system where pure univocity is possible. However, if *Dotson* effectively rendered *Heck* univocal, it would similarly transform debate over the rule's application into a mechanical calculation beyond dispute.²⁵⁶

ethos, and *pathos* stand as the central categorical underpinnings of my own account. See *supra* Part II.A.

²⁵³ One example of an "other" aspect of coherence is psychological. See Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 512 (2004) (exploring legal implications of "an emerging body of research called *coherence-based reasoning*"). The research is in experimentally based cognitive psychological theory that suggests that "decisions are made effectively and comfortably when based on *coherent mental models*. . . . A mental model of a decision is deemed 'coherent' when the decision-maker perceives the chosen alternative to be supported by strong considerations while the considerations that support the rejected alternative are weak." *Id.* at 516.

²⁵⁴ This discursive conception of relevance or resonance is similar to that of "presence" in Perelman's work. See PERELMAN & OLBRECHTS-TYTECA, *supra* note 21, at 116 ("By the very fact of selecting certain elements and presenting them to the audience, their importance and pertinency to the discussion are implied. Indeed, such a choice endows these elements with a *presence*, which is an essential factor in argumentation . . ."). Presence, relevance, and resonance also bear a familial relationship to terms like salience and valence.

²⁵⁵ See *id.* at 13 ("The only obligation resting on the builder of formal axiomatic systems, the one that gives the demonstrations their compelling force, is that of choosing symbols and rules in such a way as to avoid doubt and ambiguity. It must be possible, without hesitation, even mechanically, to establish whether a sequence of symbols is admitted in the system The search for unquestionable univocity has even led formalistic logicians to construct systems in which no attention is paid to the meaning of the expressions: they are satisfied if the symbols introduced and the transformations concerning them are beyond discussion.").

²⁵⁶ I use the phrase "mechanical calculation" advisedly given the historical success of the Realist critique of "mechanical jurisprudence." See, e.g., Dewey, *supra* note 28, at 22; Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606-07 (1908). I do not mean to resurrect the discredited Formalist view, which claims that deductive application of prior principles to present facts logically determines outcomes. See *supra* notes 27-28.

As it happened, after the flurry of activity in 2002, federal courts did not publish any decision in the § 1983 DNA access discourse until after *Dotson*. In September 2005, the Ninth Circuit issued its first opinion in William Osborne's case. Directly citing Luttig's language concerning the "scientific possibilities" of DNA access, the court concluded that "as a matter of logic" no *Heck* bar existed.²⁵⁷ The *Osborne* court added that *Dotson* removed "any doubt as to propriety of [Luttig's] approach" because the *Dotson* Court "reads 'necessarily' to mean 'inevitably.'"²⁵⁸

A year later, the Seventh Circuit sided with the Eleventh and Ninth Circuits on the *Heck* issue in Johnnie Lee Savory's case.²⁵⁹ The *Savory* court once again specifically cited Luttig's minor-premise language regarding "scientific possibilities."²⁶⁰

Finally, the Second Circuit confronted *Heck* in 2007 in Frank McKithen's case.²⁶¹ Defining the test as whether victory would "necessarily demonstrate the invalidity of [a] conviction,"²⁶² the *McKithen* court again cited Luttig's minor premise in concluding that no *Heck* bar exists.²⁶³ The court further suggested that previous courts finding *Heck* bars had employed reasoning "no longer tenable after *Dotson*" and that its own view expressed "an emerging consensus."²⁶⁴

However, I do suggest that formal *logos* may be appropriate in legal discourses that value bright-line and univocal rules.

²⁵⁷ *Osborne v. Dist. Attorney's Office*, 423 F.3d 1050, 1054 (9th Cir. 2005) (citing *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005); *Harvey v. Horan (Harvey II)*, 285 F.3d 298, 308 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc)).

²⁵⁸ *Id.* at 1055 (citing *Dotson*, 544 U.S. at 78-82). Of course, the *Osborne* case remains in litigation—it is the case now before the Supreme Court. *See supra* note 1.

²⁵⁹ *Savory v. Lyons*, 469 F.3d 667, 672 (7th Cir. 2006).

²⁶⁰ *Id.* at 671 (citing *Bradley v. Pryor*, 305 F.3d 1287, 1290-91 (11th Cir. 2002) (quoting *Harvey II*, 285 F.3d at 308 (Luttig, J., respecting denial of rehearing en banc))). Despite siding with Savory on the *Heck* question, the Seventh Circuit also affirmed the dismissal of Savory's action on statute of limitations grounds. *Id.* at 669. Savory unsuccessfully sought certiorari, bringing his federal litigation to an end. *Savory v. Lyons*, 550 U.S. 960 (2007) (mem.). In 2006, Johnnie Lee Savory was released from prison on parole and continues to this day to seek DNA testing and proclaim his innocence. *See Karoun Demirjian, Convict's Allies Ask Governor for Aid; DNA Test Sought in Case of Double Murder in '70s*, CHI. TRIB., Jan. 18, 2008, at C3.

²⁶¹ *McKithen v. Brown*, 481 F.3d 89 (2d Cir. 2007).

²⁶² *Id.* at 102. It is worth noting that the *McKithen* court engaged in a fairly extended review of Supreme Court cases from *Preiser* to *Dotson* before reaching this conclusion. *See id.* at 99-102.

²⁶³ *See id.* at 102-03 (citing *Harvey II*, 285 F.3d at 308 (Luttig, J., respecting denial of rehearing en banc)).

²⁶⁴ *Id.* at 103. Aside from the Eleventh, Ninth, and Seventh Circuits, the *McKithen* court cited to district courts in the First and Third Circuits as evidence of this consensus. *See id.* at 99 (citing, inter alia, *Wade v. Brady*, 460 F. Supp. 2d 226, 237 (D. Mass. 2006); *Derrickson v. Delaware County*, No. 04-1569, 2006 WL 2135854, at *8 (E.D. Pa. July 26, 2006)). It

C. PREDICTION: NO HECK BAR IN OSBORNE

At this point, it seems fair to declare that Luttig's *logos* in *Heck* has proved itself the better. Admittedly, the consensus is not complete as district courts in the Fifth and Sixth Circuits have continued to follow pre-*Dotson* precedent²⁶⁵—though not universally.²⁶⁶ And without question, it remains a theoretical possibility that the Supreme Court will find that a DNA access action does “necessarily demonstrate” the invalidity of an underlying conviction when it decides the question this term. However, I am confident that Luttig's *logos* will prevail and predict that *Heck* will present no bar to William Osborne's § 1983 DNA access action.

In the final analysis, the reason I deem Luttig's *logos* the victor is that it better resonates with the formal character of the underlying discourse. In the argument with Wilkinson, Luttig's syllogistic premises have gained adherence as the accepted starting points of legal proof. Concerns over the morality of process and state court exhaustion have been explicitly folded into the *Heck* rule itself, which now signs univocally. And, it should now be accepted *ex concessis* that the narrative context of a prisoner's § 1983 DNA access action—his subjective belief that he will prove his innocence—has no relevance to the essential logic at play. Given that DNA testing could inculcate and prove a conviction's evidentiary validity, and given further that this is precisely what happened in James Harvey's case, the inference that *Heck* presents no bar should follow deductively.

VI. CONCLUSION

Through the foregoing, I have sought to persuade readers of this Article of three basic claims: (1) that Luttig's *Harvey II* concurrence has

should be noted, however, that *Derrickson* is not a DNA access case. The *McKithen* case remains in litigation. See *McKithen v. Brown*, 565 F. Supp. 2d 440 (E.D.N.Y. 2008), *appeal filed*, No. 08-4002-pr (2d Cir. filed Aug. 13, 2008).

²⁶⁵ See *Gilkey v. Livingston*, Nos. 3:06-1903, 3:06-1904, 3:06-1905, 2007 WL 1953456, *5 (N.D. Tex. June 27, 2007) (following *Kutzner v. Montgomery County*, 303 F.3d 399, 340-1 (5th Cir. 2002)); *Smith v. Worthy*, No. 4:07-10243, 2007 WL 295007, at *1 (E.D. Mich. Jan. 29, 2007) (following *Boyle v. Mayer*, 46 F. App'x 340, 341 (6th Cir. 2002)).

²⁶⁶ In *Alley v. Key*, a court in the Western District of Tennessee stated that “[t]he [*Heck*] issue appears to be one of first impression in this Circuit” and found no *Heck* bar. 431 F. Supp. 2d 790, 795 (W.D. Tenn. 2006). Of course, the Sixth Circuit had actually ruled on the issue in its unpublished *Boyle* case. See *Boyle*, 46 F. App'x at 341. Though the *Alley* court came to the opposite conclusion of the *Boyle* court, it also ruled against *Alley* on constitutional grounds. See *Alley*, 431 F. Supp. 2d at 795, 800-04. *Alley* appealed but the state did not cross-appeal the *Heck* ruling. In another unpublished case, the Sixth Circuit affirmed the district court's ruling without mentioning its apparent mistake on the *Heck* issue. See *Alley v. Key*, No. 06-5552, 2006 WL 1313364, at *2 (6th Cir. May 14, 2006). This is somewhat surprising since Chief Judge Boggs sat on both the *Boyle* and *Alley* panels. In the end, this curious saga supports the conclusion that *Boyle*'s viability is suspect at best.

exerted a singularly persuasive influence on the § 1983 DNA access discourse; (2) that Luttig's rhetorical sway derives significantly from the formal *logos* of his argument; and (3) that what made Luttig's *logos* compelling includes its resonance with the formal *logos* of the Supreme Court's analysis of *Heck* in *Dotson*. I sought to establish these claims using a rhetorical method that first compared the competing premises, inferences, and conclusions in *Harvey II*'s Luttig and Wilkinson opinions and then examined how subsequent courts regarded their incommensurable arguments. In the end, I found that though Wilkinson's *Heck* analysis was both reasonable and backed by precedent, his narrative interpretation of *Heck*'s rule proved inconsistent with the Court's more formalistic approach to the relevant doctrine.

Inferring further from these descriptive and explanatory claims, I have also hazarded a prediction as to how the Court will rule on the *Heck* question in *Osborne*. My prediction proceeds from two potentially vulnerable assumptions. First, I assume that the Court will accept that the *Heck* rule signs univocally, and that its relevance has been established *ex concessis*. Second, I take for granted that Luttig is correct in regarding *Heck*'s procedural question as logically severable from the substantive constitutional question. Naturally, neither of these premises is assured *a priori*.²⁶⁷ The Court is not bound by its own precedent and could chose to overrule *Dotson* if a majority both accepts the primacy of Wilkinson's morality-of-process/institutional competence concern and wishes to avoid pronouncing on the constitutional question.

Though possible, I do not think this outcome is likely. At a theoretical level, a formal reading of *Heck* actually seems appropriate because it provides a "rule of recognition" for determining subject matter jurisdiction.²⁶⁸ Creating a bright-line, easy-to-apply "rule" makes sense for courts seeking a coherent boundary between § 1983 and federal habeas.²⁶⁹

²⁶⁷ My prediction here is thus not a formal argument. Rather, I am making an essentially narrative claim that the story of the discourse so far points in the direction of *Heck* presenting no bar to a § 1983 DNA access claim.

²⁶⁸ Professor H.L.A. Hart famously advanced the concept of "rules of recognition" in law. See H.L.A. HART, *THE CONCEPT OF LAW* 94-110 (2d ed. 1994). In Hart's account, jurisdictional rules are both rules of adjudication and rules of recognition. See *id.* at 97 ("[T]he rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and these judgments will become a 'source' of law.").

²⁶⁹ A jurisdictional situation favors rules over standards. See SCHAUER, *supra* note 59, at 231-32 ("[T]he essence of rule-based decision-making lies in the concept of jurisdiction, for rules, which narrow the range of factors to be considered by particular decision-makers, establish and constrain the jurisdiction of those decision-makers."). In my account, rules employ a formal *logos* while standards employ a narrative *logos*. See *supra* notes 59, 73.

As a practical matter, even if the Court wishes to rule against Osborne, upsetting *stare decisis* and overruling *Dotson* hardly seems worth the effort and inevitable doctrinal contortions given that the constitutional right asserted has never been recognized. It just seems simpler rhetorically to permit the action to proceed under *Heck* but find no underlying postconviction constitutional right to access DNA evidence.²⁷⁰

Of course, I have not undertaken a rhetorical analysis of the constitutional question in this Article. However, Luttig and Wilkinson did vigorously dispute the issue in *Harvey II* and I imagine that the resolution of the constitutional debate will depend on how the Court perceives the merits of two jurists' competing first principles. Is this debate really about accuracy versus finality in law? Or is it about the moral competence of federal courts to override state criminal processes? The relative resonance of these starting points will inevitably guide what categories of doctrine are seen as relevant and what *logos* will dominate.²⁷¹

Whether I am right or wrong in my prediction, I hope that my rhetorical approach to analyzing arguments retains methodological appeal. Any argument, I have argued, exists in layers of discourse. Persuasive success depends on the audience and how it perceives the demands of proof. To help navigate this complicated terrain, I proposed a loose taxonomy that distinguishes between formal, empirical, narrative, and categorical types of *logos*. By focusing on legal *logos*, I aimed to emphasize the role of reason in legal argument and suggest that reasoned proof works differently depending on the status of premises and the nature of its inferences.

Certainly, persuasion in law will also depend on the *ethos* and *pathos* of arguments. I do not mean to suggest that law is an objective science. At the same time, by exploring the role of various *logoi* in legal argument, I hope to counter the notion that persuasion in law is utterly subjective and beyond the purview of "logic." Where reason matters, I maintain, *logos* matters too. Though I applied my rhetorical framework to disentangle a single argument about DNA, this framework might also usefully elucidate the DNA of other legal arguments.

²⁷⁰ This is exactly what courts in the Sixth and Eleventh Circuits have done. See *Thompson v. McCollum*, 253 F. App'x 11, 13-15 (11th Cir. 2007) (citing *Grayson v. King*, 460 F.3d 1328, 1339-42 (11th Cir. 2006)) (finding Thompson had no constitutional right); *Thompson v. Crist*, 200 F. App'x 895, 897 (11th Cir. 2006) (citing *Bradley v. Pryor*, 305 F.3d 1287, 1290-91 (11th Cir. 2002)) (finding no *Heck* bar); *Alley*, 431 F. Supp. 2d 790 (finding no *Heck* bar but no constitutional right), *aff'd* 2006 WL 1313364 (6th Cir. May 14, 2006).

²⁷¹ In the terms of my rhetorical framework, a constitutional contest that involves battles of analogy over relevant doctrine would be said to involve categorical *logos*. See *supra* notes 75-83 and accompanying text.

VII. EPILOGUE

On June 18, 2009, the Supreme Court issued its *Osborne* opinion.²⁷² In a 5-4 decision, the Court reversed the Ninth Circuit on the ground that Osborne did not have “a right under the Due Process Clause to obtain postconviction access to the State’s evidence for DNA testing.”²⁷³ On the question of § 1983’s procedural propriety, the Court wrote:

While we granted certiorari on this question, our resolution of Osborne’s claims does not require us to resolve this difficult issue. Accordingly, we will assume without deciding that the Court of Appeals was correct that *Heck* does not bar Osborne’s § 1983 claim. Even under this assumption, it was wrong to find a due process violation.²⁷⁴

In other words, the majority did not find a *Heck* bar but also did not technically rule out that such a bar could exist.

While I certainly did not predict that the Court would duck the *Heck* issue, I do not think the ultimate resolution at all falsifies my prediction. After all, no *Heck* bar was found. Furthermore, it seems evident that only two members of the Court actually would have found a *Heck* bar: Justices Alito and Kennedy.²⁷⁵ The failure of these two justices to act in accordance with what I characterized as *Dotson*’s formal *logos* might be fairly attributed to the fact that Kennedy was the sole dissenter in *Dotson* and that Alito was not on the Court when *Dotson* was decided.²⁷⁶

Though the existence of two votes in favor of finding a *Heck* bar undeniably presents some challenge to my rhetorical analysis,²⁷⁷ the force of this challenge is considerably weakened by the fact that four justices

²⁷² Dist. Attorney’s Office v. Osborne, 129 S. Ct. 2308 (2009).

²⁷³ *Id.* at 2316. Chief Justice Roberts wrote the Court’s opinion and was joined by Justices Scalia, Kennedy, Thomas, and Alito.

²⁷⁴ *Id.* at 2319.

²⁷⁵ While the majority technically did not decide the question, Justice Alito wrote a separate opinion in which he expressed his view that though “it is sometimes difficult to draw the line between claims that are properly brought in habeas and those that may be brought under [§] 1983 . . . [Osborne’s action] falls on the habeas side of the line.” *Id.* at 2324 (Alito, J., concurring). Justice Kennedy joined in this opinion. *See id.* at 2312. Though Justice Thomas joined Part II of Alito’s opinion, he did not join Part I, wherein Alito made his *Heck* argument. *Id.*

²⁷⁶ *See* *Wilkinson v. Dotson*, 544 U.S. 74, 88-92 (2005) (Kennedy, J., dissenting).

²⁷⁷ Given Alito’s dissent, I concede that a fair critique of my rhetorical method is that it unwisely neglected to analyze the potential impact of Kennedy’s lone dissent on the *Heck* question in *Osborne*. Kennedy appears to have remained unpersuaded by *Dotson* and his analysis seems to have swayed Justice Alito. *Osborne*, 129 S. Ct. at 2325 (Alito, J., concurring) (citing *Dotson*, 544 U.S. at 92 (Kennedy, J., dissenting)). Though Alito did technically distinguish *Dotson*, *id.* at 2325 n.1, the general strategy of his concurrence is to ignore that case rather than engage its analysis of the “necessarily demonstrates” formulation of the *Heck* rule.

unambiguously voted against imposing a bar and wholly relied on Luttig in doing so. The first footnote of the main dissent²⁷⁸ reads: “Because the Court assumes *arguendo* that Osborne’s claim was properly brought under [§] 1983, rather than by an application for the writ of habeas corpus, I shall state only that I agree with the Ninth Circuit’s endorsement of Judge Luttig’s analysis of that issue.”²⁷⁹

The dissent thus confines its entire analysis of the *Heck* issue to an explicit adoption of Judge Luttig’s argument. It is hard to imagine a more pithy or powerful endorsement of Judge Luttig’s *logos*.

While acknowledging the theoretical possibility that the Court would find a *Heck* bar, I had observed that this would require “doctrinal contortions” and that if the Court wished to rule against Osborne, “[i]t just seems simpler rhetorically to permit the action to proceed under *Heck* but find no underlying post-conviction constitutional right to access DNA evidence.”²⁸⁰ In the end, this aspect of my rhetorical analysis was entirely vindicated. What I failed to anticipate, however, is that the Court would employ this tactic to avoid actual analysis of the procedural question.

Before concluding this Epilogue, a brief discussion of how the Court’s resolution of the constitutional issue reflects upon my general rhetorical analysis is in order. Though I did not undertake a specific inquiry into the persuasive dynamics of the constitutional discourse, I suggested its resolution depended on the same competing first principles articulated by Luttig and Wilkinson in *Harvey II*: “Is this debate really about accuracy versus finality in law? Or is it about the moral competence of federal courts to override state criminal processes?”²⁸¹ As it happens, these incommensurable starting points did end up driving the competing proofs in the *Osborne* majority and dissenting arguments.²⁸²

The majority opinion clearly analyzed the issue as one of institutional competence. The existence of Alaska procedures to obtain postconviction DNA testing formed the opinion’s “starting point in analyzing Osborne’s constitutional claims.”²⁸³ After finding “nothing inadequate” about

²⁷⁸ Justice Stevens wrote the primary dissent, which was joined by justices Ginsburg and Breyer. *Id.* at 2312. Justice Souter joined Part I of Justice Stevens’ dissent (which includes footnote 1 regarding the *Heck* issue) and also wrote a separate dissent. *Id.*

²⁷⁹ *Id.* at 2331 n.1 (Stevens, J., dissenting) (citations omitted).

²⁸⁰ See *supra* p. 152. As I noted, this strategy was adopted by the Sixth and Eleventh Circuits. See *supra* note 269.

²⁸¹ See *supra* pp. 152-53.

²⁸² For the sake of simplicity, I confine my analysis here to Chief Justice Roberts’ majority opinion and Justice Stevens’ main dissent.

²⁸³ *Osborne*, 129 S. Ct. at 2318.

Alaska's procedures,²⁸⁴ the Court deliberately echoed Wilkinson in declining to "short-circuit" state legislative activity.²⁸⁵ In the end, the majority did not find DNA's accuracy relevant to a debate it sees as fundamentally about the morality of federal courts overriding state processes.²⁸⁶

By contrast, the dissent emphasized the accuracy of DNA and its ability to prove to a certainty whether William Osborne committed the rape for which he was convicted.²⁸⁷ Because DNA obtains "uniquely precise" results, it can "ascertain the truth once and for all."²⁸⁸ Quoting Judge Luttig, the dissent contended that finality must give way when "objective proof that the convicted actually did not commit the offense later becomes available through the progress of science."²⁸⁹ For its part, the dissent only briefly engaged with the majority's institutional competence premise when it disputed the empirical probability that finding a right for Osborne would affect use of DNA testing in the states.²⁹⁰

In addition to confirming *Harvey II*'s rhetorical influence on the postconviction DNA access discourse, I see the structure of the conflicting premises from *Osborne* as evincing a categorical *logos* dispute.²⁹¹ The

²⁸⁴ *Id.* at 2320. Here, the Court rejected Osborne's procedural due process theory.

²⁸⁵ *Id.* at 2322 ("To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response."); *cf.* *Harvey v. Horan (Harvey I)*, 278 F.3d 370, 376 (4th Cir. 2002) (Wilkinson, C.J.) ("Permitting Harvey's § 1983 claim to proceed would improperly short-circuit legislative activity by allowing judges, rather than legislatures, to determine the contours of the right."). Here Roberts even directly cites Wilkinson's questions from *Harvey II* designed to demonstrate how unwieldy involving the federal courts in this process would be. *Id.* (citing *Harvey v. Horan (Harvey II)*, 285 F.3d 298, 300-01 (4th Cir. 2002) (Wilkinson, C. J., concurring)). See *supra* note 176 and accompanying text (analyzing this part of Wilkinson's opinion).

²⁸⁶ *Osborne*, 129 S. Ct. at 2323 ("The question is whether further change will primarily be made by legislative revision and judicial interpretation of the existing system, or whether the Federal Judiciary must leap ahead—revising (or even discarding) the system by creating a new constitutional right and taking over responsibility for refining it.").

²⁸⁷ *Id.* at 2331 (Stevens, J., dissenting). The state of Alaska had conceded in briefing that DNA could definitively resolve the question of Osborne's guilt or innocence. *Id.* at 2337 (Stevens, J., dissenting) (referencing Alaska's concession). The majority did not mention this point.

²⁸⁸ *Id.* at 2331 (Stevens, J., dissenting).

²⁸⁹ *Id.* at 2337 (Stevens, J., dissenting) (quoting *Harvey II*, 285 F.3d at 306 (Luttig, J., respecting denial of rehearing en banc)). Stevens repeatedly returns to Luttig's "oft-cited opinion in *Harvey*" to support his own argumentation. *Id.* at 2335.

²⁹⁰ *Id.* at 2339. The dissent also analogizes the empirical claim made by the majority to Justice Harlan's ultimately incorrect empirical judgment made in his 1966 *Miranda v. Arizona* dissent. *Id.* at 2339 n.10 (citations omitted).

²⁹¹ As I put it *ex ante*: "The relative resonance of these starting points will inevitably guide what categories of doctrine are seen as relevant and what *logos* will dominate." See

majority specifically rejected the idea that DNA's ability to demonstrate error means that it "must be treated as categorically outside the [existing] process, rather than within it."²⁹² The dissent stressed that the ability of DNA to prove Osborne's own guilt or innocence put his case in a "narrow[] category" implicating "systemic interests in fairness and ultimate truth."²⁹³ As my *logos* taxonomy would suggest, the categorical dispute subsequently resulted in fundamental disagreement over what families of doctrine were relevant.²⁹⁴

From this, it seems safe to conclude that my case study fairly succeeded in describing the *logos* driving the federal postconviction DNA access argument. Whether the framework might also usefully describe the logic of persuasion in other doctrinal disputes remains to be seen.

supra pp. 152-153 and note 270 (further specifying this as a dispute involving categorical *logos*).

²⁹² *Id.* at 2323 (Roberts, C.J.).

²⁹³ *Id.* at 2335 (Stevens, J., dissenting) (quoting *Harvey II*, 285 F.3d at 317 (Luttig, J., respecting denial of rehearing en banc)).

²⁹⁴ For example, the majority rejected the analogy to *Brady v. Maryland* that the Ninth Circuit had adopted in finding Osborne had a postconviction right. *Id.* at 2320 ("*Brady* is the wrong framework."). The dissent countered that the fact of conviction "does not mean . . . that our pretrial due process cases have no relevance in the post-conviction context." *Id.* at 2335 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

