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ABSTRACT

The Supreme Court opinion's absolute authority and guaranteed admission to the legal canon make it a rhetorically unique genre, but nevertheless one that is illuminated through close analysis. On June 30, 1986, the United States Supreme Court announced its decision in Bowers v. Hardwick, expressing a judgment that the Federal Constitution does not confer "a fundamental right upon homosexuals to engage in sodomy." Written by Justice Byron White, the "Bowers" majority opinion has been one of the most widely attacked opinions in Supreme Court history, primarily because of its selective attribution of constitutional rights, and secondarily because of its open privileging of perceived moral attitudes. To illustrate the connection between language and ideology in Bowers v. Hardwick, this paper focuses on ways in which not only the meaning, but also the voice of the opinion, privileges an attitude of intolerance toward diversity. Mikhail Bakhtin's concept of hybrid constructions provides an avenue to analysis, as the opinion appears to include the case's opposing voices. However, the voice of Michael Hardwick, who initiated the case after being arrested for sodomy, is misconstrued consistently in ways that portray him as perverse, self-serving, and completely ignorant of the law. The monologic nature of the opinion suggests that it was Hardwick's homosexuality, not his case, that was considered. (Author/RS)

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Abstract

The Supreme Court opinion's absolute authority and guaranteed admission to the legal canon make it a rhetorically unique genre, but nevertheless one that is illuminated through close analysis. On June 30, 1986, the United States Supreme Court announced its decision in Bowers v. Hardwick (478 U. S. 186), expressing a judgment that the Federal Constitution does not confer "a fundamental right upon homosexuals to engage in sodomy." Written by Justice Byron White, the Bowers majority opinion has been one of the most widely-attacked opinions in Supreme Court history, primarily because of its selective attribution of constitutional rights, and secondarily because of its open privileging of perceived moral attitudes.

To illustrate the connection between language and ideology in Bowers, this paper focuses on ways in which not only the meaning, but also the voice of the opinion, privileges an attitude of intolerance toward diversity. Bakhtin's concept of hybrid constructions provides an avenue to the analysis, as the opinion appears to include the case's opposing voices. However, the voice of Michael Hardwick, who initiated the case after being arrested for sodomy, is misconstrued consistently in ways that portray him as perverse, self-serving, and completely ignorant of the law. The monologic nature of the opinion suggests that it was Hardwick's homosexuality, not his case, that was considered.

GUARANTEED AUTHORITY AND CONTRIVED DIALOGISM: THE SUPREME COURT'S MAJORITY OPINION IN BOWERS V. HARDWICK

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In 1982, Michael Hardwick was arrested for engaging in sodomy in his bedroom with another adult male. Sodomy is a felony act in the state of Georgia calling for a punishment of up to 20 years imprisonment. Georgia law states that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . ." [Ga. Code Ann. S 16-6-2 (a) (1984)].

After being arrested, Hardwick and his partner were jailed for 12 hours before being released. At a preliminary hearing, the District Attorney decided not to pursue the case unless "further evidence developed" (Bowers 188). Hardwick has stated that he believes he could have had the case thrown out because the arresting officer had entered

his home on an invalid warrant. However, he decided to challenge the constitutionality of his arrest after being contacted by the American Civil Liberties Union, which convinced him that his was "a perfect test case" (Kent 132). The Eleventh Circuit Court of Appeals agreed with Hardwick that "the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation. . ." (Bowers 189). Subsequently, Michael J. Bowers, Georgia Attorney General, appealed the ruling to the United States Supreme Court, which agreed with him that the Court of Appeals made an erroneous decision, and thus ruled to reverse its judgment.

The Court announced its decision in Bowers v. Hardwick (478 U. S. 186) on June 30, 1986, expressing a judgment that the Federal Constitution does not confer "a fundamental right upon homosexuals to engage in sodomy" (190). Written by Justice Byron White, the Bowers majority opinion has been one of the most widely-attacked opinions in Supreme Court history (Kent 116), primarily because of its selective attribution of constitutional rights, and secondarily because of its open privileging of perceived moral attitudes (Agneshwar 3).

An underlying, but very important factor connected to the attacks on Bowers is that the decision represented a major shift away from the Court's 60-year trend of expanding individual rights. In blatant contrast to the highly-publicized decisions of the 1960's and 1970's favoring personal freedom, the majority decision in Bowers emphatically exempted one class of citizens from the Constitutional guarantees of due process and equal protection. This denial of equality is evident explicitly in the opinion's

literal meaning, and implicitly in its stylistic characteristics. To illustrate the connection between language and ideology in Bowers, this analysis will focus on the ways in which both the meaning and the voice of the opinion privilege an attitude of intolerance toward diversity. Throughout the opinion, the voice of Michael Hardwick is misconstrued in ways that portray him as perverse, impertinent, and misguided. The full analysis, which draws on the discourse theories of Russian literary theorist M. M. Bakhtin, suggests that it was Hardwick's homosexuality, and not his argument, that was considered by the five justices who decided against him.

I realize that there could be some question about the applicability of Bakhtin's writings to an analysis of a judicial opinion. Bakhtin's theory is based on novelistic discourse; he never intended it to explain the language of law--or, for that matter, of any nonfictional discourse. Still, his innovative ideas about dialogic and monologic voices in literature do illuminate an understanding of the ways in which voices are controlled and misrepresented in the Bowers majority opinion.

James Boyd White, who advocates a literary approach to the analysis of legal documents, has written that an ideal judicial opinion would demonstrate conclusively that the judge

> . . . had listened to the side he voted against and that he had felt the pull of the arguments both ways. The [decision] that was made. . . would comprise two opposing voices, those of the parties, in a work made by another, by the judge who had listened to both and had faced the conflict between them in an honest way. ("Rhetoric" 315)

With his "listening judge," White advocates what in effect amounts to a conscious Bakhtinian-style dialogism in the judicial opinion. It is not enough, White argues, for judges to say they have considered both sides of a case; they should also make overt efforts in the opinion to show they heard both sides. In the Bowers opinion, Michael Hardwick's claims do appear, but always within a context that misconstrues, denies, or parodies them. In this sense, Hardwick's voice is never truly allowed to enter the opinion.

In fact, the Court openly calls Hardwick's challenge to Georgia's antisodomy law "at best, facetious" (Bowers 194), exhibiting a tone that has been described as "flippancy verging on contempt" (Stoddard 655). This tone continues when the Court discounts Bowers's similarity to other privacy cases on the basis that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated" (Bowers 191). This statement essentially banishes Hardwick from bona fide citizenship on the basis of his supposed "moral inferiority" (Gillerman 7).

Throughout the opinion, Hardwick's argument is mocked and ridiculed through embedded fragments of what superficially appears to be his language. In his theory of the novel, Bakhtin devised a term--hybrid constructions--to describe discourse that "belongs. . . to a single speaker, but that actually contains mixed within it two utterances, two speech manners, two styles, two 'languages,' two semantic and axiological belief systems" ("Discourse" 304). All utterances, Bakhtin wrote in "The Problem of Speech Genres," have "dialogic overtones." Through the close study of utterances, according to Bakhtin, readers can discover "many half-concealed or completely concealed words of

others with varying degrees of foreignness" (92-93). In the remainder of this presentation, I will closely examine several of the opinion's particularly revealing statements, which appear to be the kinds of hybrid constructions described by Bakhtin.

One of the Bowers opinion's most prominent hybrid constructions is the statement that defines the Court's version of the issue considered in the case. This statement reads as follows:

> The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. (190)

Hybrid constructions, Bakhtin explained, are usually structured in such a way that author's view is favored ("Discourse" 306). In the implicit question of the statement above, the phrase "a fundamental right upon homosexuals to engage in sodomy" revises Hardwick's version of the key issue: which is, essentially, his belief that, as an American citizen, he should have the right to freely make choices about his sexual preference and behavior. But in considering Hardwick's claim, the Court apparently could not avoid a focus on its own disdain for Hardwick's particular choice. The statement's embedded reminder that "homosexuals . . . engage in sodomy" is probably not incidental. In response to this and other similar constructions, Justice Harry Blackmun's scathing dissent from the majority opinion denounces "the Court's almost obsessive focus on homosexual activity" (200), pointing out the absence of concern for heterosexual sodomy, which is also illegal under the Georgia law.

Besides its corruption of Hardwick's main argument, the Court's statement of the issue contains a "trump" of sorts, in the form of a sternly disapproving voice that terms homosexual relations as "such conduct." This phrase's full meaning is realized in Burger's concurring opinion, which quotes English laws that describe homosexual sodomy as a crime so heinous, its "very mention. . . is a disgrace to human nature" (197). In Bakhtinian terminology, the phrase "such conduct" may qualify as "an analogous hybrid construction, in which the definition provided by the general opinion of society. . . merges with authorial speech." According to Bakhtin, novelists (such as Charles Dickens, for example) blend the speech of common opinion into their own speech in order to "expose the hypocrisy and greed of common opinion" ("Discourse" 307-308). Certainly the Supreme Court had no such intention, as the voice of a disdainful society is called upon as a moral authority throughout the opinion. Still, it is very interesting, and somewhat frightening, that an utterance that would have been considered parodic in the novel is favored as authoritative in a judicial opinion.

The issue statement contains one more conspicuous voice, apparently the rhetoric of the majority justices' renewed mission to protect states' rights. The statement's final emphasis is upon the many States that have made sodomy illegal "for a very long time." Whereas in the six preceding decades justices had held absolutely no awe for laws on the basis of longevity, the 1986 Bowers decision demonstrated an abrupt restoration of authority to tradition and history. Court observers found this change very disturbing; as one Boston Bar Journal editor wrote, "This reliance on 'ancient roots' ignores the other

occasions, which are both numerous and recent, in which the Court cast aside such roots in favor of constitutional rights" (Gillerman 7).

A few lines beyond the issue statement comes the majority's expression of disagreement with the Court of Appeals. In this sentence, the justices conclusively dismiss both Hardwick's claim and the Court of Appeals judgment that had favored his case.

> We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. (190)

Again, the justices paraphrase Hardwick's argument (and the Court of Appeals ruling in his favor) in language that parodies his version of the case. Hardwick is portrayed in this statement as believing that cases "construe. . . the Constitution," a backward reasoning from most legal viewpoints. He is also implicated for an alleged assumption that he has the interpretive capability to understand and decide his own case. The banal phrase "for all intents and purposes," attributed as it is to Hardwick, implies he made hasty and simplistic leaps in judgment in order to link prior cases to his own.

The justices reiterate their rejection of Hardwick's claims in an especially emphatic statement that concludes their discussion of previous cases. This statement reads as follows:

> Moreover, any claim that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. (191)

The base sentence in this statement is "any claim. . . is unsupportable." The inclusive wording suggests that what the justices really mean is that any claim of the sort that Hardwick would make is unsupportable. Besides this blanket negation, the other language event in this statement is the appearance once again of a revised version of Hardwick's voice. The embedded clause distinctly implies that Hardwick advocates "any kind of . . . sexual conduct." The phrase "any kind of" could mean an infinite number of possibilities, none of which Hardwick was necessarily advocating.

The idea that any attempts to decriminalize sodomy are in essence moves to increase its frequency continually haunts homosexuals and others interested in reform. In Kentucky, my home state, where the Supreme Court is currently considering a challenge to the state's antisodomy law, conservative church and community leaders regularly warn that if sodomy is legalized, it will then have to be taught in schools. The justices' implication that Hardwick advocates "any kind of sexual activity" is just another version of this scare tactic.

To justify their rejection of Hardwick's claim, the majority justices produce two cases that set limits as to which fundamental rights deserve heightened protection--specifically, those rights that are "implicit in the concept of ordered liberty" and those that are "deeply rooted in this Nation's history and tradition." The Court dismisses Hardwick's case as being outside both those limits.

> It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. (192)

Given the previous statements that have challenged Hardwick's understanding of legal interpretation, the first sentence's opening, "It is obvious to us," seems intended as an insult to Hardwick, who is implied to be unable to perceive the obvious. In addition to the veiled insult, two previously-cited hybrid constructions reappear in this sentence sequence. First, a vivid focus on sexual activity is once more embedded within a sentence: "homosexuals. . .engage in acts of. . .sodomy." And again, the justices resort to the euphemism "that conduct" to describe the activity, which, according to Burger, is "not fit to be named"

(Bowers 197).

In the final paragraphs of the majority opinion, the justices reemphasize their position that Hardwick lacks interpretive abilities:

> Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. He relies on Stanley v. Georgia . . . .(195)

The two verbs used by the justices, "asserts" and "relies," both connote a weak, perhaps groundless argument.

In a subsequent statement disclaiming Hardwick's constitutional knowledge, the justices' imagery has distinct overtones of forced sex:

> The right pressed upon us here has no similar support in the text of the

Constitution . . . .(195, emphasis added)

There is no doubt that the majority justices subverted Michael Hardwick's voice in this case through contrived dialogism. James Boyd White, who argued for the inclusion of both voices represented in a case, simultaneously argued against what he describes as "monotonal thought and speech,. . .against the single voice, the single aspect of the self or culture dominating the rest" (Heracle's Bow 124). It is probably a useless venture to expect that Supreme Court justices might exchange their monologic morality for the kind of dialogic morality that White advocates. Still, it seems important for rhetoricians to claim their own bit of analytical authority over the Court's guaranteed authority. Even though rhetorical analysis--like legal criticism--is powerless to change judicial decisions, it can allow an enhanced understanding of the ways in which those decisions were reached. In the case of Bowers v. Hardwick, the opinion's contrived dialogism suggests that it was not Hardwick's argument, but his homosexuality that the justices rejected. I imagine that this conclusion is not news to most of us; still, I believe that the kind of systematic text analysis made possible through a Bakhtinian-style reading can give rhetoricians a distinct power advantage, even over a text with guaranteed authority.

Bakhtin was once asked to comment on the concept of "outsideness." He responded that outsideness is "a most powerful factor in understanding." The reason for this, he explained, is because

> . . .[i]t is only in the eyes of another culture that foreign culture reveals itself fully and profoundly. . . .A meaning only reveals its depths once it has

> encountered and come into contact with another, foreign meaning: they engage in a kind of dialogue, which surmounts the closedness and one-sidedness of these particular meanings, these cultures. (Novy Mir 7)

As a result of this kind of meeting, Bakhtin concluded, the two cultures would be "mutually enriched."

Unfortunately, a dialogue of the Bakhtinian sort appears to have never occurred between Michael Hardwick and a majority of the United States Supreme Court justices. Again, it must be recalled that Bakhtin's theories are based on novelistic discourse. Likewise we should keep in mind that the idealistic White, when he argues for rhetorical analyses of judicial voices, is also writing from a background in literary studies. However, without the kinds of readings suggested by Bakhtin and White, judicial efforts to silence or misconstrue voices may become a norm that is completely unrecognized, or worse, completely unfeared.

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