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Employment discrimination plaintiffs tend to lose on summary judgment. In these cases, judges are acting like juries and undermining anti-discrimination legislation while paying lip service to the law and the judicial role. How and why are courts doing this? Legal scholars blame bad doctrine and biased judging. But neither one tells the full story. The tell is in the opinions' strategic use of language, which shows how the court, as an institution, "sized up" the case and the motives of key actors— the parties, the lawmakers, other courts, and the court itself. Conducting the first-ever rhetorical analysis of this problem, this Article reveals how these rhetorical innerworkings of judicial opinions can drive summary judgment in discrimination cases, forging pro-defendant and non-discrimination assumptions into law.

To illustrate, this Article conducts a rhetorical case study showing how a notorious en banc opinion maneuvered within

doctrinal spaces, presented rhetorical choices as commands of law, and concocted a version of motives that closed out any possibility of discrimination. The opinion also laundered its own judicial action, using error-correcting and procedure-protecting rhetoric as a cover for an implicit assumption that employers do not discriminate. Viewing the rush to summary judgment through this new theoretical and interdisciplinary lens, the case study provides a deeper understanding of the problem and suggests defensive litigation strategies. By understanding how opinion language strategically constructs motives, advocates can devise counternarratives, making it harder for courts to fill in the blanks with pro-employer rhetorical choices.

INTRODUCTION

Employment discrimination law is procedurally broken.[1] Defendants routinely win summary judgment on intentional discrimination claims, and it is not because the employees' claims are inherently weak.[2] The loss rate for employees is much higher

1. *See* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 4 (2017) (explaining that employees lose on summary judgment because "[f]ederal judges do not apply the traditional rules of litigation to discrimination cases. Instead, judges have created a new set of rules. These rules are not neutral. They favor employers and disfavor workers."); *id.* at 23 (citing a Federal Judicial Center study finding summary judgment was granted to employers in over 70% of discrimination cases and an Atlanta federal courts study showing a grant rate of 83%); Theresa M. Beiner, *The Trouble with* Torgerson*: The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 NEV. L.J. 673, 693 (2014) (citing Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1966–67 (2009) ("Studies have shown that judges demonstrate an anti-plaintiff bias in employment discrimination cases."). Professor Thomas has argued that summary judgment should be denied when panel judges stand in disagreement. If the judges themselves cannot agree on whether material facts are disputed, they more than likely are contested. *See* Suja A. Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, 86 FORDHAM L. REV. 2241, 2241 (2018).

2. *See* David Schraub, Torgerson's *Twilight: The Antidiscrimination Jurisprudence of Judge Diana E. Murphy*, 103 MINN. L. REV. 65, 86 (2018) ("There is a whole network of precedents which seek to presumptively strip discrimination cases away from juries and dispose of them at summary judgment."); *id.* at 87–88 (arguing that employment discrimination cases are not inherently weak, and that summary judgment grants reflect the procedurally erroneous view that courts' role is

than for other civil plaintiffs whose cases require proof of the defendant's intent,[3] which is normally a question for a jury to decide after trial, and not for a court on summary judgment.[4] Scholars blame the doctrine for enabling trial and appellate courts to dodge contested facts on discriminatory intent.[5] They point to a confusing set of proof frameworks, and employer-friendly shortcut rules,[6]

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to predict jury verdicts on summary judgment).

3. *See* Beiner, *supra* note 1, at 680–81 (explaining judges' reluctance to grant summary judgment in other civil cases that allege the defendant's intent, including defamation and patent cases); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 128 (2009) (finding discrimination plaintiffs won only 3.59% of pretrial adjudications compared to 21.05% in other civil cases over a 27-year period); Daniel, at 680. Warren, *Stress Fractures: The Need to Stop and Repair the Growing Divide in Circuit Court Application of Summary Judgment in Antitrust Litigation*, 35 REV. BANKING & FIN. L. 379, 399 (2015) (noting the Eighth Circuit's more favorable treatment of antitrust cases, which require proof of intent to agree to fix prices). Moreover, the "presumptions and inferences that have traditionally been afforded to" tort plaintiffs are not afforded to discrimination plaintiffs, even though discrimination is a statutory tort. Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U.L.J. 111, 111 (2011).

4. *See* Beiner, *supra* note 1, at 674 (quoting 10B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2730 (3d ed. 1998) ("Indeed, the premier treatise on federal practice and procedure, Wright, Miller, and Kane, has an entire section devoted to the difficulties in granting summary judgment in 'actions involving state of mind,' in which they discuss discrimination and employment cases as part of this category.")). For a fuller discussion of how intent issues are (or should normally be) jury questions, *see generally* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009); Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of* Ricci v. DeStefano, 57 N.Y.L. SCH. L. REV. 865 (2013).

5. *See* Stone, *supra* note 3, at 166–67 ("[S]ome scholarship has maintained that appellate judges could be somehow regarding trial court judges as pro-plaintiff, and . . . try[ing] to "remedy the inequality . . . ."). One district judge recounts, the "daily ritual of appellate courts affirming summary judgment grants to employers, often without comment, at a rate that far exceeds any other substantive area of federal law." Mark W. Bennett, *Essay: From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 686 (2012).

6. Stone, *supra* note 3, at 113. Judge Gertner observes that "[c]hanges in

which facilitate "slicing and dicing"[7] the plaintiff's evidence of intent until there is nothing left for a jury to decide.[8] These critiques extend to the judges themselves, who are said to be hostile to discrimination claims.[9] Their hostility is attributed to ideology,[10] cognitive bias,[11] docket pressures, and a lack of personal experience with discrimination.[12]

These explanations are compelling, but not complete. The tools of rhetorical theory reveal more, showing how courts can smuggle in

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substantive discrimination law since the passage of the Civil Rights Act of 1964 were tantamount to a virtual repeal. This was not so because of *Congress*; it was because of *judges*." Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 109 (2012); *see also* SPERINO & THOMAS, *supra* note 1, at ix (arguing that discrimination law's "judge-made rules". . . are contrary to both the text and the purpose of the discrimination statutes"); Gertner, *supra*, at 121 (explaining that the "net effect" of judge-made rules "has been to substantially lighten the employer's burden of proof and make summary judgment in his or her favor increasingly likely").

7. Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 585 (2001) (coining "slicing and dicing" as it relates to a plaintiff's evidence in discrimination cases); *see also* SPERINO & THOMAS, *supra* note 1, at 151 ("The doctrines and frameworks encourage judges to think about discrimination cases out of context by prompting judges to 'slice and dice' cases.").

8. *See* SPERINO & THOMAS, *supra* note 1, at 10 ("Judges have created a whole host of frameworks, inferences, and doctrines that they use to dismiss cases and keep them away from juries[.]"); Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 505 (2008) (blaming the courts' use of frameworks for obscuring "the ultimate issue of whether the employer discriminated against the complaining employee").

9. *See* Charlotte S. Alexander et al., *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 91 N.Y.U. L. REV. 1, 11 (2016) (noting the "growing judicial hostility toward employment discrimination claims"); Bennett, *supra* note 5, at 686 ("Unfortunately, my colleagues have become increasingly unfriendly to plaintiffs' employment discrimination claims."); Gertner, *supra* note 6, at 109 (stating that federal judges are, in fact, "hostile to discrimination cases").

10. *See, e.g.*, Gertner, *supra* note 6, at 112 ("Is the explanation solely an ideological one? Is the cause a more conservative bench, and in particular a more conservative Supreme Court, that is far, far less supportive of anti-discrimination laws than it was in the past? That is surely part of it.").

11. *See, e.g.*, Beiner, *supra* note 1, at 700 (theorizing that judicial cognitive bias plays a role in discrimination case outcomes); Gertner, *supra* note 6, at 111 ("It is as if the bench is saying, 'Discrimination is over. The market is bias-free.'").

12. SPERINO & THOMAS, *supra* note 1, at 20–21; Stone, *supra* note 3, at 160, 162.

assumptions of non-discrimination under the cover of legal and institutional commands.[13] This assumption that employers do not discriminate is deeply embedded in the language of court opinions in ways that are visible through rhetorical analysis, and not through legal analysis.[14]

The Article's rhetorical analysis uses a method of rhetorical criticism[15] called dramatism.[16] Dramatism is a qualitative epistemological and ontological rhetorical system[17] that unpacks what opinions and other forms of public discourse are doing, and why they are doing it.[18] Presuming that thoughts and ideas are

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13. Rhetorical theory explores "the human use of symbols to communicate." SONJA K. FOSS, RHETORICAL CRITICISM: EXPLORATION AND PRACTICE 3 (4th ed. 2009). In rhetorical lingo, "construct" means using language to create a version or perception of something. *See id.* at 5 (explaining how language use constructs reality because "[r]eality is not fixed but changes according to the symbols we use to talk about it"). Consider a person's impending move to another city. A person favorably disposed to this move may construct this "reality" as "an adventure," while a person who does not want to move may construct this "reality" as "a tragedy." *Id.* at 368.

14. Understanding that legal theory is far from monolithic, this Article nevertheless occasionally uses the phrase to isolate fundamental differences between how legal scholars assess judicial opinions and how rhetoric scholars assess judicial opinions.

15. As a disciplinary method within rhetoric, rhetorical criticism discerns and explains the meanings of a text's chosen symbols, critiques those choices and the perspectives they privilege and silence, and evaluates their social impacts. Kirsten K. Davis, *Rhetorical Criticism as Essential Legal Skill: Some Thoughts on Developing Lawyers as "Public Citizens,"* 16 COMMC'N L. REV. 43, 50–51 (2016).

16. Dramatism is so named to reflect how humans use rhetoric to "present[] a particular view of our situation, just as a play creates and presents a certain world or situation inhabited by characters in the play." FOSS, *supra* note 13, at 356.

17. DAVID BLAKESLEY, THE ELEMENTS OF DRAMATISM 5 (Longman Pub. 2002). *See generally* Bernard L. Brock, *Epistemology and Ontology in Kenneth Burke's Dramatism*, 33 COMMC'N. Q. 94 (1985).

18. Kenneth Burke, the great twentieth century humanist, rhetorical critic, and philosopher, introduced the theory of dramatism as a means of exploring "What is involved when we say what people are doing and how they are doing it?" KENNETH BURKE, A GRAMMAR OF MOTIVES xv (Cal. ed. 1969) [hereinafter BURKE, GRAMMAR] (penned in 1945). He went on to develop the theory over decades in three seminal works: the aforementioned *Grammar of Motives*, as well as *A Rhetoric of Motives* and, in 1966, *Language as Symbolic Action: Essays on Life, Literature, and Method. See* Jeff Todd, *The Poetics and Ethics of Negligence*, 50 CAL. W. L. REV. 75, 79 n.13 (2013) [hereinafter, Todd, *Poetics and Ethics*] (first citing: ESSAYS ON LIFE,

never free from the language used to express them, dramatism engages in a "microscopic analysis of language" that directly connects a judicial opinion's institutional *text* to its institutional *motives*. To be clear, dramatism does *not* aim for psychological motives harbored inside an individual judge's mind, and it does not infer those motives from a judge's background, voting record, or generally expressed values.[19] Rather, dramatism extracts *institutional motives,* which are rhetorical constructions embedded in the language of the opinion, where the court says with one voice what it is doing, and why.[20]

In the first scholarly work to provide a rhetorical analysis of the pro-summary judgment problem,[21] this Article uses dramatism to

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LITERATURE, AND METHOD 54 (1966) [hereinafter BURKE, LANGUAGE AS SYMBOLIC ACTION]; then citing KENNETH BURKE, A RHETORIC OF MOTIVES (Cal. ed. 1969); and then citing BURKE, GRAMMAR, *supra*) (describing Burke's expansive project on dramatism).

19. CLARKE ROUNTREE, JUDGING THE SUPREME COURT: CONSTRUCTIONS OF MOTIVES IN BUSH V. GORE xv (Mich. St. U. Press 2007).

20. Renowned Burke scholar Clarke Rountree has pioneered the use of dramatistic analysis to show how Supreme Court opinions construct and ascribe motives to the Court itself and to and others. *See, e.g.*, CLARKE ROUNTREE, JUDGING THE SUPREME COURT: CONSTRUCTIONS OF MOTIVES IN BUSH V. GORE xv (Mich. St. U. Press 2007) [hereinafter ROUNTREE, JUDGING]; Clarke Rountree, *Instantiating "The Law" and Its Dissents in* Korematsu v. United States: *A Dramatistic Analysis of Judicial Discourse*, 87 Q.J. SPEECH 1, 3–4 (2001) [hereinafter Rountree, *Instantiating*]; J. Clarke Rountree III, *Coming to Terms with Kenneth Burke's Pentad*, 1 AM. COMMC'N J. 1, 2, 4, 6 (1998) [hereinafter Rountree, *Coming to Terms*]; Clarke Rountree & John Rountree, *Burke's Pentad as a Guide for Symbol-Using Citizens*, 34 STUD. PHIL. & EDUC. 349, 356 (2014); *see infra* Part II.

21. This Article adds to the growing law-and-rhetoric canon, arguing that law is usefully seen as "branch of rhetoric," not just a "system of rules"—and not rhetoric in the sense of "the ignoble art of persuasion" but "the central art by which community and culture are established, maintained, and transformed." James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1995); *see, e.g.*, Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2205 (1995); Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 54–55 (2005); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1202–04 (1996); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1419 (1995) [hereinafter, Wald, *Rhetoric of Results*]; Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1547–52 (1990).

conduct a case study of three opinions in a well-known, influential Eighth Circuit discrimination case: *Torgerson v. City of Rochester*.[22] The case study shows how the opinions' strategic portrayals of motives – not just the motives of parties, and witnesses in litigation-producing events, but the motives of precedent-setters, and law-makers, and even the court itself – drive results as much as doctrine.[23] In attributing differential motives to this array of actors, these opinions embed warring assumptions about the phenomenon of discrimination.[24]

Most notably, the *Torgerson* en banc opinion reinstated summary judgment through a default non-discrimination assumption encoded in three aspects of the opinion: (1) rhetoric that implicitly presumes an employer's merit-based personnel rules foreclose discriminatory purposes; (2) rhetorically constructed motives for actors past and present, which are used to resolve situational ambiguities in the opinion and to galvanize the employer-friendly shortcut rules; and (3) error-correction and summary judgment-protection rhetoric, which is used as a cover for an unseemly judicial motive to replace a neutral procedural rule with a pro-employer summary judgment

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22. *Torgerson* initially yielded a panel opinion reversing summary judgment, followed by an en banc opinion reinstating summary judgment and a corresponding dissent. Torgerson v. City of Rochester, 643 F.3d 1031, 1036 (8th Cir. 2011) (en banc). The *Torgerson* case was chosen for this study for three reasons. First, the en banc opinion is a circuit-law changing opinion that has been widely critiqued in the legal literature. That treatment permits a comparison between existing doctrinal insights and new, dramatistic insights about *Torgerson* concerning the rush to summary judgment. *See infra* Parts V & VI. Second, the *Torgerson* case comes with a wide range of situational and legal ambiguities. As Part V explains, these ambiguities are breeding grounds for rhetorical manuevering. Because *Torgerson* is particularly rife with rhetorical opportunitism, it is a rich source for understanding how rhetoric, not just doctrine, drives results. Third, notwithstanding their factual and doctrinal common ground, the three *Torgerson* opinions produce opposing outcomes. A comparative dramatistic analysis of these opinions isolates the rhetorical strategies and the underlying assumptions that promote disparate results despite this common ground.

23. ROUNTREE, JUDGING, *supra* note 20, at xv (explaining that through dramatism, "motives can be teased out, their propriety assessed, and the *quality of judicial opinions as rhetorical performances determined*") (emphasis added).

24. *See* BLAKESLEY, *supra* note 17, at 41 ("Dramatism "reveal[s] the implicit assumptions people make when they say what people are doing and why they are doing it.")

standard.[25] These rhetorical feats not only reinforce legal scholars' contentions that the *Torgerson* en banc opinion is wrong and unjust, but they also explain *how* and *why* the opinion succeeded and remains intact today.[26]

More broadly, the case study yields two key insights. First, the long-suspected judicial assumption of non-discrimination is not just theoretical or psychological; it is rhetorically decipherable from an opinion's text. Second, to combat summary judgment, scholars and lawyers must stop butting heads with the doctrine and start undercutting judicial assumptions by changing the picture of motives. By offering alternative motives for factual and legal actors in cases like *Torgerson*, advocates can minimize the role of employer-friendly doctrine, and present legal and factual realities consistent with anti-discrimination law's baseline assumption that employers *do* discriminate.

From here, the Article proceeds as follows. Part II explains dramatism, what it is, and how it works to unlock motives from text in discourse, including judicial opinions. Part III turns to the ways in which employment discrimination doctrine does not fully explain the rush to summary judgment and leaves plenty of room for rhetorical choices to drive outcomes. Part IV addresses the *Torgerson* en banc opinion, including its facts, holding, and reasoning. Part V conducts the case study, showing how the three *Torgerson* opinions frame competing motives to reach opposing outcomes that are embedded in

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25. Torgerson, 643 F.3d 1031, 1058. Rhetorical critics employing dramatism "contest opacity and dishonesty" in texts. MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS 4 (Stanford U. Press 2014); *see* Jeff Todd, *The (De)Mystification of Environmental Injustice: A Dramatistic Analysis of Law*, 93 TEMP. L. REV. 597, 600 (2021) [hereinafter Todd, *(De)Mystification of Environmental Injustice*] ("Because rhetoricians consider the tensions between law and justice, [rhetorical and dramatistic analyses] are particularly apt for addressing whether the law corrects, causes, or has minimal effect on [] justice").

26. Though *Torgerson* is just one case, its rhetorical insights provide a blueprint for understanding and fighting the pro-summary judgment trend. Because intentional discrimination cases share common situational features and doctrine, the *Torgerson* case study illustrates how an opinion's ascription of motives paves the path to summary judgment for employers. *See infra* Part V. Indeed, "dramatistic rhetorical analysis" of *any* text "is ultimately a case study that constitutes . . . evidence [in] . . . a larger quest to generalize and to account for all variations in human communication" about situations with common elements of action. James W. Chesebro, *Kenneth Burke and Jacques Derrida*, *in* KENNETH BURKE AND CONTEMPORARY EUROPEAN THOUGHT 198 (U. Ala. Press 2006).

contrary implicit assumptions. Part VI develops the case study's theoretical insights and develops litigation strategies for advocates.

I. THE INTERPRETIVE POWER OF DRAMATISM

Dramatism is both a philosophy of language and a rhetorical theory that "analyz[es] human communication in all of its complexity."[27] Many fields have harnessed its power to pull motives from language to interpret sophisticated discourse, including law,[28] politics,[29] art, literature,[30] anthropology,[31] psychology,[32] and popular culture.[33] This section explains the philosophical basis for dramatism's claim that motives are embedded in language. It also introduces the *pentad,* the content analysis tool that dramatism uses

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27. BLAKESLEY, *supra* note 17, at 5.

28. In addition to Clarke Rountree's work in law on judicial opinions, Professor Jeff Todd has used dramatism to critique the substitution of statutory negligence *per se* standards for the "reasonable person" standard. He argues that only the latter permits juries to fully consider relevant actions and motives. Todd, *Poetics and Ethics*, *supra* note 18, at 126–27. In the legal transactional realm, Professor Lori Johnson has used dramatism to unpack the language choices and motives driving terms of art in contracts. Lori D. Johnson, *Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices*, 65 SYRACUSE L. REV. 451, 481–90 (2015).

29. *See, e.g.*, David S. Birdsell, *Ronald Reagan on Lebanon and Grenada: Flexibility and Interpretation in the Application of Kenneth Burke's Pentad*, 73 Q.J. SPEECH 267, 267–68, 274–76 (1987); Barry Brummett, *A Pentadic Analysis of Ideologies in Two Gay Rights Controversies*, 30 CENT. STATES SPEECH J. 250, 250–51 (1979); David A. Ling, *A Pentadic Analysis of Senator Edward Kennedy's Address to the People of Massachusetts, July 25, 1969*, 21 COMMC'N CENT. STATES SPEECH J. 81, 83 (1970).

30. *See, e.g.*, Hugh Dalziel Duncan, *Literature as Equipment for Action: Burke's Dramatistic Conception, in* THE SOCIOLOGY OF ART AND LITERATURE: A READER 713, 713–20 (Milton C. Albrecht et al. eds., Praeger 1970).

31. *See, e.g.*, CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 30, 114, 153, 173–75 (Basic Books 2000).

32. *See, e.g.*, Bernard Kaplan, *Genetic-Dramatism: Old Wine in New Bottles, in* TOWARD A HOLISTIC DEVELOPMENTAL PSYCHOLOGY 53, 61–67 (Seymour Wapner & Bernard Kaplan eds.) (1983)

33. *See, e.g.*, Samantha Senda-Cook, *Fahrenheit 9/11's Purpose-Driven Agents: A Multipentadic Approach to Political Entertainment*, 4 J. KENNETH BURKE SOC'Y 1, 2, 3, 14, 15, 20 (2008); Mari Boor Toon et al., *Hunting and Heritage on Trial: A Dramatistic Debate Over Tragedy, Tradition, and Territory*, 79 Q.J. SPEECH 165, 165 (1993).

to unlock motives from text.[34]

After explaining the theory and analytical method, this section shows how pentadic analysis works with a simple piece of discourse. It then moves to judicial opinions, and explains why dramatism's pentadic analysis is a rich interpretive method for analyzing judicial motives, and what it adds to existing critiques.

A. *Dramatism's Premise and the Pentadic Method*

1. The Premise: How Dramatism Connects Text to Motives

Kenneth Burke,[35] viewed by many as the "dominant rhetorical theorist of the twentieth century,"[36] conceived the theory of dramatism over decades. Indeed, Burke's dramatism stands among the "most significant contribution[s] to rhetorical theory since Aristotle."[37] Dramatism's premise is that *action* is the primary lens

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34. Rountree, *Coming to Terms*, *supra* note 20, at 2. The pentad is part of dramatism's vast specialized vocabulary. To help readers decipher that vocabulary, many texts provide a glossary of "Burkean" terms. *See, e.g.*, BLAKESLEY, *supra* note 17, at 195–200. The Burkean terms used in this Article are italicized and defined in the text or in the footnotes.

35. *See* Rountree & Rountree, *supra* note 20, at 350 (identifying Burke as the originator of dramatism and noting that "Burke revolutionized rhetorical theory in the United States between the 1930s and the 1980s").

36. Delia B. Conti, *Narrative Theory and the Law: A Rhetorician's Invitation to the Legal Academy*, 39 DUQ. UESNE L. REV. 457, 479 459 (2001); *see also* Brock, KENNETH BURKE AND CONTEMPORARY EUROPEAN THOUGHT, *supra* note 26, at ix (calling Burke an "outstanding contemporary American critic and theorist," who influenced leading thinkers such as Jurgen Habermas, Ernesto Grassi, Michael Foucault, and Jacques Derrida); FOSS, *supra* note 13, at 63 (explaining that Burke "had the greatest impact on rhetorical criticism as it is practiced today."made significant contributions to our understanding of how and why human beings use rhetoric and to what effect"); Todd, *supra* note 25, at 600 (identifying Burke and Chaim Perelman, the originator of contemporary argument theory, as the two most important twentieth century rhetorical thinkers).

37. Todd, supra note 25 at 600; *see also* BLAKESLEY, *supra* note 17, at 5 (stating that Kenneth Burke, through his work on dramatism, "has influenced the thinking of countless others interested in the study of speech, writing, and society); Charles W. Kneupper, *Dramatistic Invention: The Pentad as a Heuristic Procedure*, 9 RHETORIC SOC'Y Q. 130, 132 (1979) (stating that Burke's "most important" contribution to rhetoric is dramatism).

through which humans view the world.[38] When people talk about actions, they capture not only their personal perceptions of *what* happened, but also their individual takes on *why* those things happened.Thus, language reveals a speaker's point of view about two things: (1) the action or actions she is speaking about; and (2) the motive or motives for those action(s).[39]

Dramatism refers to this as the speaker's rhetorical "orientation" to a situation, illustrated in this example of how two different speakers might talk about actions and motives around logging:

> [I]f two persons were to observe [an] actual event in which lumberjacks cut down trees in a forest and one describes the event as "progress" while the other describes it as "the destruction of natural resources," then significant differences of orientation and motive are implied. Both descriptions are strategic interpretations of reality . . . . The "progress" observer has a favorable/supportive attitude toward the act witnessed. The "destruction of natural resources" observer has an unfavorable, perhaps objecting attitude toward the act witnessed. Both are disposed to act differently towards the same objective event.[40]

Through their rhetoric, these speakers fashion two distinct "cuts of reality" from one action.[41] Their rhetorical characterizations also

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38. As Clarke Rountree puts it, "[w]e might say that humans [are] born wearing 'action' glasses[.]" Rountree & Rountree, *supra* note 20, at 356. *See* Kenneth Burke, *Dramatism*, *in* DRAMA IN LIFE: THE USES OF COMMUNICATION IN SOCIETY 7, 10 (James E. Combs & Michael W. Mansfield eds., Hastings House 1976) [hereinafter Burke, *Dramatism*] ("'Action,' is a term for the kind of behavior possible to a typically symbol-using animal (such as a man) in contrast with the extra symbolic or nonsymbolic operations of nature.").

39. FOSS, *supra* note 13, at 368.

40. Kneupper, *supra* note 35, at 131.

41. Foss explains how language fashions a "cut of reality" by using strategic characterizations that ascribe motives to actors:

> Our language, then provides clues to our motives or why we do what we do . . . particular vocabularies constitute a selection and deflection of reality providing clues to our motives[,] or why we do what we do. . Once you know how rhetors have described situations, you are able to discover their [attribution of] motives

ascribe contrasting motives to the lumberjack – good and productive motives versus bad and destructive motives. In short, each speaker's language reveals how she has "sized up"[42] the tree-cutting action to reflect her own perceptions of the lumberjack's motives for cutting trees.[43]

But there's an additional layer: speakers *themselves* have motives for communicating. For example, assume that a logging operator is talking to local residents to garner their support for the operation. Although his rhetorical objective may be to reassure and to persuade the residents about the operation's economic benefits, it is also possible that the speaker's *actual motive* goes beyond this objective—what he really wants is to stop local protests before they start. He cannot say this explicitly for fear of alienating or riling up the residents. But if the speaker's protest-curbing motive is strong enough, he will get the "don't protest" message across through in his language.[44]

> for action in the situations and how they justify, explain, and account for that action . . . [Dramatism] is a way of unlocking the motives in someone's discourse, revealing how particular "realities' come into being and how texts thus motivate or block particular understandings, attitudes, and pre-dispositions."

FOSS, *supra* note 13, at 356, 367–68; *see also* Johnson, *supra* note 28, at 478 ("Dramatistic analysis of the rhetor's choices can provide clues into the rhetor's motives or why they do what they do.").

42. FOSS, *supra* note 13, at 368 ("Through rhetoric, we size up a situation and name its structure and outstanding ingredients."); Toon, et al., *supra* note 33, at 165 (showing through dramatistic analysis the polarized manner in which Maine townspeople "sized up" a hunter's accidental shooting of a resident, revealing divergent perceptions of the hunter's actions and the motives of the townspeople themselves).

43. Kneuper, *supra* note 37, at 131. One can imagine how differently the lumberjack's account of his tree-cutting reality would read than either of the observers. The lumberjack's characterizations might center on the practical aims of getting the job done.

44. *See* FOSS, *supra* note 13, at 368 (explaining that humans "use rhetoric to constitute and present a particular view of our situation, just as a play creates and presents a certain world or situation inhabited by characters in the play").

2. The Method: How Pentadic Analysis Interprets Motives in Texts

To unpack motives from discourse, dramatism uses a method called pentadic analysis, which proceeds in four steps. [45] The first step assesses how a speaker characterizes five interrelated *elements of action* in the situation they are talking about.[46] These five elements are a "heuristic of motives" for how humans talk about action.[47] They did not originate with Burke, but rather came courtesy of earlier philosophers, including Aristotle and Talcott Parsons.[48] These elements comprise the *pentad*:[49]

45. *See* FOSS, *supra* note 13, at 357.

46. *Id.*

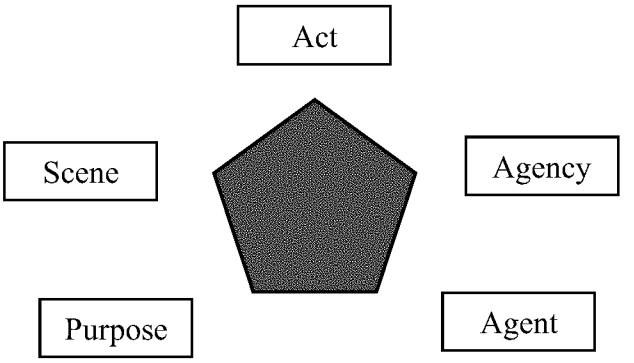
47. Rountree, *Coming to Terms*, *supra* note 20, at 2.

48. Rountree & Rountree, *supra* note 20, at 354 (first citing ARISTOTLE, NICOMACHEAN ETHICS (Martin Ostwald trans., 1962); and then citing TALCOTT PARSONS, THE STRUCTURE OF SOCIAL ACTION (The Free Press 1937)). The five elements of action were also "fixed in the medieval questions: quis (agent); quid (act); ubi (scene defined by place); quibus auxiliis (agency), cur (purpose), quo modo (manner, 'attitude') quando (scene defined temporarily)." Burke, *Dramatism*, *supra* note 38, at 9.

49. BURKE, LANGUAGE AS SYMBOLIC ACTION, at xv. Burke elaborates on each element:

> [Y]ou must have some word that names the *act* (names what took place, in thought or deed), and another that names the *scene* (the background of the act, the situation in which it occurred); also you must indicate what person or kinds of person (*agent*) performed the act, what means or instruments he used (*agency*), and the *purpose*.

BURKE, GRAMMAR, *supra* note 18, at xv. Burke belatedly considered a sixth term, "attitude," which "answers the how question in the sense of 'in what manner?'" Rountree & Rountree, *supra* note 20, at 353. But because attitude overlaps with agency, most scholars view the original five terms as a complete heuristic. FOSS, *supra* note 13, at 369.



The second step evaluates the speaker's choice of a "dominant" pentadic element or "term," which exerts its rhetorical will on the rest. The third step is normative: it evaluates whether the speaker has exceeded her own rhetorical constraints and identifies "realities" and voices the speaker has silenced along the way. The fourth step sharpens the assessment by generating a "counterstatement," which shows rhetorical roads not taken in the discourse. Applying this method to the logging discourse example, this section illustrates how pentadic analysis discerns the motives portrayed in that discourse and the implicit assumptions embedded within it.

a. The first analytical component: assessing the elements of action

Pentadic analysis begins by pinpointing the situation the speaker is talking about, and assessing how the speaker characterizes the five elements of action: act, agent, agency, scene, and purpose. In the logging example, the logging operator may wish to convey that the residents' past, current, and future *actions* are incompatible with protesting, and compatible with supporting logging. The speaker may portray the residents as *agents* with a *purpose* of supporting the local economy; cite their past *actions* as evidence that they can use their *agency* as residents to realize this vision; and emphasize how the residents' support of the operation will shape a *scene* of an economic windfall. These characterizations reveal implicit assumptions that the speaker is making about the residents' motives. At the same time, they paint a portrait of the speaker's *own* motives. If the speaker presents these characterizations skillfully, he will get across that protesting is not a fitting response to the operation because that act would run against

the locals' commitment to progress.[50] The speaker's anti-protest motive[51] will have been realized without the alienating downside of expressing it directly.

Notice how, in characterizing these elements of action, the speaker has also used his words to shape a future reality: one of prosperity. Rhetorically, what this speaker has done is to attribute motives to the audience and to package his own, less palatable motives in messaging that the audience is likely to find acceptable.[52]

b. The second component: locating the dominant term

The above assumes a speaker giving equal emphasis to every element of action, but that is not what speakers do; rhetorical strategies lead them to emphasize some elements over others.[53] Typically, one element is so pronounced that it becomes the "dominant term."[54] Accordingly, the second step in the pentadic method is locating this dominant term,[55] which shows "what dimension of the situation the rhetor privileges or sees as most important."[56] Conceivably, pentadic analysis of the logging operator's entire speech could show that the dominant term is the residents'

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50. *See* Ling, *supra* note 29, at 82 ("[M]an's description of a situation reveals what he regards as the appropriate response to various human situations."). In contrast, if this speaker simply lauds the operation's benefits, he does not convey a "don't protest" message, because he will have failed to implicate the *residents' own actions* in that enterprise.

51. Note that it is premature at this stage to conclude that the speaker, in fact, has an anti-protest motive, because this example runs through only the first of four components of pentadic analysis. More qualitative evidence, based on the entire text, would be required to pin down such a motive.

52. Rhetoric scholar David Ling unpacked a similar rhetorical strategy from Senator Ted Kennedy's speech about the car crash that killed his passenger at Chappaquiddick in 1969. Ling, *supra* note 29, at 81. Ling's pentadic analysis showed that Kennedy's message of taking responsibility for the crash was belied by his remaining characterizations, which revealed a motive to be seen as a victim of circumstance, deflecting the alternative possibility of personal recklessness. *Id.* at 85–86.

53. FOSS, *supra* note 13, at 359; Kneupper, *supra* note 17, at 132; Ling, *supra* note 29, at 86; Rountree, *Coming to Terms*, *supra* note 20, at 2.

54. This Article uses "term" and "element" interchangeably when referring to the pentad, as rhetoric scholars do.

55. FOSS, supra note 13, at 372.

56. *Id.*

purpose of committing to economic progress, in line with their portrayed motive of supporting the logging operation.[57]

But consider how the logging operator may make *scene* the dominant term if he sizes up the residents' motive differently. Say the area has been ravaged by forest fires. Sizing up the residents' *fear* as their primary motive (rather than environmental concern), he may make this "unsafe scene" (rather than economic progress) the focal point of his speech. To do so, he may repeatedly emphasize the damage wrought by past fires and discuss them in inordinate detail.[58] But most important, his speech will make the scenic danger of forest fires the lens "through which everything else happens[.]"[59] With *scene* as the dominant term, the location and the circumstances, rather than the people, drive the action and the discourse. In contrast to the previous example, the speaker will not emphasize the locals' past actions and agency towards progress. He may instead cast the residents as *agents* at the mercy of nature's dangerous and unpredictable will, able to *counteract* nature only by using their *agency* to support the logging operation.[60] The residents' primary *purpose*[61] will be portrayed as staying safe.[62]

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57. The speaker's choice of a dominant term sends different messages and insinuates different motives depending on which of the five elements of action predominates. *See* BURKE, GRAMMAR, *supra* note 18, at 17 ("[O]ne may deflect attention from *scenic* matters by situating the motives of an *act* in the agent . . . or conversely, one may deflect attention from the criticisms of personal motives by deriving an *act* or attitude not from traits of the *agent* but from the [*scene*, the] nature of the situation.") (emphasis added).

58. The dominant term can be discerned in different ways. It may appear first in the text, it may pervade the text, or it may be treated in more detail than other terms. Rountree, *Coming to Terms*, *supra* note 20, at 5.

59. FOSS, *supra* note 13, at 372.

60. Todd, *Poetics and Ethics*, supra note 18, at 117 (noting that if scene is the dominant term, "the agent [becomes] a person limited by circumstances who has little or no choice in behaving the way he does").").

61. *See id.* at 118 ("The concept of purpose is implied in act and agent, for people do things with some end in mind, as well as with agency, 'since tools and methods are for a purpose.'") (quoting BURKE, GRAMMAR, *supra* note 18, at 289).

62. These relationships between the dominant term and the remaining elements of action are expressed in pentadic analysis as "ratios." There are twenty potential pentadic ratios in any piece of discourse, reflected in the following table:

By making the unsafe scene the dominant term, the discourse reveals a different implicit assumption: the speaker views the residents as motivated to avoid danger. Accordingly, the speaker's characterizations send a fear-based message: support this logging operation or lose everything to the forest fires. As for the speaker's *own* motive, that has shifted too. Because the speaker's characterizations no longer appeal directly to the residents' agency and actions, it is harder to say that the speaker is driven to prevent their protests. Instead, the rhetoric suggests that he is drawing attention away from such actions. This suggests other motives for the speaker—to get the logging to proceed with no obstacles whatsoever, or less cynically, concern for the residents' safety.[63] If the speaker has read the residents' fears correctly, they will identify with the message and see supporting the operation as the "fitting" response.

These first two components of the pentadic method—assessing the speaker's pentadic characterizations and locating the dominant term—yield two insights. *First*, they show how a speaker has "sized up" the actions and motives of others (e.g., the local residents). *Second*, they reveal how a speaker's *own* motives are integrated into—and sometimes skillfully cloaked by—the speaker's overt messaging (e.g., the anti-protest motive embedded in the speaker's appeal to the residents' commitment to progress). These rhetorical insights are native to any discourse that talks about what people are doing and why.[64] In this respect, the first two dimensions of pentadic

Scene-act	Scene-agent	Scene-agency	Scene-purpose
Act-scene	Act-agent	Act-agency	Act-purpose
Agent-scene	Agent-act	Agent-agency	Agent-purpose
Agency-scene	Agency-act	Agency-agent	Agency-purpose
Purpose-scene	Purpose-act	Purpose-agent	Purpose-agency

Kneupper, *supra* note 17, at 133. Drawing on the example above, the logging operator's scene-purpose ratio would be fire danger *scene*-preserving safety *purpose*. His scene-act ratio would be fire danger *scene*-support logging *act*. Notice how the dominant "scene" shapes both the purpose and the act, rather than the converse. *See infra* note 70.

63. Again, this is a simplified example. With only two components of the analysis run so far, it is too early to pin down the speaker's motive.

64. This is because rhetoric is always "interested"; it is biased towards the speaker's perspective, which has but one outlet: language. *See* FOSS, *supra* note 13, at 3–6 (describing the interested nature of rhetoric).

analysis are descriptive—they show how people *are* talking about motives, not how they *should* talk about motives.[65]

c. The third component: assessing rhetorical limits and disconnects

But pentadic analysis has a normative side, too. It comes into view with the third component: checking the internal logic of the speaker's pentadic characterizations and discerning the silenced alternatives.[66] Speakers use dominant terms to advance their rhetorical strategies in line with their motives, but the choice of dominant term also cuts back the "inventional resources available"[67] for shaping the rest of the pentadic elements.[68] That is because the elements of action are interrelated;[69] "pulling a conversation one way limits how far the other terms can be pulled in another direction."[70] Pull one term too far, and the rhetorical house of cards collapses.

For example, if a speaker portrays an *agent* in a manner that is inconsistent with how such a person would normally *act*, the incongruity creates a logical disconnect. To flip the logging example, a local journalist might oppose the logging operation by characterizing the act of logging as "destroying a pristine natural resource," but then she would be hard-pressed to call the logging operator a "preservationist."[71] If she did, her message would be confusing, maybe even suspect, and it certainly would not foster

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65. Rountree & Rountree, *supra* note 20, at 354.

66. *See* FOSS, supra note 13, at 377–79 (discussing these normative aims).

67. Clarke Rountree, *When Actions Collide: Motives Spanning Different Acts,* 12 J. KENNETH BURKE SOC'Y 1, 2 (2017) [hereinafter Rountree, *When Actions Collide*

68. "[O]ne element transforms our understanding of another. Thus, a scene may be shown to contain an act, an agency may be adapted to a purpose, a particular kind of agent may be said to be responsible for a corresponding kind of action (heroic, foolish, selfish, etc.), and so forth." *Id.* at 3. These understandings are culturally specific and tied to discourse communities' assumptions. Rountree & Rountree, *supra* note 20, at 354.

69. BURKE, GRAMMAR, *supra* note 18, at xix.

70. Rountree, *Coming to Terms*, *supra* note 20, at 2. Rountree elaborates, "[W]henever we perceive a scene, agent, act, agency, [or] purpose . . . as having a given nature or quality . . . we 'grammatically' limit potential interpretations of all the other terms." *Id.*

71. In contrast, one would not be surprised to find, in a speaker's account of a "teacher," that the person is "teaching"; or in an account of a police officer, that the officer is "arresting." Rountree & Rountree, *supra* note 20, at 353.

audience identification.[72] In the language of pentadic analysis, characterizing the dominant term or any element of action inconsistently with another creates a *grammatical strain* in the discourse's internal *logic*.[73]

To maintain the internal logic of his "unsafe scene" rhetoric, the logging operator must talk about acts, agents, agencies, and purposes consistent with that scene. To test for this logic, the pentadic method scrutinizes "what goes with what."[74] A *scene* thick with the threat of forest fires "goes with" residents as *agents acting* with an *agency* and *purpose* to protect their persons and property; it does not go with a *purpose* to preserve the environmental status quo. Likewise, the unsafe scene fits with residents who lack the *agency* to prevent forest fires on their own, but it does not square with their *agency* to take matters into their own hands using other preventive measures.

Viewed this way, the logging operator's discourse "conceals as it reveals": it covertly silences alternative realities[75] that would give the residents their own *agency* and *purposes* apart from the scene – realities in which the residents are empowered and not beholden to a powerful, funded "expert" such as the logging operator. But the

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72. A prime example of this is Senator Kennedy's 1969 Chappaquiddick speech. As Ling explains, the strategy of explicitly taking responsibility but using language that blamed a dangerous nighttime "scene" for the accident worked in the short term, as "thousands of letters of support poured into Kennedy's office." Ling, *supra* note 29, at 85. But in the long term, this rhetorical strategy invited skepticism because the scene did not explain all of Kennedy's actions, including his failure to report the accident. In the end, Ling said, writing before Kennedy lost his Presidential bid, the strategy "appear[ed] to have done little to enhance Kennedy's chances for the Presidency." *Id.* at 86.

73. *See, e.g.*, Rountree, *Instantiating*, *supra* note 20, at 6, 11 (discussing grammatical strains in judicial opinions); *see also* FOSS, *supra* note 13, at 378 (noting a speaker's tendency to "overstress" certain pentadic characterizations, signaling a logical disconnect). Grammatical strains also detract from the quality of the rhetorical performance. Rountree, *Instantiating*, *supra* note 20, at 6 (discussing what marks a successful or failed rhetorical performance in the context of judicial opinions). Rhetorical "failure" or "success" is itself a difficult and disputed notion, worthy of its own scholarly project.

74. Rountree, *Coming to Terms*, *supra* note 20, at 3.

75. Todd, *(De)Mystification of Environmental Injustice*, *supra* note 36, at 604 (explaining that strategic language choices reflect the speaker's selective views of reality, which are, in turn, a "'deflection of [an alternative] reality'") (quoting BURKE, LANGUAGE AS SYMBOLIC ACTION, *supra* note 18, at 45.)

logging operator's pentadic configuration has its limits. A *scene*, by itself, does not have the agency to act – only human *agents* have agency to act in alignment with cognitively determined purposes. By leaning so heavily on scenic danger and suggesting that the residents lack the agency to prevent forest fires on their own, the logging operator insinuates that the forested *scene* is itself an *agent* armed with a dangerous *agency* – a grammatical strain that surpasses the limits of his own pentadic configuration. This risk is worth taking only if the logging operator's rhetoric encodes a motive – such as "economic progress beats environmental preservation" – the commitment to which is so strong that it threatens the pentadic logic designed to induce the residents' buy-in.

d. The Fourth Component: Generating a Counterstatement to Reveal the "Open Spaces" for Rhetorical Maneuvering

The first three steps of pentadic analysis reflect the discourse's cut of reality and the alternatives it deflects, but they do not explain *what* the alternative discourse would look like, or what competing characterizations of action would be in it. That is the purpose of the fourth step: generating a pentadic counterstatement.[76] A counterstatement with a contrasting dominant term shows how competing discourse shapes an alternative reality with different motives, implicit assumptions, and messages.[77] Methodologically, the counterstatement may be generated through real-life competing discourse, or it may be the product of the analyst's dialectical ingenuity.[78] The logging example imagined such alternatives by changing the logging operator's dominant term (purpose vs. scene) and the nature of that term (prosperity vs. safety); this changed the picture of motives and implicit assumptions. The same thing is accomplished by performing pentadic analysis on real-world competing discourse. In a news article version of events, for instance,

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76. *See* FOSS, *supra* note 13, at 377–79 (discussing counterstatements and their purposesIn discussing pentadic mapping, Foss draws on the work of Floyd D. Anderson and Lawrence J. Prelli. *See generally* Floyd D. Anderson & Lawrence J. Prelli, *Pentadic Cartography: Mapping the Universe of Discourse*, 87 Q.J. SPEECH 73 (2001).

77. FOSS, *supra* note 13, at 378 (describing the role of the counterstatement as "opening the universe of discourse on an issue to provide multiple perspectives on it

78. *See* FOSS, *supra* note 13, at 378–79 (discussing how to develop counterstatements); *see also* BLAKESLEY, *supra* note 17, at 35–41 (discussing how the Columbine tragedy generated multiple strands of discourse as counterstatements).

a journalist with the motive of exposing the greater environmental problem of logging may cast the operation within the larger *scene* of development and a wider span of agents, actions, agencies and purposes. This discourse generates "new ideas and understandings" about a debated situation.[79]

Among those understandings are "the strategic spots at which ambiguities necessarily arise"—that is, where there is room for rhetorical choice in the elements of action.[80] Contrasting how the text and the counterstatement harness these "resources of ambiguity"[81] delineates the "open spaces"[82] where the discourse has the most rhetorical room to maneuver. The greater the situational ambiguity, the greater the range and influence of rhetorical choice and motives.

The notion that speakers turn situational ambiguities in their favor is not unique to pentadic analysis; it also resides in cognitive psychology's concept of "framing," which advertisers,[83] political campaigns,[84] and lawyers[85] have all put to use. But pentadic

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79. Todd, *Poetics and Ethics*, *supra* note 18, at 119.

80. BURKE, GRAMMAR, *supra* note 18, at xviii.

81. BURKE, GRAMMAR, *supra* note 18, at xix. A real-life illustration of competing discourse harnessing the resources of situational ambiguity can be seen in the discourse about the 1999 shooting tragedy at Columbine High School. BLAKESLEY, *supra* note 17, at 35–41. Speakers disagreed about every pentadic element, even about how to characterize the act itself. Was it a rampage? A massacre? An instance of gun violence? A ploy for infamy? Naming the act circumscribed how speakers could characterize the agents (evil, driven to despair, mentally ill?); agencies (bullying as the catalyst, having access to weapons?); purposes (cold-blooded murder, revenge, seeking fame?); scenes (lax gun control, ineffectual school policies?). A pentadic analysis of this competing discourse showed the rhetorical breathing room these speakers had in characterizing the acts, agencies, agents, scenes, and purposes in the situation, and how the choices made with that leeway bespoke motives. *Id.* at 35.

82. Rhetorical "open spaces" is a term of art coined by this Article to refer to the situational and doctrinal ambiguities that permit strategic characterizations. *See infra* Part III.

83. *See, e.g.*, Gerald E. Smith, *Framing in Advertising and the Moderating Impact of Consumer Education*, 36 J. ADVERT. RSCH. 49, 49 (1996) (studying the impact of positively and negatively framed ads on consumers' purchasing decisions).

84. *See, e.g.*, Patricia A. Sullivan, *The 1984 Vice-Presidential Debate: A Case Study of Female and Male Framing in Political Campaigns*, 37 COMMC'N Q. 329, 329 (1989) (analyzing the framing strategies of Geraldine Ferraro and George Bush in their nationally televised 1984 vice presidential debate).

analysis tells far more than how a speaker persuades an audience to accept her version of the facts, paints word pictures, or frames ideas and arguments.[86] Pentadic analysis unpacks the thoughts *behind* those words and the complex rhetorical strategies driven by those thoughts. It penetrates the speaker's understanding of a debated situation, her take on the motives in play, how she configures those motives in her message, and the resulting cut of reality she presents to the audience. With twenty ratios available to dissect the internal rhetorical logic of the speaker's discourse,[87] the pentadic method goes beyond framing and storytelling; it pinpoints the underlying motives.

B. *The Pentad's Power to Unpack Motives from Judicial Opinions*

As complex, sophisticated rhetoric that resolves debated situations with legal consequences, judicial opinions are prime candidates for pentadic analysis. From a descriptive standpoint, opinions characterize actions and motives[88] with multiple rhetorical objectives: to forge identification, induce cooperation, and shape the social order.[89] Indeed, "[c]haracterization of these acts, rather than

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85. *See, e.g.*, Chad Baruch, *Legal Writing: Lessons from the Bestseller List*, 43 TEX. J. BUS. L. 593, 602 (2009) ("Good introductions frame the issues so their resolution is clear to the reader."); Judith D. Fischer, *Got Issues? An Empirical Study About Framing Them*, 6 J. ASS'N LEGAL WRITING DIRS. 1, 3 (2009) (citing James N. Druckman, *On the Limits of Framing Effects: Who Can Frame?*, 63 J. POL. 1041, 1042 (2001)) 1, 3 (2009) ("[A] framing effect occurs when a speaker's emphasis on certain considerations affects what others focus on in forming opinions."); Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1, 2, 33 (1994) (advising legal writers to frame issues for "maximal clarity and rhetorical impact" and offering strategies to help legal writers "frame their issues well").

86. *See, e.g.*, Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 LEGAL WRITING: J. LEGAL WRITING INST. 229, 263 (2006) ("Effective characterization captures appropriate traits in images, or in careful descriptions, often through the selection of vivid details."); Stephen E. Smith, *A Rhetorical Exercise: Persuasive Word Choice*, 49 U. S.F.L. REV. F. 37, 37 (2014–2015) ("In writing a legal brief, word choice is an important persuasion tool. Through word choice, legal writers may characterize a party's behavior, clarify a scene, or recast an interaction.").

87. *See supra* note 62.

88. Rountree, *Instantiating*, *supra* note 20, at 3.

89. *See* Todd, *(De)Mystification of Environmental Injustice*, *supra* note 36, at 597 (explaining how law's language can "direct[] attention *toward* dubious

some form of syllogistic or analogical reasoning,"[90] comprises an opinion's "chief rhetorical work."[91] Within judicial opinions, language strategically characterizes both factual *and legal* acts to fit together in portrayals of motives. To be clear, pentadic analysis is not limited to an opinion's statements of facts. The analysis scrutinizes the entire opinion and the motives embedded in the court's legal reasoning.

From a normative perspective, a judicial opinion's rhetoric can conceal as it reveals by cloaking unpalatable motives and silencing alternative—often non-dominant—perspectives, even as the opinion purports to do justice.[92] Just as the logging operator may strain grammatical logic in his effort to portray residents as weak agents to secure their assent to the operation in line with his motives, judicial opinions may strain grammatical logic in their efforts to secure legal compliance and reach results that reflect the court's institutional motives.[93] Pentadic analyses of judicial opinions are thus "case studies" in a "larger quest"[94] to account for how courts use rhetoric, not just doctrine, to reach outcomes and shape law.

1. How Pentadic Analysis Shows What Judicial Opinions Are Doing and Why

To begin with, judicial opinions are suited to pentadic analysis because opinion language is symbolic action that mediates human

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identifications between the government and the governed" and *away* from how law reinforces the social order) (emphasis added). Professor Todd argues that this is precisely what has happened in the realm of environmental justice: the law has bred legal fictions that, on the surface, purport to create identification between the governing and the governed, but that function to marginalize poor and marginalized populations most impacted by climate change. *Id.* at 602.

90. ROUNTREE, JUDGING, *supra* note 20, at 7 (emphasis added).

91. Rountree, *Instantiating*, *supra* note 20, at 3.

92. *See* ELIZABETH C. BRITT, REIMAGINING ADVOCACY: RHETORICAL EDUCATION IN THE LEGAL CLINIC 86 (The Pennsylvania State University Press 2018) ("Although law isn't unified, it has systemic features that tend to privilege particular groups at the expense of others.").

93. Rountree, *Instantiating*, *supra* note 20, at 20 ("[D]issents matter because minority constructions of motives create strains evident to those who read majority decisions.").

94. BLAKESLEY, *supra* note 17, at 198 (explaining that pentadic analysis of a textual artifact is a "case study" that accounts more generally for "variations in human communication" on a subject).

reality.[95] In a litigated case, that reality is a legal drama—a dispute that "arises from the conflicting factual and legal perspectives of the parties."[96] Like other products of human thought and experience, judicial opinions "size up" these legal dramas, ascribe motives to the actors in them, and reason accordingly.[97] In this process, judicial opinion language strategically characterizes—or ignores—the actions and motives of every agent to fit how the court has sized up the case.[98] Among these are past, present and future legal and historical actions, including "constitutions (enactments of their founders), laws (acts of legislatures), precedents (acts of former courts), acts of litigants (such as the crimes they are alleged to have committed), and the acts of the government (e.g., law enforcement officers, prosecutors, regulators, etc.)."[99] With such a vast array of actions and motives to characterize, and the ambiguities pervading them, a judicial opinion can typically choose from among several "cuts" of reality in which to anchor the decision.[100]

But two limits restrict how an opinion can shape a cut of reality: (1) the opinion's own pentadic configurations; and (2) the court's institutional role within the legal system. This brings in the normative side of pentadic analysis. If an opinion's cut of reality does not stay within the "open spaces" afforded by the case—that is, if the opinion pushes past the "resources of ambiguity" in portraying acts and motives—its rhetorical efforts will collapse beneath the weight of grammatical strains. These strains signal that an implicit, unstated commitment, aka motive, is driving the analysis;

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95. *See* Rountree, *Instantiating*, *supra* note 20, at 2–6 (contending that judicial opinion language is symbolic institutional action that instantiates the law).

96. Todd, *Poetics and Ethics*, *supra* note 18, at 85 (internal quotations omitted) (quoting Thomas C. Galligan, Jr., *The Tragedy in Torts*, 5 CORNELL J.L. & PUB. POL'Y 139, 139 (1996).

97. *See* Rountree, *Instantiating*, *supra* note 20, at 2–6; *see also* OLIVER WENDELL HOLMES, JR. THE COMMON LAW 1 (Little, Brown, and Company, Boston 19631881) ("The life of the law has not been logic: it has been experience); Victor D. Quintanilla, *Judicial Mindsets: The Social Psychology of Implicit Theories and the Law*, 90 NEB. L. REV. 611, 631 (2012) (discussing the legal realist view that judges "draw on the discretion . . . that the law affords them to address the particular patterns before them").

98. Rountree, *When Actions Collide*, *supra* note 67.

99. *Id.*

100. Rountree, *Instantiating, supra* note 20, at 2 (explaining that a judicial opinion's "strategic representations of motives" are "largely a product of the broad range of acts which appellate judges must review and assess").

otherwise, there is no reason for the rhetoric to step outside its own grammatical lines.[101] Institutionally, judicial opinions decide legal rights and shape the law, and must stay within those lines as well, or risk judicial legitimacy:

> [I]f they are to be persuasive, courts must be careful in the way they justify their decisions, making certain that *their* motives appear legitimate in light of the judicial role. They cannot casually ignore rhetorical constraints by appearing to run against the rulings of other cases for no good reason, ignoring the intent of the legislature, or bending the rules for a pitiable or powerful litigant while disregarding the effect of such a ruling on later cases. [102]

A judicial opinion must therefore walk a tightrope of sorts. Its characterizations of action and motives reflect what the court as an institution wants to accomplish. And this objective must be reconciled with both the opinion's explicit message and the court's need to be perceived as operating within the judicial role. Reconciling these competing demands involves rhetorical maneuvering, sometimes to a degree that an opinion *says* one thing to convey acceptable judicial motives, but then *does* another with its characterizations of action.[103] By analyzing this rhetorical maneuvering in an opinion's language, pentadic analysis uncovers the less appealing and potentially illegitimate judicial motives encoded in these characterizations.[104]

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101. *Id.* 20at 6 (identifying that a chief rhetorical goal of judicial opinions is to "avoid serious grammatical strains").

102. *Id.* at 3.

103. Clarke Rountree's analysis of the various opinions in *Bush v. Gore* makes this plain. In *Judging the Supreme Court*, Rountree analyzed these opinions on the 2000 Presidential election ballot recount. *See generally* ROUNTREE, JUDGING, *supra* note 20. He shows how they characterized "a wide array of actions (by the Founding Fathers, the Florida Legislature, the Florida Supreme Court, the U.S. Congress, and others) to construct their disparate views of what law, justice, and good precedent requires." Rountree, *When Actions Collide*, *supra* note 67, at 4. Rountree's analysis revealed, in ways that legal scholarship did not, how these opinions' constructions of motives drove results and tested the limits of judicial legitimacy. *Id.* at 402–06.

104. Rountree, *Instantiating*, *supra* note 20, at 20 (explaining how judicial opinions take their chosen story and forge it into an authoritative legal decision for the ages); Todd, *(De)Mystification of Environmental Injustice*, *supra* note 36, at 601–602 (explaining how the rhetoric of law impacts the social order).

2. What Pentadic Analysis Adds to Legal Theory's Interpretation of Judicial Opinions

a. The text-motive connection

Pentadic analysis adds value to legal analysis by identifying motives where they can't hide—directly in the text. [105] In judicial opinions, language is a "motivated . . . choice," [106] not an unconscious default; opinions undergo extensive word-smithing to explain themselves.[107] Any motive that is actually driving an opinion will show up in that language, even if framed in "coy rhetorical constructions." [108] In fact, the more sophisticated the opinion's

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105. As a philosophical system for understanding how humans use language to represent reality, the pentadic method and its insights differ from other language-focused sub-disciplines, including the "law in literature" and "law as literature" movements, whose focus is on literary analysis of law and narrative structures in legal language. *See, e.g.*, Rachel H. Smith, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression*, 18 SCRIBES J. LEGAL WRITING 145, 147 (2019) (citing JAMES BOYD WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 401–07 (2018)) (discussing White's seminal "law as literature" text and its analyses of law in relation to works of literature); Richard Weisberg, *What Remains "Real" About the Law and Literature Movement?: A Global Appraisal*, 66 J. LEGAL EDUC. 37, 42 (2016) (framing the purpose of the law and literature movement as using "the stories of the law" to find "a pathway to a sound and fair outcome")——. Pentadic analysis has closer ties to the law and language movement, which examines more generally how law accomplishes action with language and is rooted in the work of Jeremy Bentham and H.L.A. Hart. *See* Susan E. Provenzano, *Can Speech Act Theory Save Notice Pleading*, 96 IND. L.J. 1157 (2021) (explaining speech act theory's grounding in Bentham and Hart's work and arguing that its theory of "how to do things with words" should inform pleading standards). *See generally* JOHN M. CONLEY, WILLIAM M. O'BARR & ROBIN CONLEY RINER, JUST WORDS: LAW, LANGUAGE, AND POWER (3d ed. 2019); Elizabeth Mertz & Jothie Rajah, *Language-and-Law Scholarship: An Interdisciplinary Conversation and a Post-9/11 Example*, 10 ANN. REV. L. & SOC. SCI. 169, 170 (2014).

106. Johnson, *supra* note 28, at 467.

107. *See, e.g.*, Bryan A. Garner, *Interviews with United States Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING 1, 67 (2010) (interview of Justice Scalia stating opinions are revised no less than five times); Patricia Wald, *"How I Write" Essays*, 4 SCRIBES J. LEGAL WRITING 55, 55–56 (1993) (discussing her extensive judicial opinion rewriting and revising process).

108. Rountree, *Instantiating*, *supra* note 20, at 21.

rhetorical strategy, the more effective pentadic analysis is at employing its "universal heuristic" to bring those motives to the surface.[109]

This interpretive, rhetorical notion of "motive"[110] differs from other disciplines' concepts of "motive" in two important ways. First, pentadic analysis does not aim to peer into the hearts and minds of individual judges or their personal or political values.[111] Rather, pentadic analysis extracts *institutional* motives, which are *rhetorical* constructions embedded right in language of the opinion, where the court says in a unified text[112] what it is doing and why. No matter how many editing passes and pens (or word processors) contribute to the final product, a judicial opinion is a permanent institutional

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109. Rountree, *Coming to Terms*, *supra* note 20, at 1; *see* Kneupper, *supra* note 37, at 17.

110. *See* BURKE, GRAMMAR, *supra* note 18, at 173 ("A motive is not some fixed thing, like a table, which one can go and look at. *It is a term of interpretation.*") (emphasis added).

111. ROUNTREE, JUDGING, *supra* note 20, at xiv, 406 (explaining that judicial motives consist not of internal, individual thoughts, but rather, in "[w]hat judges *say* about what they are doing and why they are doing it" in the text of the opinion); Kneupper, *supra* note 37, at 17 ("The Dramatistic view of language as motive is subtle and distinct from psychological theories of motive . . . .").

In contrast, "get inside the judicial mind" is the prevailing emphasis of legal and political science scholarship, which infers internal judicial mindsets and values from case outcomes rather than a philosophically grounded understanding of language in an opinion. *See, e.g.*, Beiner, *supra* note 1, at 693 (theorizing that judicial cognitive bias plays a role in discrimination case outcomes) (citing Nancy Gertner & Melissa Hart, *Employment Law: Implicit Bias in Employment Litigation*, 1 (Implicit Racial Bias Across L., Working Paper No. 12-07, 2012)); Gertner, *supra* note 6, at 109 (inferring that judges are "hostile to discrimination cases. Although the judges may have *thought* they were entirely unbiased, the outcomes of those cases told a different story.") (emphasis added); Stone, *supra* note 3, at 159 (attributing a judicial "fundamental mistrust of plaintiffs' allegations of intentional discrimination" to judge-made doctrine).

112. *See* Linda Greenhouse, *Chief Justice Roberts in His Own Voice: The Chief Justice's Self-Assignment of Majority Opinions*, 97 JUDICATURE 90, 90 (2013) ("In writing for the majority, a chief justice, no less than any other majority-opinion author, is speaking for the Court, not simply for himself . . . ."); Harold J. Spaeth, *Distributive Justice: Majority Opinion Assignments in the Burger Court*, 67 JUDICATURE 299, 300 (1984) ("The author of the Court's opinion . . . is not a free agent; typically he must also satisfy the views of at least four other justices besides himself.").

expression that stands for posterity.[113] Baked into that expression are characterizations of action and motives collectively agreed upon by the judges who joined the opinion—regardless of these characterizations' initial origins, the judges' reluctance to agree, or the bargaining chips used to extract consensus.[114] In this sense, it is proper to speak of an opinion's "language *as motive*,"[115] irrespective of individual judges' thoughts or contributions.

That leads to the second difference: pentadic analysis does not infer motives from voting across cases, outside writings, or personal traits.[116] It *decodes* motives from a philosophical analysis of the text.

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113. Even if the court's decision is reversed or vacated, the written opinion does not disappear from public view; it remains on the books.

114. And of course, a lack of consensus on these motivated language choices produces dissenting and concurring opinions, which can be mined for their own motives and competing cuts of reality.

115. BURKE, LANGUAGE AS SYMBOLIC ACTION, supra note 18, at 16–17 (emphasis added).

116. Studies linking judicial ideology, values, and other personal traits to judicial decision-making use empirical or experimental methods rather than performing a qualitative analysis of opinion language. *See, e.g.*, Quintanilla, *supra* note 97, at 629 (discussing these empirical and experimental methodologies and how they "offer[] one explanation why different judges offer diverse factual assessments when deciding similar cases"); Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 308 (2013) (discussing motivated cognition methods that evaluate how unconscious processes affect judges' ability to "make cognitively neutral determinations, especially in the face of ambiguous or subjective legal standards"); Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 855 (2015) (employing experimental methods to the same end).
But the evidence of how ideology, values, and personal characteristics impact judicial decision-making is mixed, and this connection has not been studied in the workplace discrimination summary judgment context or through an immersive analysis of opinion language. *Compare* Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87, 112–13 (1996) (correlating judges' ideologically driven policy goals with case outcomes based on judicial voting records and ideology measures), *with* Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11, 11 (2013) (revising position to state that ideology "may not even be dominant for many judges" and calling for methods that better capture the complexity of judicial decision making). In their book, *Unequal: How America's Courts Undermine Discrimination Law*, Sandra Sperino and Suja Thomas explain that the evidence of a link between judicial ideology and employment discrimination outcomes is tenuous. *See* SPERINO & THOMAS, *supra* note 1, at 131 (citing, *e.g.*,

While these motives are intrinsic to the opinion being analyzed, the kinds of rhetorical processes that encode judicial motives are not.[117] For that reason, pentadic analysis of a single opinion yields broader insights about judicial rhetorical processes and the motives driving them.[118]

b. A clearer picture of what the opinion is doing and why

Although the legal critiques of employment discrimination doctrine and the theory of dramatism (via pentadic analysis) share an overriding concern for justice and the social impact of judicial opinions, each produces different insights. That is because their interpretive lenses are different—one is about *law* as power and the other is about *language* as power. Broadly speaking, the legal scholarship asks of an opinion, what did it do with the law, is that in keeping with the law's constraints, and it is good or bad for certain segments of society? Pentadic analysis asks, what did the opinion do with language to exert power and shape the social order, and is that good or bad for certain segments of society?[119]

Pauline Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1327 (2009). Professor Kim theorizes that doctrine remains the dominant influence on discrimination case outcomes, not ideology. Kim, *supra*, at 1368).

117. *See* Rountree, *Instantiating*, *supra* note 20, at 2–6 (cataloging common rhetorical processes in judicial opinions).

118. BLAKESLEY, *supra* note 17, at 42 (explaining that pentadic analysis of a text develops more universally "well-rounded accounts of the *patterns* and *reasons* behind our disagreements and our explanations") (emphasis added); KENNETH BURKE AND CONTEMPORARY EUROPEAN THOUGHT: RHETORIC IN TRANSITION, *supra* note 26, at 175.

119. A close legal theory kin to pentadic analysis lives in critical legal studies, with its emphasis on law's entwinement with the political and the social, and its stance that law cannot be freed from bias. James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 689–90 (1985) ("Critical legal theory . . . asserts that 'things could be otherwise,' and in working out the reasons *how* or *why* 'things could be otherwise' it has had to grapple, albeit unconsciously with the fundamental questions of contemporary social and philosophical thought."); *see also* Juhana Salojärvi, *A Counter-Culture of Law: Jurisprudential Change and the Intellectual Origins of the Critical Legal Studies Movement*, 59 AM. J. LEGAL HIST. 409, 443 (2019) (emphasizing critical legal studies' "mixture of theory, philosophy, politics, and academic endeavors"). Critical legal studies "beg[a]n the important work of critiquing the foundational premise that law,

Both have unique competencies. Legal analysis is adept at interpreting judicial opinions on the axis of law and legal reasoning. It treats opinions as products of the legal system and judges them on that baseline, assessing their use of doctrine, legal analysis, evidence, and logic.[120] The primary targets are "legal correctness" (or incorrectness) and the normative implications for the law and the governed.[121] Pentadic analysis is not concerned with legal doctrine as such or what the law should be. It concerns how courts, as institutions of power, use language to serve their rhetorical goals and balance those goals with appearing to act "judicially." The primary targets of this analysis are not legal correctness or the implications for law but how opinions forge selective realities into compulsory commands that seem beyond reproach.[122]

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as distinct from politics, was rule-bound, objective, and neutral, as part of the effort to expose the role of the law in maintaining and legitimizing an unjust status quo." Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1220–21 (2002).

120. Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 64–66, 78, 88. (2008).

121. *Id.* at 64 (describing legal analysis of judicial opinions as "the classic scholarly exercise of reading a collection of cases, finding common threads that link the opinions, and commenting on their significance"); *id.* at 87 ("Legal readers ponder the meaning of a decision for future cases by asking how the outcome in the current case relates to its facts, procedural posture, and the court's reasoning."); *see* Rountree, *Instantiating*, *supra* note 20, at 5 ("Legal scholars prophesy about future actions of persons and [institutions] if particular judicial decisions are reached.").

122. These competencies come through in the contrasting thrusts of law scholars' critiques of *Korematsu v. United States* and Clarke Rountree's pentadic critique in *Instantiating "The Law" and Its Dissents in* Korematsu v. United States*: A Dramatistic Analysis of Judicial Discourse*. Korematsu v. United States, 323 U.S. 214, 219 (1944). *See generally* Rountree, *Instantiating*, *supra* note 20. *Korematsu* upheld the constitutionality of the U.S. military's World War II mass evacuation and relocation of Japanese-Americans and sanctioned Fred Korematsu's conviction for staying put in the face of an evacuation order. *Korematsu*, 323 U.S. at 219. Legal scholars have charged *Korematsu* with constitutional errors in applying strict scrutiny and conducting judicial review of executive actions, along with cementing (if not harboring) the military's racist assumptions about Japanese-Americans and their supposed domestic threat during World War II. *See, e.g.*, Craig Green, *Ending the* Korematsu *Era: An Early View from the War on Terror Cases*, 105 NW. U. L. REV. 983, 1035 (2011); Eric L. Muller, Korematsu, Hirabayashi, *and the Second Monster*, 98 TEX. L. REV. 735, 747 (2020); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 491 (1945); Fritz Snyder, *Overreaction Then*

In keeping with this focus, pentadic analysis sees the "law" in an opinion not as a synthesis of doctrine but as a portrayal of legal agents and their motives, the same way it sees the opinion's "facts" as a portrayal of everyday agents and their motives. Law and facts are equally part of the "situation"[123] that the opinion is sizing up and shaping towards its rhetorical objectives while striving to appear to act judicially. Zeroing in on these efforts, pentadic analysis identifies when they produce faulty internal pentadic logic and carry implicit assumptions.[124] These signal that the court harbors motives that depart from its explicit messaging.[125] That sheds additional light on

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(Korematsu) *and Now* (the Detainee Cases), 2 CRIT 80, 91 (2009).

Rountree's analysis does not focus on legal or factual correctness but unpacks the rhetorical maneuvering in the opinion's characterizations of action. Focusing particularly on the opinion's grammatical strains, Rountree uncovers a range of implicit assumptions about Japanese-Americans, the military's actions, and the Court's own precedent and shows how those assumptions reflect an institutional motive to defer judgment of the military's actions to others. Rountree, *Instantiating*, *supra* note 20, at 7–19. Furthermore, Rountree exposes how *Korematsu*'s rhetorical maneuvering allowed these implicit assumptions and this motive to drive the opinion beneath a veneer of judicial legitimacy. *Id.* at 17–22. Rountree's work thus complements legal scholarship by showing not just *that* the opinion accomplished an outrageous, unjust feat, but *how* and *why* it did so.

123. This view squares with the understanding that law and facts are not ontologically distinct; that law is but one type of "fact." *See* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1790 (2002) (arguing that law and facts are ontologically equivalent).

124. *See* Rountree, *Instantiating*, *supra* note 20, at 7. In *Korematsu*, Rountree found two grammatical strains. *Id.* at 8. One was the opinion's illogical portrayal of the wartime *scene* as shaping the *agent*-military's threat-reduction *purpose* in relocating Japanese-Americans. Nothing about this scene or agent logically determined such a purpose; the military's purpose could equally have been blatant racism. *Id.* at 15. Another strain appeared in the opinion's refusal to portray the Court as the *agent* and *agency* of its own decision. Instead, the agents of decision were portrayed as an ill-fitting past precedent and the military itself. *Id.* at 17. Displacing the Court's own agency this way was illogical in a scene of constitutional review. *Id.*

125. As Rountree explains, the unjust result in *Korematsu* was not just courtesy of watered-down strict scrutiny or turning a blind eye to the evidence of racism, but also the illogical characterizations of action that enabled the opinion to fit decidedly non-judicial goals within judicial messaging norms. *Id.* at 21. By straining the ability of a scene to dictate a purpose, the opinion was able to pass off the military's mass evacuation of Japanese-Americans as a wartime necessity. *Id.* at 9. And by

what the opinion is doing and why,[126] as well as what goal is so important to the court that it is worth risking institutional integrity.

III. EMPLOYMENT DISCRIMINATION DOCTRINE'S OPEN SPACES

As Part II explained, pentadic analysis makes visible rhetorical strategies that judicial opinions deploy within the situational and institutional room that they must maneuver. Herein lie the "open spaces" for a court to exercise rhetorical choice, even as the opinion purports to be hemmed in by the evidence, the law, and the judicial role.[127] The wider that space, the more leeway the opinion has to pave rhetorical pathways toward judicially motivated goals.

In discrimination law, that open space is considerable and can be found in appellate pro-employer summary judgment doctrine.[128] The insight here is not that the doctrine can and has been shaped to favor employers—legal scholarship makes that clear—but that the doctrine is a malleable *agency* that can be molded to an opinion's portrayal of *agents*, *acts*, *scenes*, and *purposes* – all elements that can be characterized to smuggle in pro-employer assumptions. From a rhetorical standpoint, then, pro-employer doctrine performs only part of the work. These characterizations accomplish the rest.

Two jurisprudential developments have maintained the rhetorical space for doctrine to mesh with other rhetorically constructed elements of action in promoting summary judgment. The first is the Supreme Court's foundational employment discrimination proof framework, established in 1973 to assist with gauging discriminatory intent but frequently used to facilitate summary judgment. The second development occurred when the Supreme Court decided *Reeves v. Sanderson Plumbing Products*[129]

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attributing the agency of constitutional review to non-judicial agents—namely, the Executive branch—while invoking strict scrutiny rhetoric, the opinion passed off to the military the power to judge itself. *Id.* at 18. This gave rise to Rountree's conclusion that the opinion embedded a judicial motive to avoid being the "carrier of the burden of proof against the military." *Id.* at 11. Legal scholars had theorized as much, but Rountree found this in the opinion's constructions of motives. *Id.* at 20.

126. ROUNTREE, JUDGING, *supra* note 20, at xv.

127. *See* BURKE, GRAMMAR, *supra* note 18, at xviii.

128. It is possible to read Title VII as a comprehensive ban on discrimination, which is counter to the notion that there is any doctrinal open space for courts to exploit in the first place. It is rhetoric, more than law, that has pushed open this space.

129. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148 (2000).

and *Desert Palace v. Costa*[130] in the early 2000s. These decisions could have reined in the summary judgment phenomenon by constraining the doctrine, but they did not.

A. *The Foundational Open Space: The McDonnell Douglas Framework*

The Supreme Court's 1973 decision in *McDonnell Douglas Corp. v. Green*[131] established a framework for proving discrimination. Although the federal anti-discrimination laws' statutory language sets forth a deceptively simple command—an employer cannot discriminate "because of" an employee's protected status[132]—proving that causal connection is anything but simple.[133] *McDonnell Douglas* set up a burden-shifting framework to show how circumstantial evidence can be used to make this causal connection.

This framework allows a jury to infer intentional discrimination when an employer's reason for acting against the plaintiff is pretextual or caused by the plaintiff's protected trait.[134] Proving pretext is a three-step process. First, the plaintiff must raise a *preliminary* inference of discrimination by establishing statutory coverage and eliminating the most common non-discriminatory reasons for employment decisions.[135] This preliminary inference does

130. Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003).

131. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).

132. Title VII of the Civil Rights Act of 1964, the prototype federal anti-discrimination statute says, in relevant part, that it is illegal to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000(2)(a)(1). The Age Discrimination in Employment Act and the Americans with Disabilities Act contain parallel language. *See* 29 U.S.C. § 623(a)(1) (ADEA); 42 U.S.C. § 12101 (ADA).

133. *See* Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1295 (2008) (discussing the difficulties with proving an employer's intent to discriminate).

134. *McDonnell Douglas Corp.*, 411 U.S. at 801.

135. Zimmer, *supra* note 134, at 1293. Courts vary in their precise formulations of the prima facie case, but its essence is three elements: (1) plaintiff has a statutorily protected status; (2) she suffered a materially adverse employment action; and (3) the action occurred under circumstances giving rise to an inference of discrimination. *See, e.g.*, Luster v. Vilsack, 667 F.3d 1089, 1095 (10th Cir. 2011) (citing E.E.O.C. v. PVNF, L.L.C., 487 F.3d 790, 800 (10th Cir. 2007); Ward v. Int'l Paper Co., 509 F.3d 457, 460 (8th Cir. 2007); Bellaver v. Quanex Corp., 200 F.3d 485,

not lead to liability, or even get the plaintiff to a jury.[136] Instead, it shifts the burden to the defendant to "produce," but not persuade about, a legitimate, non-discriminatory reason for its action.[137] If the employer meets this light burden of production, the plaintiff can proceed to a jury with evidence that the employer's reason is a "pretext" for discrimination—which includes evidence that a protected trait caused the decision.[138] This is not as easy as it may seem. For example, if a supervisor testifies in a deposition that he terminated the plaintiff because of her tardiness, and said so when he fired her, the plaintiff's claim will fail on summary judgment unless she has evidence that undermines the tardiness explanation or that implicates her sex in the decision. It is not up to the employer to substantiate its self-serving (if consistent) explanation with time sheets or other documents.[139]

The *McDonnell Douglas* framework has not lived up to its promise.[140] For one thing, the evidence of discriminatory intent is typically in the employer's possession, and it can be well-cloaked. This challenges plaintiffs' ability to maintain the burden of

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494 (7th Cir. 2000).

136. *See* Zimmer, *supra* note 134, at 1248 (explaining that this framework modifies the "traditional structure of civil litigation" because the prima facia case, if shown, does not establish liability).

137. *McDonnell Douglas, Corp.*, 411 U.S. at 801.

138. *Id.* at 802.

139. The lesser used "mixed motive" framework gives employees another option for getting to a jury if they have evidence that a decision maker's discriminatory mindset was a "motivating factor" in the decision, even if other non-discriminatory reasons also contributed. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e–2(m)); Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989). For reasons beyond the scope of this Article, few plaintiffs go this route. *See* Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 194 (2009) ("[C]ases are typically framed in terms of the traditional McDonnell Douglas proof structure"). Moreover, courts dispense with these frameworks only when plaintiffs have "smoking gun"-type "direct evidence" of discrimination. Courts have set a high bar for what counts as direct evidence, as shown in this provocative example: "If the employer tells a job applicant that he will not hire her because she is a woman, that may not be direct evidence of an intent to discriminate because the employer may be joking or teasing." Zimmer, *supra* note 134, at 1276. All of this is to say that for most plaintiffs, the *McDonnell Douglas* framework remains the most viable option.

140. *See* Stone, *supra* note 33, at 157 (explaining that the *McDonnell Douglas* framework disadvantages plaintiffs who lack a smoking gun).

persuasion through all three steps of the framework.[141] For another, the framework's intricacy obscures the ultimate question on summary judgment: whether the record, viewed in the light most favorable to the plaintiff, supports a reasonable inference of discriminatory intent.[142] Most important, the *McDonnell Douglas* framework is a mechanism for proving discriminatory intent through pretext, but it does not define what pretext is.[143]

In the space left open, appellate courts have crafted doctrine defining what does and does not amount to pretext. Most of the doctrine rules *out* discrimination rather than ruling it *in*.[144] Among the frequently invoked maxims are: (1) the "stray remarks doctrine," which discounts a supervisor's overtly biased statements when they are too far removed in time or context from the employment decision against the plaintiff[145]; (2) the "honest belief" doctrine, which treats an employer's flawed explanations for employment decisions as non-discriminatory if they were "honestly believed" at the time[146]; (3) the "almost-twin" comparator rule, under which better treatment of a worker outside the protected class has no bearing on discrimination unless that worker and the plaintiff are identical in *all other respects*[147]; (4) the "same actor rule," which assumes that a supervisor could not possibly harbor discriminatory animus in terminating a person that she originally hired[148]; and (5) the "business judgment" rule, under which courts, reluctant to behave as "super-personnel boards," refuse to probe the reasons behind

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141. *See* Tymkovich, *supra* note 8, at 521.

142. Gertner, *supra* note 6, at 121; Stone, *supra* note 3, at 123.

143. Zimmer, *supra* note 133, at 1283–84.

144. Gertner, *supra* note 6, at 121–22; *see* Stone, *supra* note 3, at 123 ("Despite the fact that Title VII's broad remedial goals are articulated so clearly and steeped in so much history, judges have taken it upon themselves to craft strictures that serve to bar or impede certain cases not barred by any language in the statute or any procedural rule.").

145. Gertner, *supra* note 6, at 118; Stone, *supra* note 3, at 131.

146. *See* Zimmer, *supra* note 134, at 1283 (attributing the most extreme version of this rule to Judge Posner: "An honest mistake, however dumb, is not [discrimination]").

147. Peter Siegelman, *Protecting the Compromised Worker: A Challenge for Employment Discrimination Law*, 64 BUFF. L. REV. 565, 596 (2016) ("[M]ost courts require comparators to be virtually identical to the plaintiff in every significant respect."); Sullivan, *supra* note 140, at 216–17 (observing circuit courts' imposition of this rule).

148. Gertner, *supra* note 6, at 122; Stone, *supra* note 3, at 126–31.

employer decisions.[149] By articulating a proof framework without substantive definitions, the *McDonnell Douglas* decision enabled these "one-sided heuristics" to "quickly dispose of complex cases" based on the "incomplete data" of a summary judgment record.[150]

B. *The Space Persists: The Reeves and Desert Palace Decisions*

Nearly thirty years after *McDonnell Douglas*, the Supreme Court issued two decisions that could have closed off this space: *Reeves v. Sanderson Plumbing Products* and *Desert Palace v. Costa*.[151] These decisions made clear that judgment as a matter of law in the employer's favor is not inevitable, and that employment discrimination cases should reach juries no less often than any other type of civil case. But the Court's interpretive resets did not touch the shortcut rules, leaving appellate opinions free to keep using them to match other characterizations of action in favor of summary judgment.

Reeves appeared to have good intentions. It laid to rest a pernicious appellate interpretation of the *McDonnell Douglas* framework called the "pretext plus" standard.[152] Under pretext plus, it was not enough to undermine the employer's explanation for an employment decision; the plaintiff needed something more to raise an inference of discriminatory intent.[153] That "something more" was the sort of bigoted utterance that many discriminators had learned over time to keep to themselves.[154] *Reeves* rejected that notion and made clear what had seemed obvious from *McDonnell Douglas* to all but a steadfast group of appellate courts: a plaintiff can raise an inference of discriminatory intent with circumstantial evidence that simply calls into question the employer's explanations for its decision.[155] Furthermore, clarified *Reeves*, courts must view the

149. Gertner, *supra* note 6, at 122.

150. *Id.* at 116.

151. *Desert Palace, Inc.*, 539 U.S.; *Reeves*, 530 U.S. at 133.

152. *Reeves*, 530 U.S. at 133; Sullivan, *supra* note 140, at 215; Zimmer, *supra* note 133, at 128.

153. *Reeves*, 530 U.S. at 140–41.

154. Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 326 (2010) (explaining what plaintiffs were required to show under the pretext-plus standard).

155. *Reeves*, 530 U.S. at 153–54. *Reeves* was a Federal Rule of Civil Procedure Rule 50 decision reversing the trial court's grant of judgment as a matter of law. FED. R. CIV. P. 50. The standards for summary judgment on a discovery record are parallel to judgment as a matter of law on a trial record. *Reeves*, 530 U.S. at 150

record *holistically*, and assess whether the *sum total* of circumstantial evidence, viewed in the light most favorable to the plaintiff, could lead a reasonable juror to find discriminatory intent.[156]

Desert Palace addressed another interpretive flaw in appellate opinions—this one concerning direct versus circumstantial evidence as proof of intent.[157] Although *Desert Palace* addressed this distinction in the context of the lesser-used "mixed motive" framework for proving discrimination,[158] the decision had interpretive purchase for *McDonnell Douglas* cases too. By using pro-employer rules of thumb so often to shut down plaintiffs' pretext showings, appellate courts had made circumstantial evidence into a second-class citizen. The sense in these opinions seemed to be that if the plaintiff had a real discrimination case, she would be able to point to clearer evidence of bias; and without such evidence, employers are free to make employment decisions at will without violating anti-discrimination laws.[159] *Desert Palace* counteracted this sentiment by saying in no uncertain terms that direct evidence is just as "good" as circumstantial evidence: "The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence.'"[160] As of 2003, then, to get past summary judgment, a plaintiff needed only to have "sufficient evidence"—including solely of the circumstantial type—from which a reasonable juror could draw an inference that discriminatory intent caused an employment decision.[161] The problem is that the Court did not define what

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(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250–51 (1986)). Both inquire as to whether a reasonable juror could find for the non-movant when viewing the facts in the record in the light most favorable to the non-movant.

156. *Reeves*, 530 U.S. at 133.

157. *Desert Palace, Inc.*, 539 U.S. at 91.

158. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e–2(m)); Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989); Sullivan, *supra* note 140, at 194 ("[C]ases are typically framed in terms of the traditional *McDonnell Douglas* proof structure."); Zimmer, *supra* note 133, at 1276.

159. *See, e.g.*, Martin, *supra* note 154, at 350 (stating that lower courts often "regard biased comments with skepticism" when assessing circumstantial evidence of discriminatory intent).

160. *Desert Palace, Inc.*, 539 U.S. at 100 (quoting Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 n.17 (1957)).

161. *Id.* at 101–02.

differentiates direct from circumstantial evidence, leaving another open space.

Reeves and *Desert Palace* hewed to the existing proof framework but gave judges two interpretive outs from the summary judgment trend: (1) pretext (and therefore evidence of intent) can be inferred from false reasons for an employment decision; and (2) circumstantial evidence is a perfectly good method of raising factual disputes about discriminatory intent. The Court did not shut down the shortcuts or lay out any doctrinal rules defining what counts as pretext or how courts should categorize direct and circumstantial evidence. Left to their own doctrinal devices, many appellate courts refused to run with this interpretive ball and came up with their own pet definitions of pretext and direct and circumstantial evidence. The shortcut rules also persisted,[162] giving those courts room to use them to ground their implicit non-discrimination assumptions.

IV. TORGERSON V. CITY OF ROCHESTER: THE EN BANC OPINION

Such was the legal milieu when the Eighth Circuit decided *Torgerson v. City of Rochester* en banc eight years after *Desert Palace*. In a 6-5 opinion overturning a panel decision,[163] the court reinstated summary judgment for the City on two firefighter candidates' national origin and sex discrimination hiring claims.[164] *Torgerson* has been pilloried as a staunchly pro-employer summary judgment decision: one that flouts Supreme Court precedent, deploys doctrinal shortcuts, and disregards disputed evidence on summary judgment.[165] *Torgerson* is also a high-impact case. It changed circuit law[166] and "has taken on a life of its own, being cited positively" by

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162. Stone, *supra* note 3, at 113.

163. Torgerson v. City of Rochester (*Torgerson I*), 605 F.3d 584, 587 (8th Cir. 2010).

164. Torgerson v. City of Rochester (*Torgerson II*), 643 F.3d 1031, 1036 (8th Cir. 2011) (en banc).

165. *See, e.g.*, Beiner, *supra* note 1, at 675 (arguing that *Torgerson* misapprehended" discrimination precedent); Bennett, *supra* note 5, at 688 (arguing that *Torgerson* abandoned well-established summary judgment principles); Schraub, *supra* note 2, at 91 (contending that *Torgerson* was wrong on discrimination law and wrong on procedure).

166. Beiner, *supra* note 1, at 673–74, 677 ("Breaking its own precedent," *Torgerson* "reversed an entire line of cases dating back to at least 1987" and took "the 'ultimate' step in increasing the potential for summary judgment in employment

"over 600 courts" in the first three years after it was decided. Because of *Torgerson*'s influence, its heavy reliance on shortcut rules, and its built-in counterstatements in a panel opinion and a dissent, *Torgerson* is a prime specimen for pentadic analysis of judicial motives on summary judgment.[167]

This section recounts the facts from the summary judgment record in *Torgerson*, followed by a summary of the en banc opinion's holding and reasoning. This legwork sets up Part V's pentadic case study, which yields new insights about *Torgerson* and the rhetorical workings of the rush to summary judgment in discrimination cases.

A. The Summary Judgment Record Facts

In 2005, David Torgerson and Jami Mundell applied to be firefighters for the City of Rochester, Minnesota.[168] The hiring process was regulated by a state statutory scheme and the rules of Rochester's Fire Civil Service Commission, which is appointed by the City Council.[169] By statute and the Civil Service rules, the hiring began with an initial three-phase stage, each of which produced a set of scores: (1) an examination; (2) a fitness test; and (3) a panel interview.[170] The combined scores produced a ranked eligibility list. When vacancies arose, the second stage commenced: a three-person Commission—consisting of Commissioners surnamed Field, Withers, and Powers—certified candidates in rank order.[171] Thus began the third stage: the certified candidates were interviewed by the Fire Chief, who went back to the Commission with hiring recommendations. The Commission then voted on those recommendations.

Torgerson, who is Native American, and Mundell, who is female, made it through the first stage. Their education and experience were

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discrimination cases.").

167. *Torgerson II*, 643 F.3d at 1031. The case is more intriguing still. The panel opinion was unanimous in *reversing* summary judgment, but one of the panel judges—Judge Benton—jumped ship in the intervening year to author the *en banc* opinion *affirming* summary judgment. *Id.* Judge Benton made this about-face even though the legal and factual information before him was exactly the same. This illustrates the challenge of discerning individual judges' psychological mindsets and predispositions.

168. *Torgerson I*, 605 F.3d at 589.

169. *Id.* at 587.

170. *Id.* at 587–88.

171. *Id.* at 588. The opinion does not mention the Commissioners' first names.

right on par with the other candidates, and they received competitive scores on the exam and fitness test, but they did not fare as well in the panel interviews.[172] As a result, Torgerson and Mundell landed low on the eligibility list, ranked 40th and 45th of 48 candidates. When the Fire Chief announced seven vacancies to be filled in 2005, the Commission certified twelve total candidates. Nine were taken in rank order from the eligibility list. The final three, Torgerson, Mundell, and one other "protected group" candidate (PGC), were certified under an expanded process designed to promote the City's affirmative action goals.[173]

The expanded certification was driven by the Fire Commission's desire to get funding under FEMA's SAFER grant program, which offers hiring funds to fire departments that aim to "seek, recruit, and appoint members of racial and ethnic minority groups and women to increase their ranks."[174] But there was a catch to Torgerson and Mundell's certification: they and one other PGC had to compete for a single vacancy—the seventh slot.[175]

Retaining their 40th and 45th rankings, now in a much smaller group but both vying for just one slot, Torgerson and Mundell entered the third hiring stage: a personal interview with the Fire Chief.[176] In the interviews, the Fire Chief admitted that he evaluated PGCs differently. He looked to see if "'something . . . might have been missed . . . some quality or attribute this person brings that didn't come out in the test that we can say, 'Wow, this is a strong candidate regardless of their test scores.'"[177] In interviewing the rest of the candidates, the Fire Chief looked for a "red flag. Something that show[ed] up . . . that might give us a clue that there is a concern about a candidate."[178] Ultimately, the Chief interviewed thirteen candidates.[179] He rejected six, including

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172. *Id.* at 596. Mundell and Torgerson's testing and fitness scores were, at this point, very close to those ranked above them, even though they were ranked 46th and 41st. After the panel interviews, Mundell and Torgerson's rankings rose slightly, but the net effect on their candidacies was worse. *Id.* The disparity between their scores and the scores of the higher-ranked candidates grew considerably because their panel interview scores created a much bigger overall spread. *Id.*

173. *Id.* at 588.

174. *Id.* at 589.

175. *Id.* at 591.

176. *Id.* at 590–91.

177. *Id.* at 591.

178. *Id.*

179. *Id.*

Torgerson, Mundell, and the third PGC.[180]

In his hiring memo to the Commission, the Fire Chief explained that several candidates were rejected for missing certifications, one for lacking maturity and preparedness, and one for not showing up to the interview.[181] As for the PGCs, the Chief stated that they "did not demonstrate[] themselves to be equally or better qualified than the recommended individuals."[182] Regarding Torgerson, the only supporting specifics came from the Chief's interview notes, which stated that Torgerson had "awkward communication[,]" "came across as 'unsophisticated[,]" and "had difficulty communicating[.]"[183] The Chief's notes contained no specifics for rejecting Mundell.[184] The Commissioners accepted the Chief's rejection of Torgerson, Mundell, and the third PGC, but pushed him to reconsider the candidates who were rejected for lack of firefighter certifications. Those candidates, the Commissioners believed, were not given the right information.[185] On this basis, three candidates—but none of the PGCs—were added back into the mix.[186]

When the press revealed that one of these revived candidates—Candidate 3—had a vehicular homicide conviction, the City Council got involved in the process and held an emergency meeting.[187] Just before the meeting, Commissioner Withers talked to one of the City Council members, Councilman Carr. Carr had been monitoring the hiring process because he had concerns about the City's legal exposure. Withers told Carr that "the Commission wanted to hire Candidate 3" because "he was the absolute big, strong firefighter type," or "he was a big guy and that he'd make a good firefighter."[188] The Council then voted to hire Candidate 3 despite his homicide conviction.[189]

Three months later, Councilman Carr asked the Fire Chief about the hired candidates, the SAFER grant, and Torgerson and Mundell specifically.[190] About Torgerson and Mundell, the Chief responded,

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180. *Id.*
181. *Id.*
182. *Id.* (internal quotations omitted).
183. *Id.*
184. *Id.*
185. *Id.* at 591–92.
186. *Id.* at 591.
187. *Id.* at 592.
188. *Torgerson II*, 643 F.3d at 1041.
189. *Id.*
190. *Torgerson I*, 605 F.3d at 599.

"I interviewed them and . . . I found them unfit."[191] Several months after that, Carr called Commissioner Field and asked if he was aware that the SAFER grant "stipulated you hire women and minorities"—an incorrect statement.[192] Field responded that he knew of no such stipulation, but "[h]ad I known, I would have recommended that the City not take the grant."[193]

Torgerson and Mundell challenged the City's failure to hire them under Title VII of the 1964 Civil Rights Act, bringing national origin and sex discrimination claims, respectively.[194] The district court granted summary judgment to the City, reasoning that the record revealed no genuine, material fact disputes for a jury to decide on the issue of discrimination.[195] The Eighth Circuit panel reversed, reasoning that the record contained disputed facts for a jury's consideration.[196]

B. *The En Banc Opinion's Holding and Reasoning*

The en banc Eighth Circuit reinstated summary judgment for the City.[197] The opinion began by stating that it was correcting a string of erroneous precedents that had established an "employment discrimination summary judgment exception"—one that the court said made it *easier* for discrimination plaintiffs to get past summary judgment. The court abrogated this precedent, emphasizing the value of summary judgment as a "tool to determine whether any case, including one alleging discrimination, merits a trial."[198] The court then turned to the plaintiff's proof and found it insufficient to reach a jury. Even though *Reeves* and *Desert Palace* had put direct and circumstantial evidence on equal footing by then, the opinion's summary judgment analysis rested entirely on a direct vs. circumstantial evidence distinction.[199]

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191. *Torgerson II*, 643 F.3d at 1042.

192. *Torgerson I*, 605 F.3d at 603. After receiving concerned constituent calls, Carr begun investigating the hiring process. Carr came to believe, incorrectly, that the SAFER grant *mandated* hiring PGCs rather than encouraging their consideration. *Id.*

193. *Id.*

194. *Id.* at 587.

195. *Id.* at 592–93.

196. *Id.* at 599–600.

197. *Torgerson II*, 643 F.3d at 1036.

198. *Id.* at 1043.

199. *Id.* at 1043–44.

The court started with what it called the plaintiffs' "direct" evidence: (1) Commissioner Field's negative reaction to the SAFER grant's supposed mandatory hiring preferences; and (2) Commissioner Withers' comment that Candidate 3, a convicted felon, was hired because he was a "big guy" or "the absolute strong firefighter type."[200] As a result, these pieces of evidence were not run through the *McDonnell Douglas* framework, where they would have been viewed holistically with the rest of the evidence contributing to pretext. These comments were instead isolated and then discarded as too ambiguous to be "direct evidence" of discriminatory intent.[201] The court then turned to the *McDonnell Douglas* framework to analyze the rest of the evidence, which took three forms: (1) Torgerson and Mundell's relative qualifications; (2) their subjective and unsubstantiated interview assessments; and (3) the Fire Chief's double-standard for interviewing PGCs and his comment that Torgerson and Mundell were "unfit" to be firefighters.[202] None of this evidence, said the court, suggested that Torgerson and Mundell's rejection was a pretext for national origin or sex discrimination. In the end, the court called the record evidence in favor of the City "so one-sided that it does not present a sufficient disagreement to require submission to a jury."[203]

V. A CASE STUDY IN JUDICIAL MOTIVES: PENTADIC ANALYSIS OF THE *TORGERSON* EN BANC OPINION

This Part conducts the pentadic case study of *Torgerson*, revealing what legal analysis alone does not: *Torgerson*'s outcome is more than a matter of hewing to an outdated hierarchy of direct and circumstantial evidence, deploying shortcut rules, and ignoring disputed facts. The outcome was driven by rhetorical choices made in the situational space left open by the record and the doctrinal space left open by the Supreme Court. In these spaces, the opinion sized up and then characterized the actions and motives of a wide range of legal and factual agents—the City through its Fire Chief and Commissioners; the writers of civil procedure and discrimination doctrine; the court as past precedent-setter; and the court as current judicial agent. These characterizations, which carry implicit assumptions and exhibit grammatical strains, powered the

200. *Id.* at 1041.
201. Id. at 1043–44.
202. *Id.* at 1046–47.
203. *Id.* at 1052.

doctrine, and drove the outcome. What is more, these characterizations contrast sharply from the court's error-correcting and procedure-protecting rhetoric, signaling a different motive than the opinion lets on.

The case study proceeds as follows. First, just as Part II's logging speech example distinguished two sets of actions—the local residents' actions discussed *in* the speech and the logging operator's action in *giving* the speech—the case study is divided into two parts: (1) the opinion's characterization of the City's actions in the hiring process; and (2) the opinion's characterization of the court's judicial actions in deciding the case. Based on this division, this Part begins with the "City's Actions Pentad" and then proceeds to the "Court's Decisional Actions Pentad," applying the four-step pentadic method to each.

A. *The City's Actions Pentad: En Banc Opinion*

As shown in Figure 1, the *Torgerson* en banc opinion configured a pentad that ascribed non-discriminatory motives to the City. The opinion cast the *act* as the parties' central dispute:[204] the City's decision not to hire Torgerson and Mundell as firefighters. The opinion made agency the dominant term. That agency was the collective of merit-based statutory and Commission hiring rules.[205] Specifically, the hiring rules' agency dictated a merit-based purpose[206] for the act of rejecting Torgerson and Mundell's candidacies.[207] This shifted responsibility away from the agents who

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204. The pentadic "act" is "the rhetor's presentation of the major action taken by the protagonist or agent." FOSS, *supra* note 13, at at 370. The major thing done in the legal drama of *Torgerson* was the City's refusal to hire Torgerson and Mundell; that is what prompted the litigation. As with the other pentadic terms, what is deemed "the act" is a rhetorical choice. For example, Justice Ginsburg's discrimination opinions frequently broaden "the act" to include an employer's history of discrimination. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 609–11 (2009) (Ginsburg, J., dissenting).

205. A pentadic "agency" is a "means for doing things"—it can take the form of "technologies, methods, policies, laws, rules of thumb, ethical codes, protocols, how-to manuals" and the like. Rountree, *When Actions Collide*, *supra* note 67, at 7.

206. "Purpose" is "what the rhetor suggests the agent intends to accomplish by performing the act." FOSS, *supra* note 13, at 358. It is the end towards which the "agency" is used. Johnson, *supra* note 28, at 480.

207. BURKE, GRAMMAR, *supra* note 18, at 287 ("Once Agency has been brought to the fore, the other terms readily accommodate themselves to its rule.").

made this decision,[208] the Fire Chief and the Commissioners. In line with this, the hiring scene[209] was divided into discrete vignettes centered on the rules' agency rather than human agents' acts. A second potential agency—the SAFER grant and its promotion of diversity—was relegated to the scenic background along with the plaintiffs.

As explained below, this contrived reality was the product of strained grammar resting on an illogical assumption: good rules guarantee good outcomes. This assumption enabled the opinion to portray the City's motive[210] as indisputably non-discriminatory and to put the shortcut summary judgment rules to work.

Pentadic Term	*Rhetorical Correspondent*
Agency (dominant term)	**Hiring Rules**
Act	Rejecting Torgerson and Mundell
Agent	Fire Chief and Commissioners
Scene	Hiring Process (Splintered)
Purpose	Merit-Based

Figure 1: City's Actions Pentad (En Banc)

1. Agency as the Dominant Term: The Hiring Rules Dictate a Non-Discriminatory Purpose for the Agents' Hiring Acts

a. Agency constrains agents and acts

208. "Agents" are humans; they are the protagonists doing the acts in the drama portrayed in the discourse. FOSS, *supra* note 13, at 358. The en banc opinion chose to portray the Fire Chief and the Commissioners as the agents, rather than Torgerson and Mundell. This squares with the opinion's focus on substantiating the non-discriminatory nature of the City's actions rather than the potential merit of Torgerson and Mundell's claims.

209. The "scene" is the "ground, location, or situation in which the rhetor says the act takes place—the kind of stage the rhetor sets when describing the physical conditions, social and cultural influences, or historical causes." FOSS, *supra* note 13, at 370.

210. In pentadic analysis, "motive is located" in the "dominant term"—here, agency—and serves to illuminate the "larger explanation for the rhetor's action." Johnson, *supra* note 28, at 480 (quoting FOSS, *supra* note 13, at 358). Motive is not synonymous with purpose. Purpose is why the *agent* purports to have performed the act, but motive is determined by evaluating the relationships among the five pentadic terms. FOSS, *supra* note 13, at 370.

The en banc opinion makes agency the dominant term by featuring the hiring rules first in the text, treating them in depth, and using word choices and sentence structures to emphasize their constraints on the Fire Chief and the Commissioners.[211] In the fact section, the opinion stresses the "state statute-driven" hiring process which "*directs the Commission* to adopt rules to carry out its purposes." These rules "*must provide*" for "public *competitive examinations* to test the *relative fitness* of applicants."[212] The opinion also speaks of what the statute "requires" or what is "required by" the statute.[213] Beholden to this agency are a set of weak decision-making agents, the Fire Chief and the Fire Commissioners.[214] Sentence structures reinforce these agents' passivity at crucial decision-making junctures: (1) after the first stage of the hiring process—based on three-phased testing and panel interviewing scores—"each candidate *is placed* in rank order;"[215] (2) in the second stage, the Commission votes [*b*]*ased on* that scoring;[216] and (3) in the final stage, the Fire Chief interview "*is used*" to determine if something was "*missed*" in the first stage's three phases.[217]

By making agency the dominant term constraining these agents' acts, the opinion rhetorically exploits a situational "open space." Even on a summary judgment record of "undisputed" facts, the true

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211. Indeed, as Clarke Rountree has explained, agency is the most important pentadic element in legal argument. That is because "following" the law moves agents out of the picture and supports the institutional "rule of law" ideal. Rountree, *Instantiating*, *supra* note 20, at 6 (noting that judges strive to show that their decisions are consistent with precedent and constitutional or statutory text to demonstrate that they are following "the law").

212. *Torgerson II*, 643 F.3d 1031, 1036 (8th Cir. 2011) (emphasis added). This italicized language, which highlights the statutory mandates for the Commission to devise fair and objective hiring rules, is absent from the panel opinion. The panel opinion refers to the "state statute-driven process" but omits how it "directs" the Commissions' rulemaking and leaves out the merit-based aims of the City's testing. *Torgerson I*, 605 F.3d 584, 587 (8th Cir. 2010). That omission makes sense because the testing phase results were not challenged by the plaintiffs.

213. *Torgerson II*, 643 F.3d at 1037. Whether in passive or active voice, each formulation centers the rules and their power. In contrast, the panel opinion's phrasing downplays the statute's agency, often with the words "[a]ccording to the Regulations." *See, e.g.*, *Torgerson I*, 605 F.3d at 588–89.

214. *Torgerson II*, 643 F.3d at 1037.

215. *Id.* (emphasis added).

216. *Id.* at 1038. *Torgerson I*, 605 F.3d at 588 (emphasis added).

217. *Torgerson II*, 643 F.3d at 1038.

agency of Torgerson and Mundell's rejection is ambiguous: did the rules really dictate this result, or was it determined through the power and discretion of the Fire Chief and the Commissioners? The opinion's agency-agent and agency-act configurations reach the former conclusion.

b. Agency constrains purpose

Buttressing these agency-agent and agency-act characterizations is the opinion's configuration of the agency-purpose relationship. This comes through in the opinion's detailed recounting of the two "objective" assessment phases (the exam and fitness testing).[218] The opinion works to make the panel interviews look objective too, by emphasizing human resources training and oversight.[219] These human resource controls are another merit-based agency that ensures a merit-based purpose for rejecting the plaintiffs' candidacies: "The Phase III interviews were conducted as a uniformly applied process using an objective performance scale and objective criteria."[220] This ignores that the most empowered decision makers—the Commissioners—sat as one member of each interview panel.[221] By treating the panels as a set of undifferentiated agents limited to merit-based hiring purposes, the opinion denies the power of the agents most influential in deciding Torgerson and Mundell's fates.

This illogical assumption that rules, not people, make decisions extends to the opinion's characterization of the decisive Fire Chief interviews. The plaintiffs had argued pretext based on those interviews' unconstrained and unexplained subjectivity. While the Fire Chief was content to give specifics for rejecting non-PGC

218. *Id.* at 1036–38. That level of detail is absent from the panel opinion, which devotes far less space to the first two "objective" phases and moves quickly to the panel interviews.

219. "A *private* HR firm *gives a class* to the interviewers *instructing* them" to ensure that "[t]he *identical* questions are asked in the *same* order by the *same* interviewer." *Id.* at 1037. In contrast, the panel opinion does not discuss this uniformity and downplays the HR controls' agency in ensuring an objective process, stating simply that the "human resources *department provides* a set of interview questions." *Torgerson I*, 605 F.3d at 588.

220. *Torgerson II*, 643 F.3d at 1050 (emphasis added).

221. Those panels consisted of a human resources representative, a fire department representative, and one Commissioner. *Id.* at 1050.

candidates,[222] he simply said of the plaintiffs, "they did not demonstrate themselves to be equally or better qualified."[223] Consistent with the agency of merit-based rules dictating a merit-based purpose, the opinion accepts the Chief's boilerplate as a "clear and reasonably specific" rationale. And it carries over the agency of the human resource controls from the panel interviews, emphasizing how the panel's conclusions "match[ed] the Fire Chief's."[224] Treating both sets of interviews as governed by primarily objective, merit-based hiring agencies gave the opinion its choice of shortcut rules to seal the deal—the rule that "the subjectivity of *some components* cannot in and of itself prove pretext or discriminatory intent."[225]

With this agency-purpose configuration, the opinion exploits the ambiguity of purpose. Ostensibly, the point of the City hiring firefighters is to fill a human resource need with capable workers, but the real purposes for any particular hiring decision may be multifaceted or even hidden. By making agency determinative of purpose, the opinion presumes that merit-based means lead to merit-based ends.[226] That is a fallacy—one that discrimination law recognizes by allowing plaintiffs to prove pretext even when decision-making processes appear objective. The agency-purpose configuration thus exhibits a grammatical strain that defies pentadic logic and runs counter to basic tenets of pretext.

2. Agency-Scene and Agency-Purpose Relationships: The Hiring Assessments Dictate the Hiring Scenes and Purposes

The hiring rules' agency also dominates the scene, the "situation in which the rhetor says the act takes place."[227] The opinion says

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222. The specifics given for other candidates were that they did "not demonstrate the level of maturity and preparedness to be successful" or were not technically eligible for hire. *Torgerson I*, 605 F.3d at 591.

223. *Id.* While the Fire Chief's interview notes state that Torgerson was an awkward and unsophisticated communicator, the Chief said nothing about that in the hiring memo. The Fire Chief's interview notes held no such specifics for Mundell. *Torgerson II*, 643 F.3d at 1050.

224. *Torgerson II*, 643 F.3d at 1050. *Id.*

225. *Id.* at 1049–50 (emphasis added) (citing Elliott v. Montgomery Ward & Co., 967 F.2d 1258, 1262–63 (8th Cir. 1992).

226. *See* Todd, *Poetics and Ethics*, *supra* note 18, at 118–19 (explaining that in pentadic configurations, "[t]he means should never compel the ends because it reduces the [human] pentadic Act to mere motion" rather than goal-oriented action).

227. FOSS, *supra* note 13, at 370.

that the act of rejecting the plaintiffs' candidacies took place in the scene of the City's 2005 firefighter hiring process.[228] The opinion then strategically shaped separate hiring scenes around the agency of various assessments, rather than treating the scene as a progressive hiring process with agents who acted in concert to make a hiring decision. This rhetorical scene-crafting made the difference in the opinion's pretext ruling: it enabled the shortcut rules to do their work.

a. Scenic split #1

The first scenic split divided up multiple assessments that yielded the eligibility list. One scene was arranged around the exam and fitness testing. Another was shaped around panel interviews, which made up 40% of the plaintiffs' eligibility score. The opinion's move to separate these interconnected assessments defeated the plaintiffs' pretext argument based on relative qualifications.[229] The plaintiffs contended that the testing and fitness scores were so closely bunched that the plaintiffs were, objectively, just as qualified as the hired candidates—or at least a jury could so find.[230] They argued that the subjective panel interviews made the discriminatory difference by introducing large scoring disparities between them and the other candidates. The court shut down this evidence of pretext with its strategic scenic split:

> *Setting aside the oral interview*—and *basing the rankings* on the undisputed scores in the rest of the process—Torgerson ranks 45th and Mundell 46th, of 48 candidates. As is clear from Table 1 [setting out

228. Kicking off the facts discussing the plaintiffs' candidacies, the court said, "In the fall of 2005, the *City sought to hire* seven firefighters." *Torgerson II*, 643 F.3d at 1038.

229. Recall that the plaintiffs argued three pieces of evidence that, viewed together, supported a reasonable inference of pretext: (1) Torgerson and Mundell's relative qualifications; (2) the subjective and unsubstantiated panel and Fire Chief interview assessments; and (3) the Fire Chief's comment that Torgerson and Mundell were "unfit" to be firefighters. *Id.* at 1046–47.

230. Torgerson's weighted score after the exam and fitness testing was 50.85, putting him ahead of the candidate who wound up ranking eighth—and getting hired—after the panel interview score was factored in. *Torgerson I*, 605 F.3d at 596. Mundell's objective weighted score after the exam and fitness testing was 50.25, "putting her within three-tenths of a point of hired candidate 8." *Id.*

> the rankings], no reasonable jury could find that Torgerson and Mundell were *better qualified* than the hired candidates."[231]

Here, the opinion appeared to take the plaintiffs on their own terms by showing that they were less qualified based on the metrics they touted—their objective rankings. But rhetorically, the opinion limited this scene to the agency of the exam and fitness rankings, rather than expanding the scene to account for the interviews, which drove the final eligibility list scoring. This contrived reality ignored the decisive metric for setting the candidates' qualifications.[232] Notably, the interview scores were produced by agents acting with discretion, while the exam and fitness rankings were produced by rule-determined testing. Thus, in cutting the qualifications *scene* to exclude the most influential agency with the strongest agents—the panel interviews with the greatest scoring impact—the opinion defeated the qualifications argument.

This scene-splitting move unlocked the opinion's rhetorical choice to use two shortcut rules: (1) "[T]o support a finding of pretext, [the applicant] must show that the City hired a *less* qualified applicant"; and (2) "'Similar qualifications' do 'not raise an inference of discrimination.'"[233] With the plaintiffs' exam and fitness ranks, not their scores, as the sole qualifications metric, it became impossible to say that the hired candidates were "less qualified" than the plaintiffs. Things would have figured differently in the alternative reality of a complete first-stage assessment scene. There, with plaintiffs' exam and fitness scores so close to the hired candidates, and the subjective interviews creating the scoring spread, the plaintiffs' relative qualifications would have at least been up for debate. And the shortcut rules would have been an awkward

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231. *Torgerson II*, 643 F.3d at 1048 (emphasis added).

232. Ultimately, the plaintiffs were certified to compete for the seventh vacancy via the SAFER grant's expanded certification, but they still retained their original scores and rankings. *Id.* at 1039–40. Thus, the plaintiffs argued, when the Fire Chief conducted his decisive interviews at the final stage, and evaluated the plaintiffs to see if they were "strong candidate[s] regardless of" their scores, what he saw were numbers artificially deflated by subjective, standardless interview evaluations. *Id.* at 1040. The degree to which the Fire Chief considered those deflated scores in making his hiring recommendations is yet another situational ambiguity swept away with the opinion's weak decision-making agent rhetoric.

233. *Torgerson II* at 1049 (quoting Kincaid v. City of Omaha, 378 F.3d 799, 805 (8th Cir. 2004)).

fit. By illogically omitting a vital scenic piece of the qualifications puzzle, the opinion's rhetoric made way for the doctrine to confirm an undisputed merit-based, non-discriminatory hiring purpose.

b. Scenic Split #2

The next scenic split defeated the plaintiffs' remaining pretext argument. The plaintiffs had argued that the Fire Chief had imposed a higher interview standard for PGCs than for other candidates. Then, after the hiring process was done, the Chief said the plaintiffs were "unfit" for the job, even though they had made it onto the eligibility short-list. These admissions, taken together, were argued to support a reasonable inference of discriminatory intent. The opinion beat this inference by dividing these admissions into unrelated scenes and using agency-drives-purpose logic.

The first scene dealt with the Fire Chief's statement that, during the interviews, he looked for PGCs to "elevate" themselves "to the level of being better than the candidates at the top of the list." The non-PGC's just had to avoid raising a "red flag."[234] On its face, this language suggested that the plaintiffs were held to a higher interview burden *because of their status as PGCs*. Such an interpretation insinuates a discriminatory purpose, especially given the Chief's contradictory and inexplicable statement that plaintiffs were "unfit." But the opinion sliced the Chief's "unfit" remark out of this scene because it was made outside the hiring process. Limiting the scene to what happened under the agency of merit-based rules, the opinion enabled a benign view of the Chief's double-standard and avoided the tainting influence of his "unfit" remark. Isolated this way by the opinion, the Chief's standard suggested merely that he was looking for a reason to hire PGCs such as the plaintiffs.

In any event, said the opinion, no jury could infer discrimination from the Fire Chief's standard because the plaintiffs still "retained their [low] ranks on the eligibility list." As a result, the plaintiffs were not "'similarly situated *in all [] respects*' [to the other candidates]—a 'rigorous' standard at the pretext stage."[235] With the agency of these earlier rankings carried forward to dictate a merit-based purpose in the Fire Chief's interview, nothing the Chief said or did could stand as proof of pretext. The shortcut "similarly situated" rule cemented that understanding.

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234. *Id.* at 1051.

235. *Id.* (emphasis added) (quoting King v. Hardesty, 517 F.3d 1049, 1063 (8th Cir. 2008).

Isolating the Chief's "unfit" remark from the hiring scene, however, presented a rhetorical challenge. The opinion could not cloak it in the hiring rules' merit-based agency, for that remark had nothing to do with the rules. So, the opinion made a different rhetorical choice of agency to attribute a non-discriminatory purpose to this remark—the legal rule of relevance.[236] According to the opinion, the fact that the Chief called the plaintiffs "unfit" was immaterial to the plaintiffs' rejection, because "everyone involved in this case" agreed that the two "were qualified."[237] This makes sense only in the opinion's concocted reality. In a world where hiring rules guarantee merit-based decision-making purposes from beginning to end, the Fire Chief's post-hiring contradiction of "what everyone agreed" is irrelevant to the court, even though contradictions like this are the essence of pretext.

In sum, with these two scenic splits and characterizations of agency, the opinion strategically but illogically avoided treating the Fire Chief's PGC interview standard and his "unfit" statement as two connected actions by the same agent in the same hiring scene. Considered together, these actions could have supported a discriminatory purpose.

3. Populating the Scenic Background with Agencies and Agents to Confirm Merit-Based Hiring Purposes

A variation on this rhetorical move defeated the plaintiffs' "direct evidence." According to the opinion, this evidence took two forms. First was Commissioner Field's statement to Councilman Carr that he would not have expanded the eligibility list to include Torgerson, Mundell, and the other PGC if he had known that the SAFER grant "stipulate[s] you hire women and minorities." Second was Commissioner Withers' proposal to Councilman Carr that the City hire Candidate 3, a convicted felon, because he was a "big guy" or "the absolute strong firefighter type."

The rhetoric in this part of the opinion continues to view the hiring rules' merit-based agency as controlling the Commissioner-agents' acts and purposes. But there is a competing hiring *purpose* in this scene: the City had to consider the SAFER grant's diversity objectives to qualify for federal funding. To avoid dealing with this competing purpose, the opinion relegated the SAFER grant, as well

236. *See generally* Rountree, *Instantiating*, supra note 20, at 21 (characterizing legal rules as "agencies" throughout).

237. *Torgerson II*, 643 F.3d at 1052.

as the plaintiffs, to a passive scenic role. This rhetorical maneuver allowed the opinion to resolve ambiguities about the purpose of the Commissioners' remarks, rather than letting the jury decide.

a. The SAFER grant

Addressing Fields' remark, the opinion first paints him as a weak agent: "it is doubtful that Commissioner Field was a decision-maker in the hirings" because "[h]e was absent when the two other commissioners voted" on them.[238] But there is no reason to question Fields' agency; the opinion quickly concedes that Fields *was* a decisionmaker. He voted on the eligibility rankings, and the hiring was "done in the name of all three Commissioners."[239] Rhetorically, questioning Field's hiring agency allows the opinion to sell his ignorance of the SAFER grant's purpose, which was, "to the extent possible," to "seek, recruit, and appoint members of racial and ethnic minority groups and women" for firefighter jobs.[240] The opinion does not recognize that Fields was in position to understand the grant's true purpose. Instead, it recasts his ignorance as support for Title VII's ban on "mandatory hiring of women and minorities."[241]

By championing Field's alignment with Title VII's limits, the opinion reduces the SAFER grant's diversity-promoting-agency to scenic backdrop. Along with it goes the discriminatory inference raised by Fields' remark, which is assigned a merit-based purpose rather than an anti-diversity purpose. An alternative reality, where the grant is an agency for diversification, not a background element of the hiring scene, would see things differently. The SAFER grant would be an agency that the Commissioners, as agents, can act on with a purpose to facilitate firefighter diversity. Fields repudiated that purpose. Although he voted for the grant, he expressed regret for that vote in the face of a clear misstatement about the grant's objectives. In the process, Fields exhibited hostility towards the grant's women and minority beneficiaries. Viewed this way, Field's protected status-based regret over supporting the grant has, at the

238. *Id.* at 1044.

239. *Id.* at 1045.

240. *Id.* at 1038.

241. *Id.* at 1045 (citing 42 U.S.C. § 2000e-2(j)) ("Commissioner Field's opinion cannot demonstrate a discriminatory animus because Congress explicitly commands that Title VII shall not be interpreted to require preferential treatment because of sex or national origin").

very least, an ambiguous purpose for a jury to sort out.[242]

b. The plaintiffs

The opinion makes a parallel rhetorical move to ascribe a merit-based purpose to Commissioner Withers' desire to hire a "big guy," an "absolute strong firefighter type." This time, plaintiff Mundell is consigned to the scenic background. In pentadic analysis, humans are normally agents doing the action or counteragents challenging the agent.[243] When humans are robbed of their agency and folded into the scene, they are dehumanized and made irrelevant to the action.[244] The opinion relegates Mundell to the scene by reasoning that Withers' comment praising a male candidate's masculinity and strength "does not relate to Mundell."[245] This treats Mundell's candidacy as background to the real action taking place—the consideration of a serious (male) contender for the job. It is true that, by this time, the Fire Chief had effectively ended Mundell's candidacy by recommending against her hire. But the opinion deflects the reality that Commissioner Withers was acting as a hiring agent throughout the entire hiring process. He made comparative candidate evaluations in the interviews, voted on the eligibility rankings, and then, with this comment, expressed a clear preference for a hiring a male. If Mundell and Withers had been afforded their respective "qualities of individual action and decision,"[246] Withers' remark could reasonably be viewed as reflecting a gender-comparative judgment and a discriminatory

242. Indeed, the Commissioners' decision to deploy the SAFER grant in the stingiest possible manner—so that all the PGCs were vying for just one hiring slot—is far from a ringing endorsement of firefighter diversity.

243. *See* Rountree, *Instantiating*, supra note 20, at 7–8, 13–14, 19 (explaining that the Japanese-Americans interned by the military during World War II could have been characterized as "counteragents" to the military in the opinion, but instead were made part of the "dangerous internal scene").

244. *See id.* at 21.

245. *Torgerson II*, 643 F.3d at 1046. The opinion emphasizes that Withers' statement "came in the context of a conversation about a specific candidate just before an emergency Council meeting that focused on reconsidering his appointment."

246. Rountree, *Instantiating*, *supra* note 20, at 21. In the ultimate backgrounding move, the opinion does not mention Torgerson in its analysis of direct evidence other than to recount what he and Mundell are arguing, lumping him into the scene with Mundell.

purpose.

4. The City's Actions Pentad: The Motives Embedded in the En Banc Opinion

All this rhetorical work configuring the City's actions might, on the surface, be chalked up to persuasion strategies, techniques taught in law school. But the foregoing pentadic analysis shows it is far more than that. The opinion's rhetoric expresses a systematic view that the City's decision against Torgerson and Mundell was grounded in pure merit. With its pentadic configurations, the opinion covertly resolved the ambiguities pervading that decision. This, in turn, opened up rhetorical choices for the opinion to make with the doctrine: namely, the choice to use shortcut rules that fit the opinion's cut of reality. It is here, in resolving situational ambiguities under the rhetorical cover of law, that the opinion smuggles in assumptions about the City's non-discriminatory motives. With the hiring rules a dominant *agency* constraining weak agents to act only with merit-based *purposes* in strategically shaped hiring scenes, the opinion conveys the City's motive as an unassailable desire to hire the best qualified firefighters. In the opinion's worldview, the City did not, and in fact could not, discriminate. This is more than the court persuading by framing facts and law. It is the court believing the City's non-discriminatory motives and forging that belief into law.[247]

As for the judicial motives embedded in this rhetoric, the tell is in the opinion's flawed pentadic logic and the disconnects between what the opinion says and what its rhetoric does. What the opinion *says* is that the court is acting judicially, viewing the record "'in the light most favorable to the nonmoving party'"[248] then applying "the

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247. Likewise, the rhetorical work in legal argument is more than a matter of "framing" facts to fit the law or the law to fit the facts. Rhetorically, the act making or shaping law—whether accomplished by judicial, legislative, or executive agents—itself can be opened up into its own pentadic configuration, where the scene, purpose, agent, or agency of the law-making act can be reshaped to move "closer" or "farther" from the disputed litigation acts. *See* Rountree, *Instantiating*, *supra* note 20, at 6 (explaining that judges' "rhetorical choices in one or more pentadic sets can become rhetorical constraints in others, particularly in that pentadic set that includes the judge as agent—the judicial decision itself").

248. *Torgerson II*, 643 F.3d at 1042 (quoting Ricci v. DeStefano, 557 U.S. 557, 586 (2009)) (internal quotations omitted).

law" and finding no disputed facts for a jury to decide.[249] But what the opinion *does* is different. It stretches the agency of merit-based hiring rules to limit the purposes of people who have plenty of power and discretion. When an opinion works so hard to distort the logic of action and the law in the employer's favor while pledging neutrality, the message fights the motive. The message is that the employer did not discriminate in this case, but the opinion's motive is grounded in an implicit assumption that employers do not discriminate.

Neither that message nor that motive is a foregone conclusion. This is shown through the ensuing pentadic analysis of two counterstatements to the en banc opinion: (1) the panel opinion that originally reversed summary judgment; and (2) the en banc dissent.

B. *The City's Actions Pentad: Counterstatement in the Panel Opinion*

Working from the same record and circuit law, the panel opinion makes *agent* the dominant term. Specifically, the Fire Chief and Commissioners are portrayed as agents acting with their own powerful agency throughout the entire hiring scene. This opens up the universe of purposes for the City's hiring decisions (see Figure 2). And it avoids the fallacy that the hiring rules' merit-based means guarantee the decisionmaker's merit-based ends. Moreover, in this configuration of the City's action, the pro-employer shortcut rules do not fit. Some of these rules are cited in the panel opinion, but the opinion's rhetoric leaves no room to deploy them as shortcuts to summary judgment.

Pentadic Term	*Rhetorical Correspondent*
Agent (dominant term)	**Fire Chief and Commissioners**
Act	Rejecting Torgerson and Mundell
Agency	Discretion to Make Hiring Decisions within the Hiring Rules
Scene	Hiring Process (Interconnected)
Purpose	Potentially Discriminatory

Figure 2: City's Actions Pentad (Panel)

Reasoning that the plaintiffs' pretext evidence should be presented to a jury, the panel opinion sizes up the Fire Chief and Commissioners as decision makers with considerable agency and ambiguous purposes. The hiring rules impose some constraints, but

249. *Id.* at 1052.

large portions of the process are left to the Chief and Commissioners' discretion. For example, the Fire Chief's PGC interview standard is presented as his brainchild: he alone resolved to look[] to see" if PGCs could elevate themselves above what their rankings would suggest.[250] Both the panel interviews and the Fire Chief's interview are characterized as inherently subjective with no basis for comparing candidates' answers.[251] Although human resource controls on the panel interviews "minimized susceptibility to abuse, they did not eliminate it"; meanwhile, the Fire Chief had "no controls on [his] subjectivity." The panel opinion thus recognizes that in these decisive interviews, the agents' purposes were unconstrained by the hiring rules.

As for the shortcut rules, the panel opinion mentions that "subjectivity alone does not render an employment decision infirm," but it juxtaposes that rule with the reminder that "subjective procedures are susceptible of discriminatory abuse and require close scrutiny."[252] The latter rule was omitted from the en banc opinion, consistent with its rhetorical characterizations. After all, weak agents kept to merit-based purposes are not "susceptible" to their own biases. The panel and en banc opinions both mention the rule that plaintiffs must be "similarly situated in all relevant respects," but in the panel opinion's estimation, the plaintiffs were similarly situated: their exam and fitness scores stacked up to the rest of the candidates. It was the "inherent subjectivity" of the panel interviews and their substantial impact on scoring which detracted from these qualifications.[253] The panel opinion thus treated the exam and fitness testing and panel interviews as connected agencies directed by City agents in the same scene, leaving their purposes ambiguous—were these agents evaluating merit or effectuating bias? Refusing to resolve this ambiguity of purpose, the opinion says a jury must decide the potential for these agents' "discriminatory abuse of the subjective interview process."[254]

Overall, the panel opinion presents an expansive hiring scene spanning all stages and phases, rather than splitting scenes and arranging them around the rules' various assessments. This portrayal of the hiring scene does not strain pentadic logic; it fits the Fire Chief and Commissioners' collective agency and influence

250. *Torgerson I*, F.3d 584, 591).

251. *Id.* at 598.

252. *Id.* at 601 (Benton, J., dissenting).

253. *Id.* at 588, 590, 595.

254. *Id.* at 598.

throughout the process. For example, the Fire Chief's post-hiring "unfit" comment is considered in the context of three related hiring acts: (1) his interviewing double-standard for PGCs; (2) the rank subjectivity of his interviews; and (3) and his failure to substantiate the plaintiffs' evaluations with relevant specifics.[255] The panel opinion sees all three as perpetrated by a single *agent* with a unified—but ambiguous— *purpose* in a cohesive *scene*.

In sum, as a pentadic counterstatement, the panel opinion shows how shifting the dominant term from *agency* to *agent*—from rules that constrain purposes to agents that act on their own purposes—fashions a competing rhetorical perspective of the case and constructs entirely different motives for the City. In this cut of reality, City agents are capable of harboring discriminatory motives and may well have acted on those motives in rejecting the plaintiffs. The ambiguities of agency and purpose are for the jury to decide.

C. *The City's Actions Pentad: Counterstatement in the En Banc Dissent*

Responding directly to the en banc opinion, the dissent offers a different legal and rhetorical route to a jury trial with a distinct portrayal of motives.[256] Legally, the dissent dispenses with the direct versus circumstantial evidence dichotomy, and treats everything as potential proof of pretext, taking its cue from *Reeves* and *Desert Palace*. Rhetorically, the dissent follows the panel opinion in making *agent* the dominant term. But the dissent's *agent*s are three individuals—the Fire Chief, Commissioner Withers, and Commissioner Field, not the panel interviewers or the Commission as a whole.

With this, the dissent rhetorically pulls away from the panel opinion's focus on the interview *scene*. Specifically, by zeroing in on three powerful people and their verbalizations, not groups and their black-box processes, the dissent paves a more direct rhetorical path

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255. *Id.* at 591.

256. *Torgerson II*, 643 F.3d at 1054 (Smith, J., dissenting). Judge Smith, the same jurist who wrote the original panel opinion reversing summary judgment, also wrote the dissent opposing the reinstatement of summary judgment. The stark rhetorical difference between these two opinions authored by the same judge illustrates the value of determining institutional rhetorical motives embedded in language versus trying to discern individual psychological motives in the mind. What Judge Smith may *think* should matter less to parties and advocates than what Eighth Circuit opinions *do*. Only the latter can be deployed in legal argumentation.

to the possibility of discriminatory intent.

It does so by directly connecting these individuals' singular hiring *agencies* to their remarks suggesting anti-protected class hiring *purposes* (see Figure 3 below). Thus, in the dissent's portrayal, Field's statement that he would not have used his *agency* to vote for the SAFER grant had he known it "stipulated that you hire women and minorities" was not necessarily made for the *purpose* of complying with Title VII. It could just as reasonably be interpreted to reflect a discriminatory purpose: that Field "was opposed to hiring women and minorities under any circumstances, mandatory or otherwise."[257] Agency and purpose were also rhetorically connected by the dissent in addressing Commissioner Withers' "absolute big guy, strong firefighter" remark. The dissent reasoned that this remark, made just before the City hiring vote, "*on its face*, referenced *gender*." The dissent thus saw that Withers used his *agency* to reflect a potentially sex-discriminatory *purpose*: to persuade the councilman that the "model 'firefighter type' is a 'big, strong' 'guy,'"[258] with an implied negative comparison to Mundell, who "[u]ndisputedly, . . . *is not* a big guy."[259] Given Field's and Withers' voting *agency*, these two remarks in a hiring process *scene* that ended with all three PGCs' rejection was ambiguous at best, and warranted a jury's consideration as evidence of discriminatory intent.[260]

Finally, the dissent tied the Fire Chief's hiring *agency* to his *purpose* in his post-hiring remark that the plaintiffs were "unfit." Given the Chief's power over hiring, said the dissent, any conflict between his and others' evaluation of the plaintiffs was "material" to the City's hiring purposes.[261] And the scenic context of this "unfit" remark—made "*during a discussion of the SAFER grant and protected-group candidates*"[262]—suggested that the Chief's evaluative comment was not clearly tied to objective merit.[263]

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257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.* at 1057.
262. *Id.*
263. *See id.*

Pentadic Term	*Rhetorical Correspondent*
Agent (dominant term)	**Fire Chief and Commissioners**
Act	Rejecting Torgerson and Mundell
Agency	Full Discretion to Make Hiring Decisions
Scene	Hiring Process (Interconnected)
Purpose	Potentially Discriminatory

Figure 3: City's Actions Pentad (Dissent)

By putting these three agents' remarks front and center, the dissent makes a rhetorical move with two important consequences. First, the dissent avoids making the hiring rules decisive on the question of intent, because the Fire Chief's and Commissioners' remarks were made outside of formal assessments and evaluations. Second, the dissent renders the shortcut rules impotent. Each of these rules in the en banc opinion concerns objective processes and comparative qualifications. But those processes, and the plaintiffs' ranks and scoring "qualifications," have nothing to do with these remarks.

As a counterstatement to the en banc opinion, then, the dissent shows how centering *agents*, and then evaluating how their *agency* informs their hiring *purposes*, changes the picture of the City's motives. Instead of denying the City officials' agency as the en banc opinion does, or emphasizing their agency *within* the hiring rules and the hiring scene as the panel opinion does, the dissent focuses on their agency *outside* the hiring rules but within the hiring *scene*. Here, in free-floating remarks about the plaintiffs' and PGCs' candidacies, is where the Fire Chief and the Commissioners reflect the potential for discriminatory purposes in their hiring acts. The dissent's pentadic grammar is also logical: what people *do (act or speak)* with their *free will* (*agency*) reflects what they *think (purpose)*. In contrast, the en banc opinion's is not. It would have what people *do* (*act*) and *think* (*purpose*) being dictated by *process (agency)*. That might explain the motives of low-level bureaucrats, but it does not logically explain the motives of high-level officials.

D. *The City's Actions Pentad: Insights from the Counterstatements*

As two counterstatements of the same "reality," the panel and dissenting opinions show that the en banc opinion did not *have* to portray the City's actions and motives the way it did. They also reveal how differences in the dominant term and pentadic relationships—a reflection of how each opinion has sized up the

case—can change outcomes. Fundamentally, these opinions' rhetorical differences are grounded in contrasting implicit assumptions. The en banc opinion's rhetoric carries an implicit assumption that good rules lead to good outcomes no matter who is involved, or how much power they have. In contrast, the panel and dissenting opinions' rhetoric acknowledges that outcomes are only as good as powerful people make them. Indeed, the panel sees the potential for City agents' subjectivity to drive discriminatory purposes through the rules' cracks. The dissent sees the potential for City agents to achieve discriminatory purposes regardless of the rules. Thus, the counterstatements suggest a rhetorical strategy that will be developed in Part VI: change the assumptions, change the results.

The counterstatements also confirm that while doctrine played a role in the en banc opinion's discrimination analysis, it was not the decisive one. For example, the panel opinion cites the same shortcut rules as the en banc opinion; but its rhetoric robs them of force. The dissent uses the *McDonnell Douglas* framework just as the en banc opinion does; but its rhetoric leaves no room for the shortcut rules to operate.

In the end, pentadic analysis of the City's actions reveals that the shortcut rules gain or lose power through the rhetorical narrowing or expansion of an agent's *purpose*s. The en banc opinion uses *agency* to pinpoint one *purpose*: merit-based hiring. That purpose, in turn, activates shortcut rules that set proxies for merit-based decision-making, such as qualifications and objective criteria. In contrast, the panel and dissenting opinions use *agents* to *expand* potential *purpose*s beyond merit-based hiring. Here, the shortcuts to finding merit-based decision making have nowhere to stand.

E. *The Court's Decisional Actions Pentad: En Banc Opinion*

In addition to portraying the City's hiring actions and motives, the en banc opinion characterizes the court's own actions and motives in deciding this summary judgment appeal. These characterizations form a separate pentad (see Figure 4), where the en banc opinion makes *agent* the dominant term. That agent is the court itself, *acting* to "review[] de novo a grant of summary judgment."[264] The court's action has a pointed *purpose*, to which the opinion devotes all of its text before addressing the plaintiffs'

264. *Id.* at 1042.

discrimination claims.[265] In the *scene* of en banc review, that purpose is to safeguard the continued *agency* of summary judgment, "which is not disfavored and is designed for every action."[266]

Pentadic Term	*Rhetorical Correspondent*
Agent (dominant term)	**The Court**
Act	Reviewing Summary Judgment
Agency	Summary Judgment Standards
Scene	En Banc Review
Purpose	Protect the Integrity of Summary Judgment

Figure 4: Court's Decisional Pentad (En Banc)

But, says the opinion, summary judgment faces a threat in the form of another agency: a line of Eighth Circuit precedent establishing a "discrimination case exception" to summary judgment. This exception has, in the opinion's estimation, unfairly eased the burden of discrimination plaintiffs, saddling employers with unnecessary jury trials.[267] To fulfill the court's procedure-saving purpose, the opinion extinguishes this precedential agency, abrogating sixty-two cases going back to 1987.[268]

There is no question that, institutionally, the en banc court is an *agent* with the *agency* to *act* with a *purpose* of protecting procedural rules by overruling erroneous precedent in the *scene* of appellate review. But it surpasses that agency for a court to spurn stare decisis without good reason.[269] Yet that is what the court's rhetoric does, as reflected in a grammatical strain that mischaracterizes the agency of the "summary judgment exception." Eighth Circuit precedent established no such exception. The sixty-two abrogated cases did issue words of caution about granting summary judgment in employment discrimination cases, but they emphasized that

265. *See id.* at 1042–44.

266. *Id.* at 1043 (internal quotations omitted).

267. *Id.*

268. *Id. See also* Beiner, *supra* note 1, at 677.

269. Indeed, that the court resorted to overruling precedent underscores the "pre-constructed" nature of precedent, which, to some degree, ossifies pentadic configurations of the law and hems in the way that later courts can deal with the law. Rountree, *Instantiating*, *supra* note 20, at 22 (explaining "how precedents fix *agencies* for future decisions"). *Torgerson* chose to discard these pre-configurations rather than be limited by them.

heeding caution does not mean forging an outright exception:

> [S]ummary judgment should be used sparingly in the context of employment discrimination and/or retaliation cases where direct evidence of intent is often difficult or impossible to obtain. . . . We have also stated, however, that *no separate summary judgment standard exists* for discrimination or retaliation cases and that such cases are not immune from summary judgment."[270]

In most of the sixty-two opinions, these words were uttered just before *affirming* summary judgment in favor of the employer.[271] The "summary judgment exception," then, had the *agency* of dicta, at best. In exaggerating this *agency*, the opinion strained the court's judicial *purpose* as well. Without a true threat to summary judgment, there was no need to abrogate such a long precedential line in the name of protecting procedure.

In straining pentadic logic, the opinion's rhetoric obscures the *real* agency targeted by the opinion—the well-established rule that juries normally decide questions of intent.[272] As articulated in Eighth Circuit precedent, this rule had counseled courts to take a beat before deciding discriminatory intent on summary judgment (pro-employee orientation), but recognized by so often affirming summary judgment for employers that such caution is rarely warranted in practice (pro-employer orientation). Balanced this way, this precedential procedural rule embodied party neutrality. Hence the rhetorical concealment: the opinion *says* it is getting rid of a rule that unfairly favors employees, but it actually *replaces* an even-handed rule with a rule that favors employers.

The en banc opinion thus sizes up the decisional situation as one where the court *must* step in and correct precedent to protect procedure. Positioned this way, the opinion conveys that the court is acting with proper judicial motives and doing what the law and the judicial role require. But this message is built on flawed pentadic logic that embeds a judicial motive at odds with the judicial role and with Title VII: to act like a jury when deciding discriminatory intent on summary judgment. The *Torgerson* rule, which still stands today,

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270. *Torgerson I*, 605 F.3d at 593. This language is representative of the sixty-two cases. *See Torgerson II*, 643 F.3d at 1058–59 (publishing an appendix of the abrogated cases).

271. *Torgerson II*, 643 F.3d at 1043.

272. *See* Beiner, *supra* note 1, at 674.

reinforces the balance of power in favor of employers, contrary to Title VII's anti-discrimination objectives.

F. *The Court's Decisional Pentad: Insights from the Dissent's Counterstatement*

As shown in Figure 5, the en banc dissent presents a competing cut of decisional reality whose pentadic logic is solid and squares with the judicial role.[273] It switches up act, agency, purpose and scene. The central judicial *act* is cast as the court protecting the *agency* of the jury's fact-finding role with the *purpose* of maintaining the proper allocation of power between judge and jury. This pentadic configuration emphasizes the institutional constraints on the court's agency to decide a case on summary judgment: "we should *never* forget that, at the summary judgment stage, the court should not *weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter*."[274] When discriminatory intent is disputed, the jury is the proper decision-making agent: "If reasonable minds could differ as to the import of the evidence, summary judgment is inappropriate."[275] This construction of act, agency, and purpose is also consistent with the *scenic* feature of Title VII's right to a jury trial, which ensures that "the plaintiff has his day in court despite the unavailability of direct evidence."[276]

Pentadic Term	*Rhetorical Correspondent*
Agent (dominant term)	**The Court**
Act	Reviewing Summary Judgment
Agency	Standards Allocating Judge and Jury Powers
Scene	Title VII's Jury Trial Rights
Purpose	Maintain Proper Judge and Jury Roles

Figure 5: Court's Decisional Pentad (Dissent)

273. Because the original panel opinion did not address the judicial action of "righting" the "summary judgment exception," it cannot stand as a counterstatement on the court's decisional pentad.

274. *Torgerson II*, 643 F.3d at 1054 (Smith, J., dissenting) (quoting Quick v. Donaldson Co., 90 F.3d 1372, 1376–77 (8th Cir. 1996).

275. *Id.*

276. *Id.* (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

With this competing decisional pentad, the dissent shows the degree to which the en banc opinion strays from its institutional *agency* and *purpose* by "conclusively resolving disputed genuine issues of material fact," and "usurp[ing] the jury's role."[277] The dissent does not take on the propriety of abrogating precedent, and it agrees that there should be no "discrimination case exception to summary judgment."[278] But the dissent stops short of saying that its precedent had established such an exception. And it takes aim at the en banc opinion's most significant rhetorical move, which is to treat discriminatory intent different than other types of intent: "The [discrimination] plaintiff's burden at this stage should be no greater than the summary judgment standard requires, i.e., showing that genuine issue of material fact remain that are worthy of the truth-finding machinery of a civil trial by jury."[279]

The question of judicial motive remains. Why did the en banc court do this? What goal is so important to the court that it is worth risking its rhetorical and institutional integrity? After all, the court could simply have reasoned that Torgerson and Mundell's case was among the many that did not merit caution in deciding intent on summary judgment. With its precedential action, however, the en banc opinion signals that the summary judgment tide must turn towards employers in the Circuit, not just in this case. The perceived need for such far-reaching action suggests a strong implicit assumption about the phenomenon of employment discrimination: it is so rare that judges can regularly resolve the issue of discriminatory intent on summary judgment. The judicial motive, right there in the opinion's language, is to forge that assumption into circuit law.

VI. PENTADIC INSIGHTS AND DEFENSIVE STRATEGIES FOR LEGAL SYSTEM PLAYERS

The *Torgerson* case study offers powerful insights into the pro-employer summary judgment phenomenon. This Part details those insights. Part VI.A compares existing legal scholarship critiques to this case study's pentadic critiques, pulling out the unique pentadic contributions. With these contributions in hand, Part VI.B. suggests litigation strategies for legal system actors who wish to push back on

277. *Id.* at 1058.

278. *Id.* at 1054.

279. *Id.* at 1055.

the rush to summary judgment.

A. *How Pentadic Analysis of Torgerson Complements Legal Theory*

The pentadic case study and the existing legal scholarship share the sentiment that *Torgerson* took "the "ultimate" step in increasing the potential for summary judgment in employment discrimination cases."[280] They concur that Eighth Circuit precedent did not establish a "summary judgment exception,"[281] and that in abrogating this trumped-up rule, *Torgerson* made discriminatory intent more amenable to judicial determination than other kinds of intent.[282] But the legal scholarship critiques center on doctrine and precedent—and specifically on *Torgerson*'s legal incorrectness in interpreting precedent[283] and its unjust use of slanted doctrine.[284] For example, in *The Trouble with Torgerson*, Professor Theresa Beiner traces the development of Supreme Court jurisprudence on the thorny issue of deciding intent on summary judgment; tracks the pro-defendant influence of the Court's "summary judgment trilogy"[285] on this issue; and illustrates how appellate discrimination decisions, including *Torgerson*, shaped this precedent into pro-employer discrimination summary judgment doctrine.[286] She categorizes each circuit's pretext doctrine into plaintiff-sympathetic, defendant-sympathetic, and "confused."[287] From this careful study of the law, Professor Beiner draws important insights about how judicial cognitive bias may explain the defendant-sympathetic doctrine in *Torgerson* and other cases. She points out the consequent need for courts to exercise caution on summary judgment until more definitive studies on bias can be done.[288] Consistent with Beiner's doctrinal critique, other scholars, including a former Eighth Circuit Judge and law clerk, have argued that *Torgerson* "emboldened judges to plow over context and wash away reasonable disputes over relevant facts," in a manner "incompatible with the true role of

280. Beiner, *supra* note 1, at 674.

281. *Id.*

282. *Id.*

283. *Id.* at 678–79.

284. *Id.* at 676 ("This article argues that the *Torgerson* court, and courts who decide these cases similarly, have got it wrong as both a matter of law and policy.").

285. *See id.* at 675.

286. *See id.* at 679–94.

287. *See id.* at 692.

288. *See id.* at 698.

summary judgment and hostile to the underlying purposes of antidiscrimination law."[289]

The *Torgerson* en banc dissent delivers its own doctrinal blows. It contends that the court is "so overly enthralled with the *McDonnell Douglas* proof scheme as to lose sight of the proverbial forest through the trees."[290] In particular, says the dissent, the court "allow[s] categories of pretextual evidence to divert [] attention away from the ultimate issue in every case: whether the adverse employment decision resulted from the employer's unlawful discrimination."[291] Rather than evaluating the "totality of the evidence" on intent as *McDonnell Douglas* requires, the en banc opinion improperly looks at "each piece of evidence in a vacuum."[292] The dissent also echoes the legal scholarship refrain that decisions like *Torgerson* "slice and dice" employers' comments into irrelevance by treating them as "direct evidence" and then deeming them "too ambiguous" to count.[293] Altogether, these critiques make a convincing case that *Torgerson* is legally wrong, unjust for employees, and bad for summary judgment and employment discrimination law.

Pentadic analysis of *Torgerson* complements this critique in three ways. First, pentadic analysis shows not just *that Torgerson* is unjust, but *how* and *why* the opinion's language did what it did in order to reach an unjust result—and got away with appearing to act "judicially." The pentadic case study gives a full accounting of how *Torgerson* systematically characterized elements of action to embed the court's perception that the City was incapable of discriminating and that employment discrimination is a rare phenomenon. And it breaks down how the opinion denied situational ambiguities to camouflage these rhetorical efforts. Second, pentadic analysis shows that discrimination doctrine is only part of the problem in *Torgerson*.

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289. Schraub, *supra* note 2, at 91. Schraub clerked for Judge Diana Murphy, who joined the *Torgerson* en banc dissent, and who, according to Schraub, had an "unwritten rule" against citing the case. *Id.* at 6665. Judge Mark Bennett, who critiques *Torgerson* along the same lines, was a district judge within the Eighth Circuit who also sat on the Circuit by designation. *See* Bennett, *supra* note 5, at 688–89.

290. *Torgerson II*, 643 F.3d at 1055 (Smith, J., dissenting) (quoting Blankenship v. Warren Cnty. Sherriff's Dep't, 939 F.Supp. 451, 460 (W.D. Va 1996)).

291. *Id.* (quoting Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 518–19 (2008)).

292. *Torgerson II*, 643 F.3d at 1056, 1058.

293. *Id.* at 1056–57.

The doctrine is merely one element of action—an *agency*—that the opinion characterized to smuggle in pro-employer assumptions. The opinion linked that *agency*, along with the hiring rules' *agency*, to *agent*s, *act*s, *scene*s, and *purpose*s on multiple levels. With so many "action" levers to pull, *Torgerson*'s pro-summary judgment result reflects a complex rhetorical phenomenon. By identifying which levers *Torgerson* pulled and which contrasting levers the panel and dissenting opinions pulled, the case study pinpoints the underlying assumptions—not just the use of doctrine—that drove the disparate outcomes. Third, while legal scholars theorize about judicial hostility and cognitive bias, pentadic analysis connects judicial motives directly to the implicit assumptions embedded in *Torgerson*'s text. While the effect of judicial bias awaits further study, institutional rhetorical motives can be discerned from *Torgerson* and any other opinion, now.

The next section develops a defensive litigation strategy to influence judicial motives: undercut the judicial assumptions driving summary judgment by changing the picture of motives.

B. *Defensive Litigation Strategies: Change the Assumptions, Change the Results*

The *Torgerson* case study suggests new litigation strategies to combat summary judgment from the rhetorical side. Although previous critiques of judicial bias and judge-made doctrine are critical to achieving law change, they are not enough to slow or stop the daily summary judgment march.[294] If judges' cognitive bias impacts summary judgment in discrimination cases, that merits legislative action, but litigants cannot win cases with arguments about those biases. As for the pro-employer doctrine, it remains sticky despite the intrepid work of scholars and lawyers.

Indeed, the plaintiffs' appellate brief in *Torgerson* unwittingly fell into a doctrinal trap. The first seven pages of argument were spent on the Eighth Circuit's cautionary summary judgment language.[295] This strategy not only backfired for the plaintiffs' appeal, it prompted the court to reject its own precedent and the hope of summary judgment neutrality with it.[296] The brief also

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294. *See supra* note 5.

295. *See* Plaintiffs-Appellants' Brief with Addendum at 22–28, *Torgerson I*, 605 F.3d 584 (8th Cir. 2010) (No. 09-1131).

296. Indeed, the en banc opinion cites the plaintiffs' argument as proof of its circuit's summary judgment exception: "Torgerson and Mundell devote one-fourth of

played into the en banc opinion's rigid evidentiary categorizations. Perhaps hoping to avoid the *McDonnell Douglas* framework's mechanics and shortcut rules, the brief carved out the Fire Chief and Commissioners' remarks as "direct evidence," and drew a firm line separating them from the subjective interview evaluations argued as circumstantial evidence.[297] That worked to the plaintiffs' detriment when the en banc opinion made the same evidentiary cut. The opinion deemed the Commissioners' comments too weak to be direct evidence, then refused to consider those comments in the picture of circumstantial evidence. Focusing so much on the doctrine was a lose-lose situation for the plaintiffs.

To avoid such doctrinal futility, and make the most of the "open spaces" and ambiguities of purpose that cases like *Torgerson* present for advocates, pentadic analysis suggests that the next wave of resistance should run through rhetorical strategies that counteract implicit assumptions of non-discrimination. One promising tactic is to rewrite the "interior drama"—the story of how the employer discriminated—to change dominant terms and pentadic relationships. Because *act* and *agent* will remain relatively constant in many discrimination cases,[298] the rhetorical move is to shape *agencies* and *scenes* to reveal an employer-agent's potentially discriminatory *purpose*. For example, in *Torgerson*, the opinion's rhetoric characterized an *agency* dictating a non-discriminatory *purpose*: "the rules made me do it."[299] In cases with different facts,

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their written argument to" panel opinion statements that "summary judgment should seldom or sparingly be granted, not in very close cases, only with caution." *Torgerson II*, 643 F.3d at 1043.

297. *See supra* note 295, at 29–44.

298. Although opinions have rhetorical room to characterize acts and agents, those are required statutory elements. *See* 29 U.S.C. § 623(a)(1) (ADEA); 42 U.S.C.§ 2000e–(2)(a)(1); 42 U.S.C. § 121(a) (ADA). In other words, every discrimination opinion must speak about an employer-*agent* who is allegedly *acting* to discriminate.

299. An alternative rhetorical strategy may run along these lines: "The employer used its business judgment to make this decision, and that's an employer's right when operating in an at will employment environment." Fighting the "business judgment" rhetorical strategy presents a different challenge. Here, the employer is not constrained by any agency other than its own; the *scene* of at-will employment is what cements the employer's non-discriminatory *purposes*. With this strategy, the assumption indulged is not that that rules prevent employers from discriminating, but that employers won't discriminate, even in the absence of such rules. The underlying pentadic logic is that the circumstances (at-will employment) give rise to

the same judicial rhetorical strategy could feature *agencies* such as reductions in force, disciplinary rules, performance plans, employee manuals, employment contracts, and the like.[300] Parallel to *Torgerson*, judicial opinions might rhetorically bolster those *agencies* within *scene*s such as economic downturns, corporate initiatives, and changes in corporate control, in order to attribute non-discriminatory *purpose*s to the *agent*s in those *scene*s. Judicial opinions might even cast plaintiffs as disruptive *counter-agents*, who create a *scene* in which the employer's recourse automatically reflects a legitimate, non-discriminatory *purpose*.

To undercut the non-discrimination assumptions embedded in such rhetoric, advocates need to undermine judicial confidence in the constraining force of these *agencies* and *scene*s. The *Torgerson* panel and en banc dissenting opinions did this by rhetorically uncoupling the Fire Chief and Commissioners' *act*s and *purposes* from the hiring rules' *agency*, shaping a cut of reality where humans' discriminatory *purpose*s were free to operate.[301] Both opinions carried an assumption contrary to the en banc opinion's, one grounded in sound pentadic logic: the Fire Chief and Commissioners had the ability *act* on their own discriminatory *purpose*s no matter what the rules said. In the panel opinion, this logic was grounded in the officials' subjective discretion within the hiring scene; in the dissent, it was grounded in what the officials were free to say and do outside of that scene. Had either version of this competing pentadic logic prevailed, it could have carried over to the court's decisional action pentad as well.[302] Specifically, if employers like the City of Rochester can and do discriminate, the en banc opinion would not have needed to cast aside caution in deciding discriminatory intent on summary judgment. And there would be no corresponding need to "protect" summary judgment's utility in discrimination cases by abrogating

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employers' (non-discriminatory) purposes for acting. The fallacy of this logic is even worse: after all, the broad at-will employment scene's failure to oust discriminatory employers' purposes is what gave rise to anti-discrimination laws in the first place. Corresponding rhetorical strategies can be worked up to expose that flaw.

300. Among the most infamous examples appears in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353 (2011), where the Supreme Court reasoned that the plaintiffs lacked proof of discrimination because "Wal–Mart's announced policy forbids sex discrimination."

301. *Torgerson I* (wherein both the dissent and panel emphasize the Chief and Commissioners' agency).

302. Rountree, *Instantiating*, *supra* note 20, at 20 (discussing how elements of action in one pentadic set can impact another).

precedent. To be clear, the litigation strategy suggested here is not simply to "frame the facts and law" advantageously. It is to upend the judicial worldview of the case by weaving an entire web of action that is congruent with Title VII's assumptions, and incompatible with shortcut rules.

Advocates should also heed the lesson of the dissent's rhetorical switch from the original panel opinion. The panel opinion arguably relied too much on *scene*. Specifically, the panel opinion mediated the City's potentially discriminatory hiring *purposes* through subjective interview *scenes*, but those scenes were still tied to the hiring rules' *agency*. In contrast, the dissent's pentadic configuration featured decision-makers' remarks made *outside* of those *scenes*. From the standpoint of pentadic logic, the dissent's rhetoric is sounder than the panel opinion's rhetoric. *Scenes* limit people less than the rules that govern those scenes, and they limit people less still than their own decision-making *agencies*. In the end, neither the panel nor the dissent carried the day for the plaintiffs. But if the plaintiffs' arguments had strategically portrayed motives by reconfiguring decision-making *agents* to have *purposes* not dictated by *agencies* and *scenes*, the advocates could have shaped a competing cut of reality in which employer-friendly assumptions went toe-to-toe with the Title VII's non-discrimination assumption, instead of butting heads with intractable doctrine. It is conceivable that this version of reality would have carried one more judge, changing the result and saving the precedent.

To sum up, with the *Torgerson* case study's insights in hand, the operative rhetorical targets are now in view. Advocates' arguments can shape judicial decisions by configuring the elements of action to fit realities consistent with the legal baseline of anti-discrimination law—the assumption that employers *do* discriminate.

CONCLUSION

The *Torgerson* case study cannot cure all that ails employment discrimination opinions on summary judgment. But it suggests new ways to loosen the shortcut rules' grip on the larger phenomenon. *Torgerson* characterizes many of the same actions that typically arise in discrimination cases. These repeat "action" players include the employer's decision-making acts; the employer's acts in creating workplace procedures and personnel documentation; and the workplace acts of the plaintiff and other employees. Pentadic analysis on a larger scale can reveal how courts characterize and configure these repeat players' elements of action to: (1) covertly resolve their ambiguities; and then (2) credit the ensuing non-discriminatory employer *purpose* that gives the shortcut rules their

agency on summary judgment. By reconfiguring these elements of action, scholars and advocates can neutralize that agency. Inasmuch as they highlight situational ambiguity rather than denying it, those reimagined configurations can *expand* rather than *contract* potential employer purposes. In an expanded universe of employer purposes, discrimination remains a possibility; it no longer fits the shortcut rules' template. By rewriting the interior dramas in these cases, then, scholars and advocates can undermine judicial non-discrimination assumptions without running headlong into doctrinal barriers.

Furthermore, all appellate summary judgment opinions, like *Torgerson*, must walk the rhetorical tightrope of realizing the court's own goals – its institutional motives – within the constraints of judicially legitimate discourse. In reviewing summary judgment, all appellate discrimination opinions must say that they are viewing the facts in the light most favorable to the plaintiff and simply applying the law to these undisputed facts. The telltale sign that this legitimizing message is at odds with the opinion's rhetorical work is the flawed internal logic uncovered through pentadic analysis. That analysis reveals when, for instance, the opinion is illogically making scenes into free-willed agents, transforming agents into passive scenes, or making agencies control human purposes. Going forward, scholars and advocates can use pentadic analysis across discrimination opinions to expose such flawed pentadic logic and the implicit assumptions behind it.

Nor are the insights of pentadic analysis limited to discrimination opinions. This disciplinary lens offers visibility into the rhetorical workings of any judicial opinion regardless of subject matter. Particularly in areas of law that suffer from doctrinal indeterminacy, intractability, and judicial skepticism – all of which give courts rhetorical room to manuever -- pentadic analysis can pinpoint the enabling rhetorical work. Lawyers and scholars can then leverage these rhetorical strategies to unpack institutional motives. Finally, pentadic analysis need not be a "gotcha" tool or used solely towards law change; its lessons are broader. The method teaches legal system actors to look for rhetorical patterns, not just the qualities of legal analysis, in the quest to better understand judicial motives.

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