AIDS, Law, and the Rhetoric of Sexuality

Joe Rollins

Models of judicial decisionmaking have traditionally relied on legal, political, and contextual variables, emphasizing judges' background, litigants' rights claims, and the relative social status of the parties involved. A recent scholarly expansion has brought cultural variables into the equation, indicating that judicial scholarship might usefully include narrative and rhetoric as measures of legal consciousness. This project examines AIDS-related litigation from the U.S. Circuit Courts of Appeals between 1983 and 1995, emphasizing the social construction of sexuality. It uses content-based coding and stepwise probit analysis to evaluate the importance of controlling for language that depicts AIDS as a "gay disease" and its association with death and plague metaphors.

Introduction

Words are arguably the fundamental element of law in Western culture. Scholars working from various disciplinary perspectives have opened up rich and productive ways of thinking about how legal language produces, reifies, or challenges social structures, cultural norms, and technologies of power. Building on the insights of Legal Realism, feminism, critical legal scholarship, and critical race theories, analysts have increasingly turned their attention to legal language. Some researchers explore the ways that language transforms disputes into public discourse, others examine concepts such as rights and their place in political life, and still others consider how disputes operate within the

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specialized language of the law (e.g., Canan et al., 1990; Glendon 1991; Mather & Yngvesson 1980; Merry 1990). Expanding the representational framework has shown how legal language constructs race, gender, and sexuality at multiple sites of social interaction (e.g., Delgado 1989; Eskridge 1997; MacKinnon 1993; Matsuda 1993; Scheppele 1992). The emotive possibilities of personal narrative have gained prominence, drawing attention to the explanatory potential of weaving together legal discourse, storytelling, social theory, or psychoanalysis (e.g., Brooks 1996; Delgado 1989; Ewick & Silbey 1998; Matsuda 1987; Minow 1996; Thomas 1993). Investigators have also begun to explore the intersection of legal and scientific narratives (e.g., Hashimoto 1997; Imwinkelried 2000; Levit 1989; Matoesian 2001; Sanders 2001), inspiring us to consider the ways that facts and artifacts are generated in the courtroom (see Latour & Woolgar 1979). Whether we refer to these approaches, in sanguine or more cautionary terms, as "law and literature," "legal storytelling," or "narrative jurisprudence" (Cover 1986; Dalton 1996:58; Gewirtz 1996:3; Sherwin 1988; Tushnet 1992), words remain the currency in an economy of legal power.

Students of judicial behavior have also been busy developing hypotheses and building statistical models that include an array of potentially influential but non-linguistic elements. Legal and extralegal variables, appointment effects, measures of political context, social and legal issues raised by litigants, and fact-patterns have all been theorized as predictors of case outcomes (see Baum 1997; Dahl 1957; Goldman & Sarat 1979).

In another shift of emphasis, Rowland and Carp (1996) propose that judicial scholars should expand their theoretical frame to encompass cognitive factors as well. Their argument, developed under the rubric of social psychology, suggests that a linguistic analysis of judicial opinions might help inform our understanding of a judge's cognitive frame and, subsequently, may improve models of judicial behavior.

In a related vein, Schneider and Ingram (1993) observe that policymakers deliberately manipulate the images and cultural symbols associated with particular groups and that, subsequently, policies are enacted consonant with the social construction of targeted populations. Unpopular groups become targets of punitive state policies, while more popular ones are offered inducements, tax breaks, and benefits programs. Social problems and the population subgroups with which they are associated thereby become the substance of campaign rhetoric as images and symbols are recruited in the production of value-laden arguments that help determine what policy tools are chosen to achieve desired goals. Who bears the costs and who reaps the benefits of particular policies, and what rationales are employed in order to "win" political debates are partially determined by the symbolic

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associations linked to social problems and population subgroups. Although the courts are not explicitly included as part of Schneider and Ingram's discussion, their argument, coupled with Rowland and Carp's, resonates with Coombe's enticing rumination, "One wonders what an empirically grounded study of metaphor or allegory in legal thought and consciousness might yield" (Coombe 2000:53).

In his introduction to *Law's Stories: Narrative and Rhetoric in the Law*, Paul Gewirtz observes that

> the turn to narrative among legal academics, like their interest in law and literature generally, is a reaction against the two most important contemporary movements in legal scholarship: law and economics, with its reinvigorated scientist approach to law, and critical legal studies, with its own form of abstraction. Those who are drawn to the subject of narrative and rhetoric in law frequently see themselves as resisting the scientism and abstraction of these other legal movements. (1996:13)

Perhaps another way to resist the excesses of scientism and abstraction is to continue developing ways to deploy them simultaneously (e.g., Drass et al. 1997; Matoesian 2001; Musheno et al. 1991). Working together they generate a hybrid technique that not only attends to the positivism of judicial behavior but also echoes the methodologies of critical legal scholars (cf. Kairys 1982; Kelman 1987) by prompting us to examine what judges know and to look anew at the processes by which legal knowledge is produced and circulated. Content analysis of specific words and phrases, the quantifiable building blocks of judicial opinions, opens a window into the symbolic, offering a glimpse of how judges perceive, understand, know, and organize the meaning of particular social phenomena. Such analysis mediates between legal scripts and legal consciousness, showing us how judges perpetuate or resist cultural meanings as they take shape discursively on the broader cultural landscape.[1] As Martha Merrill Umphrey explains, "[T]he domain of the script and the domain of consciousness are mutually constitutive in that they have and produce meaning via their inter-orientation" (1999:396).

The exploration of AIDS law and sexuality presented below might best be described as quantitative interpretation; it juggles narrative, scientism, and abstraction. On one hand, it wrestles with cultural symbols and the construction of a juridical subject and assumes that power is intentional but nonsubjective (Digeser

[1] Ewick and Silbey define "legal consciousness" as a "cultural practice and specifically as participation in the construction of social relations [attempting] to keep alive the tension between structure and agency, constraint and choice" (1998:45). The concept is highly relevant and useful here and includes what we might refer to as sexual consciousness. Sexual consciousness is also a cultural practice that participates in structuring social relations. The tensions captured by Ewick and Silbey's definition, between structure and agency, constraint and choice, are central to and constitutive of late-20th-century conceptions of sexuality as well as to the field of sexuality studies more broadly.

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1994). From this perspective, AIDS and homosexuality are especially vivid and potent at the level of legal consciousness and take their fullest form within the symbolic realm. On the other hand, the approach implies judicial agency, quantifies the metaphoric, and relies on statistical and scientific techniques that ought to be examined as points at which power, knowledge, and discourse intersect. Viewed from this angle, the legal meanings circulated through AIDS and homosexuality appear tethered to material actors, structures, processes, and institutions. Rather than treating these perspectives as oppositional or in conflict, however, it may be surprisingly productive to imagine that they are more alike than they are different. Indeed, both rely on specialized vocabularies and symbolic strategies to render "the law" intelligible through techniques of semiotic reduction and translation. Analysis of legal discourse reaches beyond legal texts to find support in history, psychoanalytic theory, science, philosophy, or statistics in the same way that legal texts and decisions themselves are often braced by the same discursive structures. A statistical rendering of metaphor—although it requires additional interpretive skills from a reader and sacrifices depth in the interest of breadth—should be no more unusual or troubling than a psychoanalytic case reading or a rhetorical examination of scientific evidence. To borrow an inspirational moment from Ewick and Silbey, it is undoubtedly more fruitful to "bridge these dualisms by redefining the relationship between the individual and social structure, reconfiguring what was understood to be an oppositional relationship as one that is mutually defining" (1998:39).

Toward this end the project explores two related questions. First and more generally, can the inclusion of specific cognitive, rhetorical, and linguistic variables improve models of judicial behavior? Second, does the social construction of homosexuality play a central role in AIDS-related case outcomes? It is easy to find obvious examples of anti-gay sentiment in governmental rhetoric,[2] but finding a setting that provides enough material for sustained, empirical analysis of sexuality, and one that is ostensibly non-partisan, means looking elsewhere. Legal materials provide the ideal setting for at least three reasons. First, measuring conceptions of the syndrome, i.e., developing a cognitive model, requires some type of linguistic analysis, and court opinions provide ample material for content-based coding. Second, since legal cases tend to focus and magnify the most socially contentious aspects of a problem, they provide an opportunity to see how different political, social, and cultural hierarchies are manifested in particular policy areas. Third, legal cases tell stories about real people and their interactions with the state. Litigants bring fac-

[2] The "gays in the military" debate, Senator Jesse Helms's position on educational materials that mentioned homosexuality, the National Endowment for the Arts controversy of the late 1980s, civil unions, and gay adoption are just a few examples.

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tual disputes to court, judges articulate the applicable law, as they understand it, and, consequently, we learn about what is contentious in society as well as how the state is attempting to resolve conflict. This final reason is what makes case opinions so ideally suited to rhetorical analysis in ways that journalistic accounts, legislative records, or political speeches are not: There is at least an attempt at or expectation of neutrality and objectivity in the judicial setting.

This project uses the language of AIDS-related case opinions in order to assess the relationship between judicial behavior and the social construction of sexuality. AIDS-related case opinions are ideally suited to such analysis. Despite cause for optimism in the treatment of HIV disease, the story of the crisis is most accurately told as a series of ruptures at various social locations. Its sudden and mysterious appearance among stigmatized minority groups, its sexual transmissibility, debilitating physical effects, fatality, and incurability have resulted in what Paula Treichler very aptly describes as an epidemic of signification (1999). Ergo, AIDS-law offers an especially rich site for studying metaphors, symbolism, language, and social construction. Furthermore, while other researchers have demonstrated that AIDS litigation is fraught with divisive metaphors and negative symbolism, few social scientists have specifically examined the relationships among AIDS, law, and sexuality (cf. Donovan 1996; Drass et al. 1997; Jelen & Wilcox 1992; Jones & Bishop 1990; Musheno et al. 1991). The data gathered for this project provide a unique opportunity to examine judicial responses to AIDS and what that might reveal about American legal, and sexual, consciousness.

The Language of AIDS

To date, some of the most thoughtful investigations into the law of AIDS come from the work of Musheno et al. (1991) and Drass et al. (1997). Their analyses, employing statistical methods to examine the symbolic content of AIDS litigation, reveal that social and cultural factors are significantly related to case outcome. They find that the relative social standing of parties, the types of issues brought to court, the presence of negative AIDS metaphors, and rights claims are linked to case outcomes. The analysis developed below confirms their finding that the presence of weighty symbolic language can predict case outcome. More specifically, however, it also teases apart those metaphors and finds that the social construction of homosexuality is also influential. Whereas Drass et al. find that judicial language regarding AIDS mirrors broader social responses to disease scares and epidemics (1997:274), this project demonstrates that such language also relies upon and reinforces myths and misconceptions about homosexuality. Toward that end it relies on judicial

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language used with reference to homosexuality, but it also includes variables designed to measure and control for political and cultural factors that may influence judges' perceptions and understandings of homosexuality and its relationship to the HIV crisis.

There are no perfect analogies to be drawn among the cases in these data; attempts to draw them are easily unraveled by variations in geography, litigant status, claims made, statutes invoked, constitutional questions—the list is long. It is, nevertheless, instructive to make limited and specific comparisons among the different types of language judges use to describe AIDS and to consider the rhetorical maneuvers achieved through word choices, metaphors, and the symbolic content of opinions. Consider the following passages:

> Certain words when directed at a person deliver such a dread message as to strike terror in that person's heart. AIDS, a modern word, less than 20 years old, is accompanied by many myths and misconceptions; it also carries with it in the public's mind such an image of inevitable death as to bring home that terror.[3] (*Marchica v. Long Island Railroad* [1994])

* * *

> Clearly, an individual's choice to inform others that she has contracted what is at this point invariably and sadly a fatal, incurable disease is one that she should be normally allowed to make for herself. This would be true for any serious medical condition, but is especially true with regard to those infected with HIV or living with AIDS, considering the unfortunately unfeeling attitude among many in this society toward those coping with the disease. An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information.[4] (*Doe v. City of New York* [1994])

In one sense, these two passages recognize the same reality: People with HIV live in a precarious social situation. The word choices and their rhetorical impact, however, are quite different. The first passage, from a case opinion upholding a sizeable monetary settlement for a seronegative employee because he *feared* he *might* have contracted HIV at work, but actually did not, relies upon and reinforces a particular set of beliefs about the syndrome. The court's use of the words "terror," "dread," and "inevitable death" frames the reader's conception of AIDS by invoking our fear of death and drawing us in to empathy with the plaintiff; we can certainly understand why he is entitled to a large cash settlement.

[3] These are the opening lines from *Marchica v. Long Island Railroad* 31 F.3d 1197 (1994) at p. 1199.

[4] This quote comes from *Doe v. City of New York* 15 F.3d 264 (1994) at p. 267.

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The second passage is also drawn from an employment-related case, but in this instance the plaintiff sued his employer because the employer revealed his HIV seropositivity without his consent. Here, the court's rhetorical project is somewhat more challenging: uphold the privacy interests of a plaintiff with AIDS despite widespread social hysteria and occasional demands to identify and segregate people with HIV. The dark language of the first passage contrasts sharply with the second, where instead the author of the opinion employs positive word choices, gender-neutral pronoun strategies, and glimmers of optimism, i.e., references to "living with AIDS," "coping with the disease," and the acknowledgment that AIDS is incurable "at this point." The language chosen not only acknowledges the discrimination and intolerance faced by people with HIV but also works to combat them. Responding to the same social problem, the second passage invokes very different emotive symbols to challenge the assumptions and perceptions reinforced by the first.

When initially identified, AIDS was largely ignored by government and mainstream media. It became newsworthy when it appeared among non-homosexual, non-drug-using, non-Haitian individuals and had seemingly crossed some border previously thought to be impregnable (Grover 1988; Treichler 1999; Watney 1987). Oftentimes, that imaginary border was breached because of confusion and conflict in policies governing blood donation and the regulation of blood products (Feldman & Bayer 1999). Many of the cases collected in this study turn on the Red Cross's policies for screening blood donors, and consequently they explore the shift from understanding HIV transmission risk as a problem of high-risk *groups* to one that involves high-risk *behaviors*. Initially, the U.S. Public Health Service recommended that the Red Cross exclude members of high-risk groups, i.e., homosexual and bisexual men, intravenous drug-users, and Haitians. That policy was changed in the years 1984 and 1985 to reflect the realization that group identification and membership did not serve as a proxy for HIV status, but that particular *acts* might. In short, HIV is transmitted not through identity or group membership, but through behaviors that exchange bodily fluids. Facing this fact, the Public Health Service recommended that the Red Cross change their screening policies and avoid donations by men who have sex with men but who do not identify themselves as homosexual. This shift in policy was explicitly intended to increase the likelihood that blood donors would willingly exclude themselves from making donations without also forcing them to self-identify as part of a stigmatized sexual minority. In one of several cases involving a plaintiff infected with HIV through a blood transfusion, the Red Cross's screening procedures became central. Writing for the Third Circuit, Judge Weis considered this change in policy:

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> Among other screening procedures, a brochure was given by the Red Cross to the donor in January 1985. It did not contain the guidelines on exclusion of high-risk groups recommended by the Public Health Service in December 1984. That guideline defined the high-risk group as homosexual and bi-sexual "[m]ales who have had sex with more than one male since 1979." Instead, the Red Cross brochure described the high-risk group as "[s]exually active homosexual or bisexual men with multiple partners (more than one)."[5] (*Marcella v. Brandywine Hospital* [1995])

Judge Weis wrestles here with the Red Cross's policy change, but the placement of the first quotation mark in the passage also marks a common misunderstanding. Indeed, the Red Cross hoped, then as now, to screen out blood donations from "males who have sex with males," an identity-free mechanism intended to target particular acts. But while the policy change—from the latter quote to the former—was explicitly intended to avoid the stigma implied by requiring all such men to identify as homosexual, the first clause of Judge Weis's sentence returns the act definition to a marker of group identification and thereby defeats its purpose. The court's language undermines the intent of the policy change and reverts back to a determination of sexual identity, and the key element seems to have become numbers of sexual partners. In contrast to the Public Health Service's intended goal, the passage reinforces a conception of AIDS as a problem properly belonging to promiscuous homosexuals. Although little more than a minor slip of the pen, the law of AIDS is shot through with these moments that subtly work to construct the HIV crisis and homosexual identity as metonymic.

Sexual identity operates at the level of epistemology in Western culture, and legal discourse is infused with its flavors even when concrete material markers (e.g., statutes, gay litigants, specific words and phrases, bodily acts) are absent or overlooked. By now it is almost passé to recite Foucault's observation that the sodomite—a temporary aberration and subject of sodomitical acts—became identified as a homosexual "species" (1978:43). As he demonstrated, discursive practices, coupled with technologies of identification and surveillance, made regulatory power automatic, rendered its actual exercize unnecessary, and allowed it to become invisible (1979:201). Barbara Yngvesson's (1997) work on adoption reveals how invisibility—erasure, silence, contradiction, and disjunction—participates in the construction of moth-

[5] *Marcella v. Brandywine Hospital* 47 F.3d 618 (1995), at p. 620, n2. The case is, in important ways, an investigation of a blood donor's sexual history and identity. He seems throughout the opinion to have avoided identifying himself as homosexual—perhaps sincerely, perhaps to avoid adopting a stigmatized identity, perhaps to avoid admitting to himself the possibility that he might be HIV positive. In the end, the identity, fears, and future of "Donor X" remain a mystery to the reader, but the association of HIV disease and homosexuality lingers.

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erhood, showing us the ways that these lacunae serve to regulate kinship, legitimacy, the family, and patriarchy. In the law of AIDS, blood donors, gay nurses, the patrons of adult theaters—people from these case data who may have understood themselves as committing discrete acts—have identities assigned to them through legal language that sometimes operates manifestly, but often as well through these same linguistic gaps. These rhetorical maneuvers in the law of AIDS shore up heterosexuality and, to again borrow Judith Butler's term, homosexuality forms the "constitutive 'outside'" of the American social order (1990; Yngvesson 1997:36). As Sedgwick articulates, sexuality is constituted in the vicinity of the closet, a space that represents complex relations between "the known and the unknown, the explicit and the inexplicit" (1990:3). These works invite us not only to consider how language transmits meaning but also to contemplate how meaning is wrought from silence.

To simply assert that AIDS and homosexuality are linked is to repeat a truism; in Western nations most people with AIDS (PWAs) are gay men. Throughout the past two decades cultural theorists and scholars of sexuality have argued that AIDS is saddled with the unique historical burdens of homosexuality: The stigma, shame, and marginalization associated with it have exacerbated fears of people with HIV and have hindered institutional responses to the crisis; state policies reflect confusion between acts (which can transmit HIV) and identity categories (which cannot), reinforcing hysterical perceptions about the contagiousness of both; hierarchies of culpability sort people with HIV disease into "innocent" and "guilty" victims, morally judging people on the basis of how they came into contact with the virus (Grover 1988; Patton 1986, 1990; Sontag 1988; Treichler 1999; Watney 1987, 1994; Watney & Carter 1989). In the epistemologies of AIDS and homosexuality in Western societies each selectively becomes metaphor for the other. One goal of this project is to sort out and measure the impact of such associations and misperceptions in the law of AIDS.

Data and Methods

In January 1996 a Westlaw search of all Circuit Courts of Appeals opinions for the terms "HIV" or "acquired immune deficiency" produced a citation list of 230 opinions.[6] Unpublished dispositions were removed, and although this is likely to have

[6] Early attempts to build this data set included the term "AIDS," which unfortunately yielded large numbers of unrelated cases, illustrating one limitation of working with electronically archived materials. The terms chosen were used because they produced the most comprehensive list of cases with the fewest number of unrelated "hits" to be discarded (e.g., one case included a litigant whose name ended with the initial "H," followed by the designation IV).

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changed the overall character of the data (Siegelman & Donohue III 1990), it was done for three reasons: first, because published cases arguably represent the most salient disputes in a particular issue area; and second and third, because published opinions are cited, circulated, and more readily accessible to electronic download and coding they are logistically manageable and are part of a circulating body of knowledge in ways that unpublished opinions are not.

Some of the cases used arose from civil suits brought by plaintiffs infected with HIV through transfusions, blood products, or other medical procedures against institutional defendants, i.e., hospitals, blood banks, or the Red Cross (36 cases, 25% of the total). Employment-related discrimination against people with AIDS generated the second-largest group of cases (32 cases, 22% of the total), and prison administration questions ranked third (27 cases, 18% of the total). A category of "other" civil claims includes a wide variety of issues including, illustratively, charges of police brutality, patent disputes regarding ownership of the virus, and challenges to safer-sex posters on the sides of city buses (32 cases, 22% of the total). Criminal charges involving people with AIDS make up the final group of cases, including such diverse charges as assault, attempted murder, sex with a minor, and money laundering (18 cases, 13% of the total). Most of these cases involve disputes between "one-shotters" and "repeat players" (Galanter 1974). Although other potentially useful sampling plans could have been used to select AIDS-related cases from state or other federal courts, the strategy used here brings into one data set the universe of cases from the federal appellate courts between 1983 and 1995.[7]

Content analysis was used to categorize and record numerous demographic, legal, and thematic variables in the case materials selected, as discussed in more detail below (Holsti 1969).[8] Generally, however, they can be classified into three groups. The first group are those judicial characteristics that we might expect to influence how judges rule. Political party affiliation, religion, and age were included here because, in theory, they are most likely to influence how judges conceptualize AIDS and homosexuality. Judicial scholars often control for various contextual and litigant characteristics as well, the former indicated by the presence of applicable statutes, strong political coalitions in certain areas of the country, or a case's geographic origins (e.g., Goldman &

[7] An *N* of 145 would be problematic if the data were a sample used to make general claims about a larger population. However, these data arguably represent the entire population of such cases heard at this level of the courts, and thus the analysis remains useful and might theoretically be generalized to other similar "universes."

[8] A team of three graduate students was hired and trained to read case opinions and record their content. A check-coding scheme cross-referenced 10% of the cases, and intercoder reliability exceeded 96%. In addition, another10% of the cases was checked electronically to ensure accuracy.

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Sarat 1979; Wenner & Dutter 1988; Yarnold 1992). The models developed here control for contextual influences by including a composite of statutes that criminalize sodomy or HIV transmission. Other controls used here were the presence of a prisoner or criminal defendant as a party to the litigation and the nature of the legal claim made by the plaintiff. Finally, the unique moment in this analysis is the inclusion of several markers that characterize a judge's cognitive frame relative to HIV and sexuality. The resultant hypotheses tested are as follows:

- Litigants with HIV will be more likely to win their claims before judges who are more politically liberal and when their cases are brought in more sexually enlightened areas of the country.
- Judges' conceptions of AIDS and homosexuality, measured by their use of specific linguistic markers, will be predicted by their political affiliations and backgrounds.

These hypotheses are tested using stepwise probit in order to demonstrate the utility of including linguistic markers and cognitive references in models of judicial behavior.

"Winning" by People with HIV

Wins and losses are often used as indicators of case outcome, but judicial decisionmaking is neither as binary nor as simplistic as such categorization implies. This study uses a generous interpretation of "winning" as both a dependent variable and a control. If a PWA, either plaintiff or defendant, prevailed on any issue raised in a case, or had a claim remanded for further consideration, that was coded as a win. This strategy is useful here because it brings into one category all case opinions from the data set that were written in support of a claim brought by a PWA, and it sidesteps the need to decide which opinion to include when cases have had multiple hearings at the Circuit Court level; it also avoids the need to alter the sampling frame when cases have moved to other courts. Since this project relies upon language use to explore judges' cognitive frame and constructions of sexuality, the scheme is useful because it links the rhetoric and outcome of each opinion. Unfortunately, this textual emphasis located at one moment in the life span of a single case may mischaracterize final outcome; cases may have been reappealed, dismissed, appealed to different or higher courts, or settled in favor of the non-PWA litigant. As a result, these findings should be read as exploratory, attesting to the need for more theoretical development as well as the application of more refined quantitative techniques.

A total of 38 cases (26%) were coded as wins by litigants with HIV, leaving 107 cases (74%) in the default category. At first glance, this seems to paint litigants with HIV as losers. It should

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be noted, however, that only 96 cases (66% of the total) involved people with AIDS; 34% of all cases analyzed here did not involve seropositive litigants. Viewed in this light, a more accurate picture emerges; seropositive litigants prevailed on at least some of their legal claims in 40% of the cases in which they were involved. This conclusion is somewhat more optimistic considering that at the time many of these opinions were written AIDS was new and seemed to affect only marginal segments of the population, and that law, through the use of precedent, constitutional history, and procedural tradition, favored established interests and the status quo.

Judicial Characteristics

Each case was coded on a scale ranging from 0 to 3 to reflect the number of judges on each appellate panel exhibiting the characteristics that follow. In cases where one judge clearly dissented from a panel of three, characteristics for the judges in the majority were enumerated on the same 0 to 3 scale. In en banc opinions, characteristics for judges in the majority were weighted in order to fit into a 3-point scale.[9]

Political Party

Since legal realists first questioned legal formalism, scholars have rejected the fiction that judges perform their work in a manner divorced from their political affiliations (Peltason 1955; Pritchett 1941:890; Slotnick 1988). The importance of political party has been examined not only as it influences the appointments process but also as it shapes the subsequent policy positions of judges. Studies of judicial behavior indicate that judges generally interpret laws and apply them to factual situations in ways that resonate with the policy positions of the presidents who appointed them. Other studies of judicial politics hypothesize correlations between judicial policymaking and the policy positions espoused by their appointing president's party (Carp & Rowland 1983; Pinello 1995). Thus, these relationships are explored through an association between party platform and the outcomes of legal cases.

In the case of AIDS, the policy position of most appointing presidents is impossible to determine because most federal judges were appointed to the bench before the syndrome was identified. The first president to appoint judges included in this study was Eisenhower, but the first president with an AIDS track record was Reagan. Until his appointments came onto the bench

[9] Where M is the number of judges in the majority exhibiting a particular characteristic, and N is the total number of judges on the panel, $(3M)/N$ was used to obtain a weighted score for each characteristic.

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post-1982 there had never been an administration with a position on AIDS policy. Additionally, many of the most important pieces of federal AIDS-related legislation passed as the result of bipartisan cooperation. Senators Orrin Hatch (R–Utah) and Ted Kennedy (D–Mass.) co-sponsored the first major piece of federal legislation to provide services for people with AIDS; the Senate's track record of bipartisanship in the AIDS policy arena has been somewhat unusual.

Nevertheless, the general political philosophies of the two major parties can be seen in most early debates about AIDS. Where these policies are concerned, the Democratic Party has been consistently pro-government, calling for greater federal involvement in service provision, research, and education. Despite Republican sponsorship of some major legislative efforts, virtually all of the most rancorous and homophobic policy proposals directed at PWAs have emerged from people associated with the Republican Party. The data in Table 1 summarize judicial appointment and background variables. Notably, the strong Republican presence indicated here parallels the composition of the federal judiciary as a whole. As Barrow et al. observe, "at the adjournment of the 102d Congress, over 70 percent of all federal judges were members of the Republican Party. Moreover, 95 percent of this cohort [1981 to 1992] were the appointees of only two presidents, Ronald Reagan and George Bush" (1996:2). It is therefore unsurprising that strictly Republican-appointed panels outnumber purely Democrat-appointed panels by a margin of over six to one.

Table 1. Number of Case Opinions by Panel Characteristics

Judges Per Panel	0	1	2	3	Totals
Republican appointees	5 (3%)	42 (29%)	65 (45%)	33 (23%)	145 (100%)
Religious conservatives	95 (65%)	46 (32%)	4 (3%)	0 (0%)	145 (100%)
Born before 1929	18 (12%)	49 (34%)	62 (43%)	16 (11%)	145 (100%)

Religious Conservatism

The influence of religion on judicial behavior is difficult to define in many policy areas, but in the case of AIDS litigation, the construction of AIDS as a gay disease places the relationship between judges' religious affiliation and their AIDS policy positions on a continuum of church doctrine. Although some churches have opened their doors to gay and lesbian members, and some clergy have agreed to solemnize same-sex unions, churches have been among those institutions that are most resistant to accepting gays and lesbians (Eskridge 1997). For the purposes of this study, judges specifically designated as Catholics, Mormons, or Baptists were coded as religious conservatives since

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official church doctrine in each instance opposes homosexuality.[10] Following this, it may seem intuitive to code for religious liberals as well, but it is not always possible to discern where Episcopalians, Protestants, non-affiliated judges, and those reported as Jewish might fall on the pro-anti-gay continuum. Consequently, this latter group of judges was coded in the default category; a summary of religious conservatives on each panel is reported in Table 1. According to Dornette and Cross, 69% of the judges in this study reported no religious affiliation (1989). Consequently, it is unsurprising that religiously non-affiliated judges outnumber religious conservatives by a margin of more than three to one.

Age

In his seminal work, *Gay New York*, George Chauncey (1994) explores the construction of homosexuality in America and argues that the current disapproval of homosexuality did not become particularly pronounced until after World War II. The American homosexual, who was tolerated or viewed with amusement prior to the war, fell prey to the same processes that drove "Rosie the Riveter" out of the workplace. This reassertion of heterosexual masculine dominance over culture, politics, and the family pushed American homophobia to new heights through the post-war and McCarthy eras. We might, therefore, expect that judges socialized after World War II would be more homophobic than their predecessors. Coincidentally, the mean birth year for judges represented in the data was 1929, so judges born in 1929 and earlier would have been 16 or older in 1945, indicating the attainment of sexual and social maturity prior to the entrenchment of post-war American culture. In order to test Chauncey's hypothesis, judges were separated into two age groups, those born before 1929 and those born after. Judges represented here were born as early as 1904 and as late as 1954. Case opinions were written by judges ranging in age from 39 to 89, raising the possibility of distinct generational differences on the federal bench. Older judges were prominently represented, with over 40% of the decisions being issued by panels on which two judges were born before 1929. (See Table 1.)

Contextual, Litigant, and Claim Control Variables

Specifying which contextual characteristics to include calls for close consideration of AIDS and the ways different parts of the country have responded to it legislatively. Studies of school

[10] Gay-affirmative religious groups have proliferated in recent years, and it is possible that some of these Catholic judges are, for example, active with the Dignity movement. Nonetheless, given the age cohorts and other conservative political markers used in this study, controlling for this possibility seems unnecessary.

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desegregation, environmental protection, and abortion cases have demonstrated the importance of controlling for regional influence (Goldman & Sarat 1979; Wenner & Dutter 1988; Yarnold 1992), linking judicial language to the wider political setting within which cases arise. Theoretically, such controls might measure the extent to which judges' rulings conform to or serve to legitimate the general political philosophies of those who appointed or elected them; in many instances regional variation accurately characterizes political context (i.e., north versus south, western versus non-western). In AIDS-related litigation, however, regional variation is only part of the story; general knowledge about HIV and attitudes toward sexual variation are more accurate measures of political context. In this study, the presence of valid sodomy laws and state statutes criminalizing HIV transmission were used to characterize the social and political context of the courts.[11] (See Table 2.)

Sodomy Laws and the Criminalization of HIV Transmission

Two types of sexually restrictive statutes were used to characterize regional political context, sodomy laws, and statutes criminalizing HIV transmission. Generally, sodomy laws are of two types. Facially neutral statutes target homosexual and heterosexual acts alike; facially discriminatory statutes apply only to homosexual acts. Furthermore, states vary widely in their enforcement of sodomy laws, and in some instances court challenges have resulted in the invalidation or restriction of a state's sodomy statutes. Approximately half the states have sodomy laws on the books, and only rarely are they used to prosecute acts between people of different sexes. All states with sodomy laws on the books until 1995 were included here.[12]

Several states have also enacted statutes criminalizing HIV transmission or knowingly putting another person at risk of infection, and the existence of such laws clearly indicates a political and legal climate of exacerbated fear. Cases were coded to reflect the existence of laws criminalizing HIV transmission.[13] These two types of laws were combined into a single scale ranked as follows:

[11] It is unrealistic to assume that judges would decide cases differently depending upon where they originated. Illustratively, judges on the 9th Circuit, situated in San Francisco—an AIDS epicenter—would be unlikely to use language differently in a case from California than they would in a case from Idaho. Nonetheless, since appellate judges are reviewing lower court records, the variable may point to the need for more research into the relationship between how and why disputes arise in the first place and the ways that rhetorical and cognitive factors "evolve" across the history of a case.

[12] These states are Alabama, Arizona, Florida, Idaho, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, North Carolina, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and Washington, D.C. (cf. Rubenstein et al. 1996).

[13] According to the AIDS Policy Center of the Intergovernmental Health Policy Project at George Washington University, these states are as follows: Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, Ohio,

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Table 2. Contextual, Litigant, Claim, and Rhetorical Variables

Sodomy or HIV Criminalized			Death/Plague References		
0	8	(5%)	No references	109	(75%)
0.1	7	(5%)	References present	36	(25%)
0.17	8	(5%)	Homosexualized References		
0.33	16	(11%)	No references	120	(83%)
0.39	20	(14%)	References present	25	(17%)
0.43	21	(15%)	Blood/Medical Transmission		
0.5	18	(12%)	0	111	(77%)
0.7	10	(7%)	1	34	(23%)
0.75	8	(5%)	Year		
0.83	29	(20%)	1987	3	(2%)
Prisoner or Criminal Defendant			1988	5	(3%)
0	100	(69%)	1989	10	(7%)
1	45	(31%)	1990	10	(7%)
Expansive Legal Claim			1991	19	(13%)
0	109	(75%)	1992	20	(14%)
1	36	(25%)	1993	18	(12%)
Positive References			1994	32	(22%)
0	34	(23%)	1995	28	(19%)
1	55	(38%)			
2	40	(28%)			
3	13	(9%)			
4	3	(2%)			
Total			$N = 145$		

NOTE: Percentages do not total 100% due to rounding.

Cases from states with neither sodomy nor HIV criminalization statutes were coded 0; cases from states with one or the other type of statute were coded 1; cases from states with both types of statutes on the books were coded 2. Existing statutes for all states in each circuit were totaled and then divided by the potential number of statutes (two per state) in each circuit, characterizing the sexual/HIV statutory climate for each circuit with a number between 0 and 1. There are ample numbers of cases in each category (Table 2). This variable also reflects general expectations about the culture of the Circuit Courts of Appeals. In other words, the more politically conservative southern circuits—the Fourth, Fifth, and Eleventh—each ranked in the highest categories on this variable, while the reputedly more liberal northeastern and western circuits—the Second and Ninth—fell toward the bottom.

Prisoners and Criminal Defendants

Although the face of AIDS is changing domestically as well as globally, these cases reflect an earlier demographic profile wherein prisoners and criminal defendants are heavily represented. Information from the Bureau of Justice Statistics indicates that these litigants were particularly unlikely to succeed in court. In fact, over half of all legal claims raised by inmates dur-

Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, and Washington (Rubenstein et al. 1996).

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ing this period were dismissed, and fewer than 2% of those petitions were partially adjudicated in favor of the inmate (Scalia 1997:2). Consequently, a variable controlling for this aspect of litigants' social standing was introduced, placing into one category those litigants who were either prisoners or criminal defendants, and, as Table 2 shows, 45 cases (31%) were initiated by such claimants.

Expansive Claims

Coders took note of the plaintiffs' claims and their relationship to the existing statutes or policies raised in each case. As Drass et al. (1997) observe, many institutions, including corporations, non-profit organizations, and bureaucracies, make restrictive legal claims that seek to preserve the status quo, while individuals often make legal claims that take existing statutes, policies, and regulatory schemes in new directions. If plaintiffs made legal claims that involved existing (i.e., pre-AIDS) statutes or policies and attempted to apply them to HIV-related issues, those cases were coded as expansive. Speculating that these types of claims would be least likely to succeed, a binary variable was constructed to control for this possibility, and, as Table 2 shows, 36 cases (25%) were of this type.

Metaphoric Markers

Cultural theorists have identified myriad constructions of AIDS in art, mainstream media, and in biomedical discourse. As stated at the outset, three themes are especially prominent. First, in the popular imagination gay men were designated as both sources and carriers of AIDS. In other words, they have been blamed for starting the crisis and for spreading it to the "general" population. This assignment of liability further perpetuated a false perception of what was dangerous and what was safe in sexual terms, giving rise to the second theme, blurring the roles of acts and identity in HIV transmission. Illustratively, heterosexuality has been designated as "safe" while homosexuality has been designated as "dangerous," despite the fact that such a construction ignores a simple underlying truth: HIV is transmitted through bodily fluids regardless of sexual identity. Furthermore, cultural theorists have argued that a hierarchy of victimization developed, whereby gay men were perceived as victims of AIDS despite the emphatic rejection of that label and the powerlessness it implied. Initially, people with HIV were separated into two camps: "innocent" victims, who were seen as not responsible for their infection (children, unsuspecting wives, blood product recipients), and "guilty" victims, whose "intentional" behavior brought them into contact with the virus (gay men, injection drug users, prostitutes). As Epstein (1996:205–7) documents,

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contesting these labels of victimization and culpability became an important goal of people in the HIV community. Labels such as "AIDS victims" and "AIDS carriers," connoting powerlessness and contagion, were very consciously resisted and replaced with more positive phrases such as "HIV positive" and "living with AIDS." Coding for these linguistic markers therefore requires recording occurrences of positive terminology, expressions invoking fear or plague metaphors, language that specifically locates AIDS within the gay community, and controlling for rhetorical evolution across the history of the crisis.

Positive Rhetorical Markers

Referring to people with AIDS as "victims," "sufferers," or "afflicted" intimates a lack of empowerment and is contrary to the way many in the HIV community refer to themselves. Still, these markers are best understood as falling on the value-neutral to positive end of the continuum because they do not stigmatize the people at whom they are directed. Referring to PWAs as "infected" implies a lack of subjectivity, but avoids specifically designating individuals as responsible for their seropositive status. Explicitly medicalized terminology might refer to PWAs as "patients" or "ill," yet designating people with AIDS as patients implies involvement with medical science and active treatment. Since these are potentially beneficial interactions, there is a positive social valence attached to this marker. Few explicitly positive references are discussed in this literature, but since many people with AIDS refer to themselves as people with AIDS (PWAs) this marker was interpreted as an empowering and positive designation. Many people in the AIDS community refer to themselves as HIV positive as well, connoting a simple statement of serostatus that is reasonably free from conceptual baggage. More recent rhetorical shifts include the word "living," in other words, people living with AIDS or HIV. These references, when they occurred, were coded as positive designations. People with AIDS were most frequently referenced as infected, patients, as people with AIDS, or as victims. The presence or absence of these four markers was added to produce a 0 to 4 index (Table 2), with the distribution being skewed toward the lower or less positive end.

Death/Plague References

On the negative end of the continuum the most prominent markers emphasize the incurability and fatality of the syndrome, painting dark, hopeless pictures of the lives of people with HIV. Language coded into this category included the markers "dreaded," "deadly," or "plague," or, for example, discussions of PWAs as "advancing inevitably towards death." Unlike the language of science or medicine, which could be used to make HIV

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disease seem manageable, survivable, or possible, these types of references evoke pessimism. Furthermore, markers of this type also indicate perceptions of hyperbolic fear. As the data in Table 2 show, one-quarter of the cases contained such dark metaphors.

Homosexualized References

Language used to describe the sexual aspects of HIV transmission or AIDS takes many different forms. For example, HIV might be described as a retrovirus transmissible through exchanges of bodily fluids (a clinical but sex-free designation), or as a virus found in semen and most often transmitted through anal sex between men (a clinical but specifically homosexualized designation). Similarly, AIDS might be described as a series of opportunistic infections that occur in the event of immune system compromise (a clinical and sex-free designation), or as a disease of gay men (an explicitly homosexualized reference). As the *Marcella* example above illustrates, coders recorded the presence of language that specifically attributed AIDS to the gay community. These homosexualized references to HIV or AIDS resulted in a binary variable that characterizes the sexual consciousness reflected in each opinion relative to the health crisis. In short, does the language of the court clearly locate AIDS within the gay community? Slightly less than one-fifth used such language (Table 2).

Determining the gender or sexual orientation of the litigants was not always easy in these cases. Many litigants, particularly in the early years of AIDS, chose to advance their cases anonymously. While John and Jane Does might be categorized by gender, many litigants were represented by their initials alone, making gender determinations impossible. Interestingly, very few litigants are explicitly identified in case opinions as either gay or straight: 5 plaintiffs are specifically identified as gay, as are 2 defendants. The number of homosexualized references to AIDS stands in stark contrast to the actual number of gay litigants involved.

HIV Transmission Routes

In order to test the assertion that PWAs are categorized as innocent or guilty victims, coders also took note of actual transmission routes when specified. Almost half of the cases did not involve HIV-positive litigants; many of these involved seronegative prisoners seeking to protect themselves by asking prison administrators to segregate inmates by HIV status. Most of the opinions wherein litigants are explicitly identified as HIV positive are vague about how litigants became infected. Indeed, for most people with HIV, pinpointing the moment of infection is impossible. In many cases, sexual transmission seems plausible and, in

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others, injection drug use is implied. Erring on the side of caution, however, coders recorded only those instances when opinions explicitly stated how a litigant was infected. Tellingly, almost all of these cases involved iatrogenic disease. Litigants infected through blood products fall within the category of "innocent victims," whereas people infected sexually or through injection drug use would qualify for "guilty victim" status. Nearly one-quarter of the time, litigants were explicitly identified as having been infected through medical procedures (Table 2).

Year

Many key events might be used to demarcate chapters in the cultural history of AIDS and, in fact, scholars have identified several: discovery of the HIV virus, the death of Arthur Ashe, Magic Johnson's announcement of his seropositivity, President Ronald Reagan's first mention of the syndrome, and the marketing of protease inhibitors (Treichler 1999; Watney 1987, 1994; Watney & Carter 1989). Each of these events helped mark off specific chapters in the history of the pandemic, but demarcating precisely when cultural perceptions of AIDS changed is somewhat tricky. As Drass et al. (1997) found, something clearly shifted in the mid-to-late 1980s, a time when hysterical fears and ostracism began giving way to expressions of sympathy and more frequent narratives of care. In order to control for such shifts in these data, a temporal variable was introduced categorizing the cases according to the years they were decided. As the data in Table 2 show, there were few cases—but enough for analysis—in the early years of the crisis, but the numbers grew and stabilized in the early-to-mid 1990s.

Analysis

Two models were estimated using "PWA-wins"and "homosexualized" references as dependent variables. Because these variables are binary, multivariate probability unit (probit) analysis was used to produce maximum likelihood estimates for the several independent variables (cf. Maddala 1988; Segal 1984). Probit analysis produces estimates of the contribution each independent variable makes to the probability that the dependent variable will fall into one of two specified categories (e.g., wins or losses).[14] A maximum likelihood estimate (MLE) is calculated for each variable, along with a standard error, allowing for the calculation of a Z statistic that can be used to test the significance of each variable's contribution to the model. Probit coefficients, it should be noted, are logged probabilities, and thus, unlike

[14] Independent variables were correlated to test for multicollinearity, and none exceeded 0.37.

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OLS regression coefficients, do not directly represent the units of measurement upon which they are based.

Three clusters of variables were regressed stepwise in four stages, three moving forward with variables added manually in order to determine which are likely to have the most predictive value when all are included. The fourth, backward, stage, relying on statistical software with criteria for inclusion set at $p < 10$, confirms that these variables are significant and result in the largest pseudo-R^2 overall.

"PWA-Wins" as Dependent Variable

If AIDS-related litigation follows the social trends outlined by cultural critics, we should expect the following to predict "wins" by litigants with HIV (i.e., positive coefficients): older judges, positive linguistic markers, medical transmission routes, and decisions written in later years. We should expect negative coefficients to be associated with Republican appointees, religious conservatives, sodomy or HIV criminalization statutes, prisoners or criminal defendants, death/plague or homosexualized linguistic references.

As the data in Table 3 indicate, the model using only the first cluster of independent variables, judicial characteristics, is significant to 0.02, with a pseudo-R^2 of 0.08, and only one of the variables, judicial age, achieves significance. The second stage of the first model introduces contextual, litigant, and claim controls, and achieves significance at the 0.01 level, with a pseudo-R^2 of 0.13. At this stage, four variables achieve significance: judges' religion, judges' age, statutes criminalizing sodomy or HIV transmission, and expansive claims. At the third stage, symbolic references are introduced, and the model is significant to 0.003, with a pseudo-R^2 of 0.22, and five variables achieve significance: judges' age, expansive legal claims, positive linguistic markers, homosexualized references, and year. At the fourth stage the model was regressed stepwise backward using the automated commands of statistical software. This technique begins with a full model and selectively removes those variables that fail to achieve significance at a specified level, leaving only significant variables in a model with the largest pseudo-R^2. At this fourth stage, the model is significant to 0.0005, with a pseudo-R^2 of 0.19, and six variables are significant: judges' age, expansive claims, positive linguistic markers, homosexualized references, medical transmission routes, and year.

In these analyses, the independent variables act as controls on each other, and thus it is difficult to specify precisely how they interact. Illustratively, when the context, litigant, and claim controls are introduced at stage 2, religious conservatism and the sodomy/HIV criminalization statute variable both become signif-

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Table 3. Probit Estimates Using PWA-Wins as Dependent Variable ($N = 96$)

	1		2		3		4	
	Coef.	SE	Coef.	SE	Coef.	SE	Coef.	SE
Judicial Characteristics								
Republican appointment	−0.22	0.17	−0.20	0.18	−0.28	0.19		
Religious conservative	0.40	0.26	0.51*	0.27	0.39	0.30		
Judges' age	0.34**	0.16	0.37**	0.17	0.45**	0.20	0.50**	0.19
Context, Litigant & Claim Controls								
Sodomy or HIV criminalized			−1.00*	0.58	−0.66	0.63		
Prisoner or criminal defendant			−0.23	0.33	−0.27	0.40		
Expansive claim			−0.64*	0.34	−0.77**	0.36	−0.68**	0.33
Symbolic References								
Positive markers					0.31**	0.15	0.30**	0.15
Death/plague references					−0.34	0.41		
Homosexualized references					0.89*	0.46	0.84**	0.41
Medical transmission					0.40	0.39	0.58*	0.33
Year					0.14*	0.08	0.14**	0.07
Prob > χ^2	0.02		0.01		0.003		0.0005	
Pseudo-R^2	0.08		0.13		0.22		0.19	

*$p < 0.10$
**$p < 0.05$
***$p < 0.01$

icant, yet these variables drop out again in the final two stages. Similarly, the medical transmission variable fails to achieve significance at stage 3, but becomes significant in the final stage of the analysis. Although the appearance and disappearance of these variables should inspire cautious interpretation, other aspects of the analysis are more consistently legible. Of particular note are the continued prominence of judicial age, the steady increase in pseudo-R^2 across the first three stages of the analysis, and, despite removal of five variables at stage 4, that four symbolic references were retained and the pseudo-R^2 remained strong at 0.19.

At stage 4, each of the variables remaining in the model is significant. Positive coefficients for judicial age, positive metaphoric markers, medical HIV transmission routes, and year mean that "wins" by litigants with HIV were associated with older judges hearing their claims, more positive language used in the opinion, individuals infected with HIV in a medical setting, and when cases were heard later in the first decade of the crisis. The direction of these coefficients is as expected. The unexpected positive coefficient for the marker of homosexualized references to HIV transmission means that litigants with HIV were more likely to win their claims when such language was present in an opinion. Although somewhat perplexing at first glance, this finding may be related to the fact that very few of these cases involved openly gay litigants, and such references were instead part of the overall rhetorical work done by judges to reinforce the association between AIDS and homosexuality. Symbolically, the *Doe* and *Marcella* examples, both coded 1 for homosexualized references, illuminate how these rhetorical maneuvers interact. In *Doe* the

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plaintiff is described as "a single gay male," and his complaint alleged that he suffered job discrimination and a breach of privacy because his employer made this information public. The plaintiff knew that he was HIV positive, but had not revealed that information to anyone other than his doctor and his lawyer. The homosexualized references in this opinion are essential to the rhetorical work done by the judge, combating homo- and AIDS-phobia. This type of rhetorical work—granting privacy protections to a gay man with HIV—is the exception rather than the rule. The language from the *Marcella* case exemplifies the rule: Locate AIDS in the gay community and the plaintiff can be perceived as an "innocent victim," and so is the Red Cross, which avoids liability. Either strategy, however, helps solidify the conceptual association between AIDS and homosexuality.

Homosexualized References as Dependent Variable

Few of the cases in this data set involve openly gay litigants that are identifiable from the text of opinions. While mechanisms that police sexual boundaries (shame, stigma, marginalization) are represented throughout, attributing HIV to the gay community is something that occurs whether or not there are gay men involved in a case. In fact, in some cases brought by apparently heterosexual litigants against institutional defendants (i.e., the Red Cross), the case outcomes eventually turned on the testimony of HIV-positive blood donors, against whom litigation was sometimes advanced.[15] As the *Marcella* example illustrates, the language and purpose of important policy issues get lost when the risk of HIV transmission is construed as gay-specific and the role of sexual acts is ignored. This misconception continues to complicate HIV-prevention efforts today, at the beginning of the 21st century, even though the perception of gay men as "carriers" has abated somewhat. For these reasons, predicting homosexualized references to AIDS serves partially as a measure of how accurately judges understand and portray the risks and realities of HIV transmission.

Coders recorded instances of judges discussing HIV transmission risk or AIDS itself in terms that emphasized gay identity or group membership. A second model was estimated using homosexualized references as the dependent variable and the same clusters of independent variables as above in order to determine whether and how judges perceive AIDS as a gay disease. In this model we should expect the following factors to contribute to increased references to the homosexuality of AIDS: Republican appointees, religious conservatives, cases from areas where sodomy or HIV transmission are criminalized, prisoners or criminal defendants as parties, and death/plague rhetoric. Negative

[15] See *Coleman v. American Red Cross* 23 F.3d 1091 (1994).

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coefficients should be obtained for older judges, positive linguistic markers, medical transmission routes, and cases decided later in the first decade of the crisis. The nature of the legal claims made and case outcome variables serve as controls.

The data in Table 4 indicate that judicial variables alone fail to achieve significance, and only when context, litigant, and claim controls are included does the model become significant. The second stage is significant to 0.01, with a pseudo-R^2 of 0.11. Here, three variables achieve significance: judicial religion, the sodomy/HIV criminalization scale, and the presence of prisoners or criminal defendants as litigants. At stage 3 the model remains significant to 0.02, but the pseudo-R^2 increases to 0.17, with the same variables remaining significant plus the addition of death/plague references. Notably, these same four variables remain significant at the fourth stage of the model when all other variables are excluded. Here the pseudo-R^2 remains fairly stable, falling slightly to 0.15, yet the model remains significant to 0.0007. Positive coefficients for judicial religion, criminal defendants, and death/plague references indicate that these elements contribute to the likelihood that more homosexualized language will be used in an opinion. The negative coefficient for the sodomy/HIV criminalization marker indicates that such references were more common in circuits with fewer sodomy laws and HIV criminalization statutes. The finding may seem unexpected, yet following the relationship between homosexualized references and PWA wins in the previous model, another interpretive possibility emerges. In more tolerant and accepting areas of the coun-

Table 4. Probit Estimates Using References as Dependent Variable ($N = 145$)

	1		2		3		4	
	Coef.	SE	Coef.	SE	Coef.	SE	Coef.	SE
Judicial Characteristics								
Republican appointment	−0.19	0.17	−0.15	0.18	−0.15	0.19		
Religious conservative	0.44**	0.21	0.42**	0.22	0.42*	0.24	0.42**	0.22
Judges' age	0.02	0.15	0.10	0.17	0.05	0.18		
Context, Litigant & Claim Controls								
Sodomy or HIV criminalized			−1.11**	0.56	−1.13*	0.60	−1.00*	0.56
Prisoner or criminal defendant			0.48*	0.28	0.55*	0.32	0.56**	0.27
Expansive claim			−0.17	0.34	−0.12	0.36		
Symbolic References								
Positive markers					0.12	0.15		
Death/plague references					0.66**	0.31	0.72***	0.28
Medical transmission					0.08	0.40		
Year					0.01	0.07		
Case Outcome								
PWA Wins					0.31	0.32		
Prob > χ^2	0.11		0.01		0.02		0.0007	
Pseudo-R^2	0.04		0.11		0.17		0.15	

*$p < 0.10$
**$p < 0.05$
***$p < 0.01$

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try, judges have to do more rhetorical work in order to reinforce the perception that AIDS properly belongs within the gay community and to "excuse" non-gay plaintiffs from the tragedy of AIDS. Conversely, in less-tolerant jurisdictions, the association was simply expected and could therefore be taken for granted, requiring no additional rhetorical effort.

Discussion

These exploratory results show that the inclusion of rhetorical variables can illuminate elements of judicial cognition, but a good deal of work remains to be done. Controlling for rhetorical markers improves statistical significance, but determining the direction of causality is, as usual, elusive. It would be rather presumptuous to draw direct associations between a judge's language use and her conception of AIDS; the examples cited in the Introduction illustrate the point. Does judicial language characterize beliefs about AIDS and homosexuality; does it indicate that judges recognize what rhetorical work must be done in order to produce a credible, persuasive opinion in the eyes of an anticipated audience, or is it an artifact of something else? It is impossible to answer these questions from the data and analysis presented here, yet parsing out the language of judicial opinions and controlling for potentially meaningful cognitive influences clearly produces some consistent results.

The most prominent variables remaining significant in these analyses are instructive. That a judge's age and religion, expansive legal claims, dark metaphoric language, associations between AIDS and homosexuality, and the importance of HIV transmission routes predict case outcome all highlight the need to further develop models that account for rhetorical, cognitive, and symbolic elements. Despite uncertain causality, the salience of the cognitive and symbolic markers identified here remains problematic because such language is reproduced by other courts, reprinted in media coverage of cases, and filtered into legal consciousness, ultimately reifying these "social facts" of AIDS and allowing them to take root in other contexts (Geertz 1983; Hirsch 1992:76–79). This statistical rendering of AIDS law and the rhetoric of sexuality negotiates the gaps among the texts of opinions, legal consciousness, and sexual consciousness, showing how these cases were not instances of formal law "corrupted by spectacularity," but instead were illustrative of a history of "discursive instability itself" (Umphrey 1999:420). Indeed, many of these cases could be described accurately as routine, despite the spectacular nature of AIDS; the heuristic malleability of homosexuality and its protean rhetorical role in these opinions underscores the point.

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The significance of four symbolic variables above further solidifies the argument. The language used by judges reflects dominant conceptions of AIDS and sexuality and, in many ways, the law of AIDS is couched in terms that continue to locate HIV-transmission risks within the gay community. The relationship between death/plague metaphors and homosexualized references (Table 4) indicates that the association is not generally a positive one. That medical transmission remains in the model at stage 4 (Table 3) signals that "innocent victims" fare better in court than "guilty victims." The significance of year in Table 3 suggests that perceptions of AIDS have shifted favorably across the history of the crisis, as Drass et al. (1997) have established, yet its absence from Table 4 may indicate that the social valence surrounding homosexuality has improved less. That these factors are linked to the thumbnail indicators of background homophobia, judges' age and religion, scratches an important cognitive surface and invites further excavation.

As noted above, the negative coefficient for homosexualized language in Table 3 and the negative coefficient for sodomy/HIV criminalization statutes in Table 4 were unexpected and should prompt more detailed investigation. Read together, however, a more coherent picture emerges. These peculiarities may be explained if we keep in mind that very few of the opinions collected here involved gay men. Explicitly homosexualized references often located AIDS within the gay community in such a way that allowed for favorable rulings in cases involving non-gay parties (i.e., "innocent victims"). To draw again on the *Marcella* case as an example, litigation against the Red Cross could have had a devastating impact on that organization's very crucial role in public health. Such cases, decided in an era of scientific, political, and social uncertainty, could be decided only by looking for sources of concrete and credible information regarding the acts and identities of blood donors, many of whom were gay men. Thus, explicitly homosexualized language attendant to these factual explorations reinforced the gayness of AIDS as a matter of rhetorical fallout and was not necessarily inspired by judicial homophobia. Shifting investigations to blood donors and their flawed sexual self-identification helped exonerate the Red Cross and had a "homosexualizing" effect at the same time. Invoking the language of tragedy and horror, as the court did in the opening lines of the *Marchica* case, further amplified that effect. Such language allows non-gay litigants threatened with HIV to be perceived as anomalous and reinforces the gayness of the syndrome while reassuring heterosexual Americans that they are safe from HIV. Moreover, this reinscription of gayness provides a rhetorical framework wherein non-gay plaintiffs might be able to recover damages, while limiting that possibility for gay ones. The significant positive coefficient obtained for positive metaphoric mark-

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ers in Table 3 coupled with their absence from Table 4 underscores the value of this seemingly paradoxical interpretation.

That less homosexualized language was used in more AIDS-phobic and homophobic areas of the country illuminates an aspect of our sexual consciousness that we can refer to as a closet effect (Rollins 1996; Sedgwick 1990). In other words, the alignment between the social construction of AIDS and the social construction of homosexuality was visible and understood in more politically/sexually enlightened areas of the country. Maintaining the association, or disrupting it—as in the *Doe* example—required more rhetorical work in those jurisdictions and thus higher numbers of references were recorded there. Ironically, in more AIDS-phobic and homophobic jurisdictions the alignment was assumed and therefore did not need to speak its name, illustrating an important mechanism by which silence produces meaning. Arguably, this finding could also be related to the fact that areas of the country with HIV seroprevalence are also more politically liberal (i.e., the west and the northeast), or perhaps the gay community has been more organized and visible in those regions and has used "cultural tactics to effect political, social, and legal change [through] queer acts aimed at transforming citizens' identifications as a means of rewriting the social text" (Bower 1994:1029). In either scenario, these results attest to the importance of continuing to explore how judicial language shapes and is shaped by broader social-psychological and symbolic influences.

Perhaps the most telling finding is the significant relationship between death/plague metaphors and homosexualized references to AIDS. That this relationship is significant when controlling for political and contextual influences as well as positive metaphors is the strongest indication that the arguments of cultural theorists bears fruit. AIDS and homosexuality carry strong negative valence and symbols of stigma. Death/plague metaphors do not predict case outcomes, as Table 3 shows, and yet they do predict the presence of language that links AIDS to dominant constructions of sexuality. This cognitive model built on rhetorical markers of judicial perceptions of AIDS, as well as sexuality, says something important about our sexual consciousness: Homosexuality associates with death/plague metaphors. On the whole, these results underscore and build upon the findings of Drass et al., adding additional evidence to their claim that "courts intended to be vigilant in controlling the spread of the epidemic to the mainstream of America, consistent with the historical response of the courts to enable repression of the already stigmatized populations as an effective symbolic response to lethal epidemics" (1997:295). A particularly homosexualized construction of AIDS is obviously problematic for the politics of the gay and lesbian community, but it is equally troubling for its im-

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pact on public health policy. Continuously increasing rates of new HIV infections across varied demographic groups provide horrifically sufficient evidence of the vexatious relationships among identity, behavior, knowledge, and public health.

Blending empiricist "realism" with an interpretive close reading is a somewhat risky exercise. The empiricism of social science invokes images of objectivity and truth and hints that the problems of public life could be overcome if only we had enough well-organized information. Readings framed by postmodern theory, on the other hand, often lead us beyond materiality and into a realm without subjects, agency, or will. In subtle ways, attempting to get empirically quantitative with postmodern thinking subverts both paradigms. Borrowing from cultural theory and engaging in rhetorical analysis suggests that discourse is the ultimate site of power. Consequently, positivist tendencies to study a state institution and the people within it are called into question. Judges cannot be taken out of the picture by which AIDS and sexuality are given meaning, nor should they be given an elevated subject position in the constructive process; however, my acts of enumeration, categorization, and calculation appear to intimate otherwise.

It is important to avoid both extremes and to draw from the strengths and potential of each. Although this analysis may duck claims of objectivity and truth, the attempt at methodological rigor should help satisfy the positivist's yen for results that can be replicated and generalized. While avoiding explicitly discussing technologies of power, governmentality, and the mechanics of regulation, the foregoing analysis is clearly built on Foucaultian foundations and should satisfy the requirement of attention to unnoticed discursive effects. Such acts of translation among the critical, the rhetorical, the activist, and the statistical—as I have attempted here—have meaning and show that we should be more synthetic in thinking about how we engage the machinery of the state to achieve policy goals (Ewick 2001). In the end, I hope to have executed well the performance of science and to have supported again the infrequently heard claim that these epistemologies and methods can usefully coexist.

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