Legal Communication & Rhetoric: JALWD

Fall 2013 / Volume 10

BOOK REVIEWS

Ryan A. Malphurs,
Rhetoric and Discourse in Supreme Court Oral Arguments: Sensemaking in Judicial Decisions
(Routledge 2013) (David Ziff, rev'r)

Book Review

Dear Chief Justice Roberts:

Please Tell Justice Scalia to Be Quiet

A review of Ryan A. Malphurs, *Rhetoric and Discourse in Supreme Court Oral Arguments: Sensemaking in Judicial Decisions* (Routledge 2013), 224 pages.

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I. A Book for One Man

I am not the Chief Justice of the United States Supreme Court. I would be willing to bet that you are not the Chief Justice, either. Unfortunately, therefore, neither of us is the intended audience for *Rhetoric and Discourse in Supreme Court Oral Arguments: Sensemaking in Judicial Decisions* (2013), a book that is "directed towards a single individual"—Chief Justice John G. Roberts.[1]

Malphurs's framing device—presenting his book as a letter to the Chief Justice—may seem like a gimmick. It's not. Rather, the "audience of one" evinces Malphurs's uncommon mission. Unlike many examinations of Supreme Court oral argument, Malphurs does not seek to predict decisional outcomes based on a review of arguments. If he did, the audience for his book might be the press, securities traders, or others interested in prognostication. And though Malphurs offers a few bits of advice to lawyers, the advice reads like an epilogue, filling a scant four pages near the end of the book.

Malphurs wants to *improve* oral arguments, to make oral argument a more effective tool for reaching *better* decisions. Chief Justice Roberts is the one person with the most control over how the Supreme Court

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1 Ryan Malphurs, *Rhetoric and Discourse in Supreme Court Oral Arguments: Sensemaking in Judicial Decisions* 1 (Routledge 2013).

conducts oral arguments, so Chief Justice Roberts is the natural audience for Malphurs's book.

This desire to improve the Court's decisions by improving the Court's oral arguments should warm the heart of any proceduralist. After the Supreme Court issues a decision, those who disagree with the substantive outcome often decry the Court's judicial activism, while those on the winning side praise the Court's adherence to precedent, the law, the Constitution, and various other sacred concepts. In this *ex post* crucible, "the Court made a poor decision" is generally synonymous with "the Court issued a decision with which I disagree."

Malphurs has no interest in attacking or supporting the Court's decisions on the merits. Instead, as a scholar of communications, Malphurs focuses on oral argument as the most visible and most communicative of the Court's decisional inputs. By improving that input, Malphurs believes we can improve the quality of the Court's decisions without debating decisional accuracy (or personal agreement) in individual cases. It is a simple and sensible project—the same sort of ingredient-focused approach that would lead a chef to recommend confidently that your lasagna would taste better with fresh instead of frozen spinach, even without trying a bite.

II. Sensemaking and the Supreme Court

A. Sensemaking—a theory of talking and thinking

Malphurs relies on the theory of sensemaking to explain what is wrong with Supreme Court oral arguments and how to improve them. Sensemaking is, as its name suggests, a theory of how people "make sense" of decisions, options, and information.[2] The theory links communication and cognition in the decisionmaking process.[3]

On communication, sensemaking means that the act of discussing a decision can, by itself, influence the speaker's thinking. Malphurs analogizes this phenomenon to the familiar experience of clarifying ideas through writing, or the frustrating experience of an opinion or brief that just "won't write."[4] Moreover, by publicly declaring a particular viewpoint, a speaker may become more committed to the spoken viewpoint and thereafter less likely to compromise or admit error.

2 When summarizing complex theories of communication in his book, Malphurs offers the following disclaimer: "I realize that reducing complex areas of communication into tight descriptions invites disagreement." *Id.* at 61. I ask that my readers, including Malphurs, grant me the same leeway regarding oversimplification through summarization.

3 *Id.* at 12.

4 *Id.* at 41.

On cognition, sensemaking means that people make decisions based on what outcome or conclusion best fits with the ideas and "cognitive commitments" they already possess.[5] In other words, people impose solutions *on* problems instead of seeking solutions *for* problems.[6] Perhaps sensemaking explains the familiar saying: "If the only tool you have is a hammer, you tend to treat everything as if it were a nail."[7]

Malphurs explains sensemaking by contrasting it with two competing theories: rational- choice theory and its companion, the strategic-actor model.[8] As opposed to sensemaking, with its focus on predisposition and top-down thinking, rational-choice theory "proposes that humans weigh all possible options before rationally choosing the best possible solution."[9] The strategic-actor model assumes that people make decisions in accordance with rational-choice theory and that they therefore "gather as much information as possible in order to find the best possible solution in accordance with their preferences."[10] The world of rational-choice theory is the world of Sherlock Holmes, who warned against a process similar to Malphurs's sensemaking: "It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts."[11]

When sensemaking, we do not, on the whole, process information with the rigor and rationality of Sherlock Holmes. Not that there's anything wrong with that. Indeed, Malphurs describes two kinds of sensemaking: the "good" or "mindful" sensemaking on one hand, and the "bad" or "biased" sensemaking on the other. "Mindful" sensemaking occurs when one is aware of preexisting preferences or "cognitive commitments" and therefore seeks out information to balance those thumbs already on the scale.[12] On the other hand, "biased" sensemaking occurs when a person seeks out information to confirm preferences while marginalizing conflicting information. Biased sensemaking is particularly problematic in group decisionmaking, in which an individual's limited perspective may inhibit the group's discussion and consideration of an issue.[13]

5 *Id.* at 38–39.

6 *Id.* at 40.

7 This saying is often attributed to Abraham Maslow. *See e.g.* Judd F. Sneirson, *Soft Paternalism for Close Corporations: Helping Shareholders Help Themselves*, 2008 Wis. L. Rev. 899, 919 n. 112 (2008) (quoting Abraham H. Maslow, *The Psychology of Science* 15–16 (1966)).

8 Malphurs, *Sensemaking, supra* n. 1, at 26.

9 *Id.*

10 *Id.*

11 Arthur Conan Doyle, *A Scandal in Bohemia,* in *The Complete Sherlock Holmes* 163 (Doubleday 1906).

12 Malphurs, *Sensemaking, supra* n. 1, at 39.

13 *Id.* at 45.

B. Sensemaking applied to Supreme Court oral arguments—exposing a flawed process

Supreme Court oral arguments—with their group-communicative decisionmaking—present fertile ground for sensemaking analysis. And Malphurs takes full advantage. In researching this book, Malphurs observed nearly one hundred live oral arguments,[14] though only three cases receive in-depth analysis in the text: *Morse v. Frederick* (the "Bong Hits 4 Jesus" case),[15] *Kennedy v. Louisiana* (on whether the death penalty could be imposed for the rape of a child),[16] and *District of Columbia v. Heller* (on Second Amendment rights).[17]

Based on his observations, Malphurs concludes that Supreme Court oral arguments exhibit biased sensemaking, and that this biased sensemaking negatively affects the Court's decisionmaking process. The Justices' questions during argument "do not always follow a systematic and fair consideration of all possible solutions."[18] Whereas some Justices attempt to engage in mindful sensemaking by gathering information during arguments, other more aggressive Justices often cut off that process by interrupting with their own interrogations. In Malphurs's view, those interruptions "clearly impact[] how other justices [are] able to gather information."[19] And that impact is not positive.

Though many of the Justices receive criticism from Malphurs, his main target is Justice Scalia, whom Malphurs describes as "by far the most consistently active" Justice.[20] Malphurs asserts that Justice Scalia's tone can be "nasty and arrogant" and that his "behavior in oral argument makes it very clear which side he supports and for whom he will vote to win the case."[21] After observing the oral argument in *Morse v. Frederick*, Malphurs concludes that Justice Scalia exhibited "a clear communicative and *possible judicial bias* against" the student respondent.[22]

All of this is quite troubling to Malphurs, who asserts that "Americans should expect more from the nation's highest Court: at the very least, we should be able to expect fairness and measured inquiry."[23] He sees no point to the "[l]ogic games or arm-twisting to expose the weaknesses of an advocate's argument"; in fact, he claims that these aggressive tactics "undermine[] the Court's integrity."[24]

14 *Id.* at 61.

15 551 U.S. 393 (2007).

16 554 U.S. 407 (2008).

17 554 U.S. 570 (2008).

18 Malphurs, *Sensemaking*, *supra* n. 1, at 48.

19 *Id.* at 139.

20 *Id.* at 93.

21 *Id.*

22 *Id.* at 111 (emphasis added).

23 *Id.* at 113.

24 *Id.* at 176.

In a closing letter to the Chief Justice, Malphurs offers some suggested solutions. The Court should give more time for oral argument so that all the Justices—especially the less-aggressive Justices engaged in mindful sensemaking—can ask questions and gather the information they need to make an informed decision.[25] Malphurs praises the Chief Justice's decision to extend oral argument in *District of Columbia v. Heller* as a step in the right direction,[26] though even the *Heller* argument reflected a "flawed approach to problem solving, resulting perhaps in a poorly considered decision."[27]

Moreover, the Chief Justice should encourage the other Justices to behave less like Justice Scalia and more like Justice Thomas.[28] Indeed, Malphurs suggests that Justice Thomas may represent the ideal for judicial decisionmaking.[29] While Justice Thomas is famously silent during oral argument, Malphurs observes that Justice Thomas actively listens during oral argument and that his behavior "appear[s] more indicative of careful reflection than bored indifference."[30]

III. Making Sense of Sensemaking

Malphurs offers a helpful nonlawyer's perspective on Supreme Court oral arguments. Although that perspective presents new and interesting ideas, it also overlooks important aspects of the Court's decisionmaking process. Malphurs implores the Court to decide cases with an open mind. But an open mind is not an empty mind, and Malphurs seems to expect the Justices to approach each case as if they had never before considered how the First Amendment applies to schools or whether the death penalty violates the Eighth Amendment.

We expect the Justices to have views on general matters of constitutional law. That is, after all, why Presidents often appoint sitting judges, lawyers, or law professors to the Supreme Court instead of appointing psychologists or mechanical engineers. We neither want nor expect each decision to be drawn on a blank slate.

Malphurs's opposition to any decisional predisposition is exacerbated by his choice of illustrative arguments. All three cases—*Morse v. Frederick*, *Kennedy v. Louisiana*, and *District of Columbia v. Heller*—were 5–4 decisions along "liberal" and "conservative" lines with Justice Kennedy joining the majority. These were "political" cases resolving hot-button

25 *Id.* at 174.

26 *Id.* at 149.

27 *Id.* at 159.

28 *Id.* at 175.

29 *Id.* at 186–87.

30 *Id.* at 187.

issues. Indeed, the Court likely agreed to hear these cases precisely because the Court wanted to resolve these issues. But 5–4 decisions split along "ideological" lines are quite rare.[31] One wonders if the rhetorical style of oral argument and the quality of the Justices' sensemaking would differ in a statutory-interpretation case in which the majority comprises Justice Sotomayor joined by Justices Scalia, Kennedy, Thomas, and Kagan.[32]

Moreover, Malphurs minimizes the Justices' decisionmaking activities that occur before oral argument. A Justice may come to the argument already convinced by the parties' briefs and her own independent research. Justice Thomas—Malphurs's ideal—readily admits that "for all practical matter the argument's settled in the briefs."[33] Such preargument decisionmaking is not the result of bias; it is the result of effective written advocacy.

And Malphurs's analysis does not address what is likely the Court's most influential form of sensemaking and conversational decision-making—a Justice's conversations with law clerks. Well before oral argument, the Justices have already discussed a case numerous times in chambers. These conversations are not limited to thirty minutes per side, and the Justices rely on them heavily. The "biased" sensemaking that Malphurs witnessed during oral argument may follow an extended period of mindful sensemaking among a Justice and law clerks. Justice Scalia explains, "In my chambers, at least, my law clerks are the principal people with whom I discuss a case."[34] Similarly, Justice Thomas involves all of his clerks in the preparation of every case; before oral argument he has already discussed the case with the clerks and outlined a draft disposition.[35] And Justice Breyer discusses particularly difficult cases together with all of his law clerks.[36]

But Malphurs's book is about oral argument, and it can hardly be criticized for failing to address matters outside of oral argument. To the extent his analysis neglects to fully consider these extra-argument areas of sensemaking, those omissions are a small price to pay for an outsider's perspective and a communication scholar's analysis of the Court's most

31 Generally, less than a quarter of all cases are 5–4 splits, and of those, a sizeable minority do not break down along traditional lines. *See* SCOTUSblog, *Stat Pack for October Term 2011* at 5, http://sblog.s3.amazonaws.com/wp-content/uploads/2013/03/SCOTUSblog_Stat_Pack_OT11_Updated.pdf (last updated Sept. 25, 2012).

32 *See Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012).

33 Bryan A. Garner, *Justice Clarence Thomas*, *Scribes J. Leg. Writing* 99, 103 (2010) (interview).

34 Garner, *Justice Antonin Scalia*, 13 *Scribes J. Leg. Writing* 51, 67 (2010) (interview).

35 Garner, *Justice Clarence Thomas*, *supra* n. 33, at 123.

36 *See* Garner, *Justice Stephen G. Breyer*, 13 *Scribes J. Leg. Writing* 145, 153 (2010) (interview).

public form of communication. Nevertheless, the theory of sensemaking likely has something to say about the Supreme Court's decisionmaking process as a whole—the selection of cases, the parties' briefs, the discussions with law clerks, the Justices' conference, and the drafting and circulating of opinions. Malphurs's book is subtitled "Sensemaking in Judicial *Decisions*," but that phrase overstates his contribution. Rather, he has given us a discussion of sensemaking in *oral arguments*. A more holistic inquiry would be a useful sequel.

Oral argument matters. Reasonable minds may differ as to the extent and the nature of its effects, but as long as the Supreme Court continues to conduct oral argument, it will continue to affect the Court's decisions. Anyone interested in the Supreme Court's administration of justice, therefore, should want those effects to be positive and to improve the quality of the Court's decisionmaking process.

Malphurs makes a strong case that, if we want to improve oral argument, scholars of communications should be part of the effort. How would live streaming audio affect the Court's arguments? What about video? And how would those effects ultimately influence the Court's written opinions? Lawyers often speculate on these matters, but perhaps we should ask communications scholars to help us find some answers.