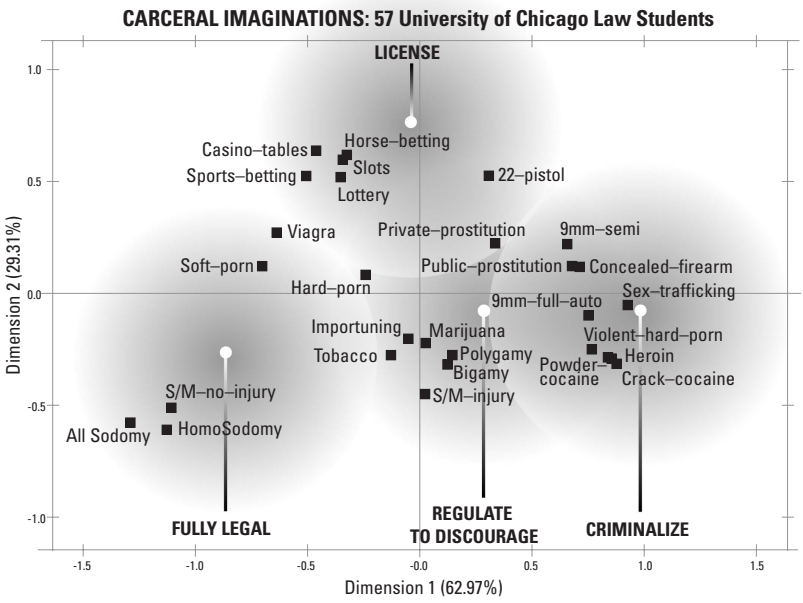
CARCERAL IMAGINATIONS



Non-procreative marital sexual intercourse. Fornication. Fellatio. Cunnilingus. Sodomy (traditionally defined as oral or anal sexual intercourse) between married persons — or unmarried heterosexuals. Homosexual sodomy. Importuning. Multiple-partner sexual intercourse. Polygamous relations. Consensual and safe sado-masochism. Violent, skin-breaking or blood-letting S/M. Street prostitutes. Escort services. Bordellos. Incest. Bestiality. Race track betting. Sports wagers. Office betting pools. Slot machines. Table games. Casinos. State lotteries. Smoking marijuana. Drinking alcohol. Shooting heroin. Firing automatic assault weapons. Popping Viagra.

Where do we stake the boundary of the criminal law — or, more importantly, how? How do we decide what to punish? Do we distribute these vices, these recreations, these conducts — what do we even call these *things*? — into two categories, the passable and the penal, and then carve some limiting principle to distinguish the two? Are we, in the very process, merely concocting some permeable line — a Maginot line — to police the criminal frontier? Or do we formulate the limiting principle first and then deploy it to parse these *things*? Or do we do a little of both, going back and forth, and back again, from moral intuition to principled ideal? Do we lean more towards one or the other? Do we peak behind the curtain, every once in a while, to make sure that our product is coherent, aesthetically pleasing, perhaps convincing? And how is it exactly that the boundaries change over time? What is it that pushes one of these *things*, previously criminalized — fornication, perhaps, or prostitution, or state lotteries — from the penal category to the permissible? How is it that the edifice that our parents constructed — and their parents and grandparents before them — shifts, settles, collapses in some places, is fortified in others?

Theirs was a masterpiece of legal regulation. An Acropolis of moral enforcement — handsome, strong, complete. Theirs had robust, tall, powerful columns of moral righteousness that rose up to present a coherent façade with a certain classic simplicity. In the realm of sexual regulation, only procreative marital relations were allowed. All else was barred — non-marital sex, same-sex relations, even recreational marital intercourse. How did those columns become unstable? Did they fall to ruin one at a time? The first to go, perhaps, was the ban on recreational marital sex. How could we police the marital bedroom? Of all places, not that sacrosanct bastion of parental authority. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea," Justice William O. Douglas would declare in *Griswold* in 1965, "is repulsive to the notions of privacy surrounding the marriage relationship."[1]

And as that grisled column fell, surely it destabilized the surrounding foundations. The next to fall, perhaps, was the ban on fornication—sexual intercourse between non-married couples. That ban, after all, was just a companion to the prohibition on recreational marital sex. "If the right of privacy means anything," Justice William J. Brennan would declare seven years later in *Eisenstadt*, "it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[2] The structural shock was so strong, in fact, that it would even destabilize the prohibition governing *children*. The logic—that gangrenous logic—would extend to minors, not just adults. And so, five years later, the Supreme Court invalidated a New York law prohibiting the sale or distribution of contraceptives to persons under 16 years of age.[3]

Now, recreational sex, after all, should be fun. It should be varied, sometimes even, experimental—which raises a host of questions, naturally, about, well, oral sexual intercourse (and maybe even anal sex). And it turns out, of course, that when we start to investigate these questions, a lot more Americans engage in these immoral acts than one might have thought at first blush. As the American Psychological Association and the American Public Health Association explained in 1986 in an *amicus* brief filed on behalf of Michael Hardwick in the infamous case of *Bowers v. Hardwick*—where the court ultimately upheld Georgia's ban on sodomy—"Today, it is safe to conclude that a vast majority of all adult Americans—men and women, married and unmarried, heterosexual and homosexual—have engaged in the intimate conduct made felonious by Georgia."[4] According to their research, almost 90 percent of heterosexual couples surveyed had had oral sex and more than 25 percent of married couples under age 35 had had anal sex. In 2004, *Glamour* magazine reported having conducted, in partnership with MensHealth.com, a survey of 2,793 men to explore issues of sexual practices. One question they asked was "Why are men so fixated on having anal sex?" Forty-seven percent of the respondents answered "because it's taboo." Twenty-two percent chose "because it feels great," and thirty-one percent "because it's an accomplishment just talking her into it."[5] In fact, in their *amicus* brief back in the mid-1980s, the APA and APHA went so far as to suggest that "reliance on vaginal intercourse alone is not [psychologically] healthy."[6] Limiting sexual relations to the procreative type, it turns out, may be positively harmful to young couples.

And so that column fell as well, at least *de facto* and quietly at first, but, a few years later, with a big, loud crashing sound. For if we condone sodomy in heterosexual relations, how could we in good faith exclude homosexual couples from this province of healthy recreation? "Sodomy

between opposite-sex partners," Justice Sandra Day O'Connor observed in her *Lawrence* concurrence in 2004, "is not a crime in Texas."[7] Would it not be unfair to ban homosexual but not heterosexual sodomy? Would it not, at the very least, violate some principle of equal treatment? Yes, of course. "A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review."[8] Another column hit the dust.

(Incidentally, if we let the ban on homosexual sodomy fall, then we may as well drop the prohibition on importuning—defined as loitering in a public place for the purpose of engaging in or soliciting another to engage in non-commercial sodomy. The statute prohibiting solicitation is nothing more, after all, than a "companion statute" to the ban on sodomy, as the New York Court of Appeals explained in its decision striking down a state ban on importuning in 1983.[9] Its object is simply "to punish conduct anticipatory to the act of consensual sodomy."[10] Clearly, that column must fall as well—or, in more technical language, "Inasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose."[11])

What does the Acropolis look like today? Which columns still stand and for how long? On what do they rest? Where is their support? Can they withstand another shock? And how should we redesign this decrepid structure—this degenerate monument to former virtue? Should we tinker with it—or bulldoze the whole monument? What pieces could we use to shore up what's left? Should we polish off the tops of the few remaining columns with some notion of consent? Respect for the equality of women? Privacy? Liberty? Do we level every column with a litmus test of harm to others? Should we be paternalistic—or laissez-faire? Do we privilege family—as in the traditional nuclear family? Or identity? Love? Child-rearing? Do we do a calculus of social welfare? Are we, in the end, just handymen using the scraps we find on the ground of the Sacred Rock to remake a hollow façade?

Or are we instead engineers, bringing in new material, building from scratch? Do we dynamite the Sacred Rock and use the hole to pour a new foundation? When the American Law Institute started drafting the Model Penal Code in 1952, was it deploying the new materials of modernity?[12] Steel beams and alloys? Glass façades and straight modern lines? The Millian harm principle, we are told, guides the entire enterprise. In the very preliminary article of the Model Penal Code, Section 1.02, the drafters address the purposes of criminal law and state, as the very first principle, the objective "to forbid and prevent conduct that unjustifiably and inexcus-

ably inflicts or threatens *substantial harm to individual or public interests.*"[13] The Comment to the preliminary article refers to the harm principle as "the dominant preventive purpose of the penal law."[14] It emphasizes that the harm principle "reflect[s] inherent and important limitations on the just and prudent use of penal sanctions as a measure of control."[15] "The Model Penal Code does not attempt to enforce private morality," the drafters explained. "Thus, none of the provisions contained in Article 251 purports to regulate sexual behavior generally."[16] Herbert Wechsler, the chief reporter and intellectual father of the MPC, emphasized that:

> Private sexual relations, whether heterosexual or homosexual, are excluded from the scope of criminality, unless children are victimized or there is coercion or other imposition. Penal sanctions also are withdrawn from fornication and adultery, contrary to the law of many states. Prostitution would continue to be penalized, primarily because of its relationship to organized crime in the United States, but major sanctions would be reserved for those who exploit prostitutes for their own gain.[17]

Is this new structure as coherent as the former Acropolis? Are the lines straight and strong? Does it look like a Mies van der Rohe, perhaps like the IBM building in Chicago — black glass and beams, right angles, straight lines, repeated patterns, an imposing box of a structure?

But no. Perhaps the Acropolis — as well as this IBM tower — are simply figments of our imagination. Nothing more than a mythic Atlantis of morality. Nothing more than a vain hope, or worse, a revisionist hoax. Perhaps, there *never was* an Acropolis. Instead, all along, *we* have been building a strong, coherent monument to individual autonomy, to personal ethic, to equality, consent, and privacy, to tolerance — in effect, to moral respect. Perhaps we have been building it on our own soil over decades and decades of criminal history. To be sure, the lines are not simple or modern. Our structure does not have that single razor's edge of Millian harm, those straight angles of the Mies van der Rohe. No, the floor plans are littered with conflicting values — self-fulfillment, identity, equal respect, consent. The lines are not all perpendicular. The structure is wavy, flowing, sharp-edged in places, smooth in others, but sheen and powerful. It looks like Frank Gehry's pavilion in Chicago's Millenium Park or his Guggenheim in Balboa. It reflects a new moral aesthetic — complex, flowing, undulating, intersecting, imbricated. It is a structure dedicated to intersectionality and hybridity. No one principle governs. Instead, the new moral aesthetic gives place to varying and competing values.

Or perhaps, the reality is far less grandiose. There was no Acropolis and there never was. But *neither* is there a Gehry today. Perhaps the better way to conceptualize is the more mundane ordinary model of urban change in the old city. It is a story of Lévi-Straussian *bricollage*. There is some deconstruction and decay with age—some structures fall to ruin, left to the inclement weather, poorly maintained. Fornication, for instance, falls by the wayside, the victim of scorn. This is not to suggest, of course, that there ever was a coherent monument to begin with. No, remember, there was no Acropolis. There were just buildings that rose from the surrounding. And some of them do remain in place today. Incest, for instance, or bestiality. Those were well maintained and remain strong. But others have fallen aside—evincing some deregulation in the area of sexuality and gambling, perhaps—while others are either restored, gut rehabbed, or modernized, and yet others are newly built. An extra floor here, an addition on the back. In some locations, an entirely new building is raised, scattered here and there on formerly empty lots, some lots that had never been developed, others that fell to ruin.

It is not a story of decay only. There are some new structures cropping up here and there. The criminal law now penetrates the sanctity of the marital bedroom. We more willingly police the intimate private sphere with domestic abuse statutes. We frown on marital rape and enforce rape statutes in acquaintance and college campus cases.[18] We are also more willing to police the workplace for sexual harassment. No, it is neither a story of decay, nor progress—but some of both at the same time.

THE GENEALOGY OF HARM

In the process, the materials we use seem to change. We speak today of harm, consent, gender equality, and individuality. These terms reflect a different vocabulary, with different sources of authority, and different intellectual traditions. It almost sounds as if, now, the only valid discourse on crime is a consequentialist, harm-based rhetoric that turns over the decision-making process to deliberative democracy and the legislative process. The harm principle seems to have triumphed over legal moralism in the debates over the legal enforcement of morality.[19]

Today's consequentialist harm arguments resemble the new steel beams of modernity—not, of course, that iron ore is new, but it is styled today in a more rigorous, strong, straight manner. Gender equality is the glass façade. The older, deontological arguments—the categorical imperatives of punishment—resemble elegant mahogany furniture, well crafted, hand-made, intricately inlaid—a Louis the XVIth armoire, a Topino desk, a Canaba table. The older religious arguments are cut of stone—permanent, solid, unmovable. Their source and weight of authority was clear.

Would it be possible, then, to trace the genealogy of these arguments back from harm to morality and to religion before it? Could we trace the harm arguments used today back to a time when moral arguments ruled, and before that, to a time when religious arguments were supreme? It might be possible to imagine a progression from religion, to morality, to deliberative democratic debate and econometric cost-benefit analyses. The sources of authority are different, to be sure. The authority figures are different as well—the priest, the philosopher, the economist and policy maker. And the vocabulary is certainly different, as is the ultimate arbiter—God, reason, and now, welfare. But are they just different ways of saying the same thing? Are we invoking the same emotion, but using a more updated idiom? Has anything changed over the centuries?

Clearly, what has not changed is the indignation, the outrage, the venom. The passion in the debates remains pitched. Picture the indignation of the morally offended, the visceral contempt at human debasement. And, on the other side, the haughty grin of the enlightened libertarian. Think of the glee so many experience when the modern-day moral crusaders are defrocked—when, for instance, William J. Bennett, the great moralist of the late 20th century is outed as an addicted gambler. Self-righteous claims of hypocrisy and an overwhelming sense of *schadenfreude* overcomes the libertarian—Oh, what bliss! What bliss to throw moral condemnation back at the moralist! Carefully, that is, with a slightly edged constraint, a certain understanding empathy, a show of remorse that only rubs the wound. Think also of the smugness and content of the moralist pointing at the libertarian's sexual proclivities—proving that it was not principle, but hedonism, base sexual indulgence, mere gratification. Nothing more!

Still today, centuries later, we speak the language of morals in such venomous terms. We talk about moral breakdown, collapse, and ruin on one side, moral enlightenment and progress on the other. How can it be? How can one person's moral decay be another's moral progress? How can it be that the very same history, the same facts, the same trajectory can be interpreted in such diametrically opposed ways—much like a tessellation in the hands of Maurits Escher? How can it be that the very same history of the societal treatment and marginalization of homosexuals can be used by gay-friendly advocates for enhanced equal protection guarantees for homosexuals as a suspect class and by prohibitionists as evidence of the kind of moral opprobrium that satisfies rational basis review?

Morality or oppression—how *do* we distinguish the two? What is the optical filter that makes us see the foreground from the background—or vice versa—of this moral tesselation. What makes us interpret the very same set of facts as decay or enlightenment, righteousness or discrimination, passable or penal?

MORAL AND SEXUAL PROJECTS

The answer, I suggest here, lies in our *carceral imagination*. We have certain moral desires—visions of a moral order, yearnings for the comportment of others and ourselves—and we seek to impose those moral desires on the world in whatever idiom we believe to be most persuasive. Elsewhere, in the more specific context of the regulation of sexuality, I have referred to these moral visions as "sexual projects," by which I mean *other-regarding* ideologies of sexual practice, a set of views central to one's own identity as to how *others* should act sexually.[20] These sexual projects may or may not be related to one's own sexual practices—some may actively engage in one type of sexual practice only, yet firmly believe that others should (or should be allowed) to engage in other practices. Sexual projects may also include a complete *indifference* to the practices of others. What is central to the idea of the sexual project, though, is that it dictates how we believe *others* should act or should be allowed to act.

Our moral-criminal landscape is the littered product of these moral projects—of the struggles, alliances, truces, and coalitions, of the triumphs, defeats, and collapses, of the coordination and fragmentation of these sexual and moral projects. The scars of many battles pockmark the landscape. The abortion wars have left their mark, as has Prohibition and the temperance movement (which itself was scarred by the abolitionist movement before it), the War on Drugs, and the struggle over the Equal Rights Amendment. All of these conflicts galvanized some moral projects, while corroding others, leaving trenches and channels for later battles.

The penal code is, at its core, this imperialist project—a project that attempts to shape society in its image and that distributes in its wake social status, wealth, power, respect, pain, and stigma. At every juncture of the penal project there are clashing visions of social relations, and as it metes out justice, the penal code shapes our social and cultural hierarchies. The examples abound. Does the sight of adultery or a homosexual advance justify a heat of passion defense? Does a battered woman's perception of impending harm satisfy the imminence requirement of self-defense? Does crack consumption by a pregnant mother, followed by the delivery of a still-born child, amount to homicide? Can the force element in rape be replaced by a requirement of affirmative verbal consent? Is the prohibition on public drinking a status crime when applied to the homeless? Can the death of a police officer be an aggravating circumstance for purposes of capital punishment? All of these reflect clashing visions of what our society should look like, morally, culturally, sexually.

Judges, lawyers, and legal scholars desperately seek to veil these moral projects behind the cover of legal principle. Justice Anthony Kennedy's opinion for the majority in *Lawrence v. Texas* is a brilliant illustration, offering a dizzying array of possible limiting principles to justify dropping the ban on homosexual sodomy, ranging from the harm principle of the American Law Institute's Model Penal Code, to evolving standards of morality as reflected in the history of state legislative enactments (and repeal) of sodomy provisions, to the critical commentary of reputedly conservative American academic judges such as Charles Fried and Richard Posner, to international law decisions of the European Court of Human Rights, to the 1957 British Wolfenden Report of the Committee on Homosexual Offenses and Prostitution, to the *Romer v. Evans* equal protection anti-animosity principle, to state judicial resistance to the *Bowers* ruling, to conceptions of privacy, notions of dignity, or what Cass Sunstein refers to as "an American version of desuetude."[21] As Mary Anne Case observes, the *Lawrence* opinion points to a "this" and "that" of ambiguous referents—it is, in Case's words, an opinion that "starts its readers off with this and in the end may deliver that instead."[22] The result is a rhetorical smorgasbord of legal authority that does everything in its power to mask the project behind a veil of reason and legal rhetoric. But it is a veil—and behind it is a shared carceral imagination, or at least, the imagination shared by some.

MAPPING OUR IMAGINATION

What then does *our* collective carceral imagination look like today? In 2004, I surveyed my students at the University of Chicago Law School. These were students in an upper-level course called *Advanced Criminal Law: Sex, Drugs and Guns.* I asked them to tell me, as conscientiously as possible, how they would classify the different types of conduct at the border of the criminal law. My purpose was not to sample the general population—or even law students more generally, or young professionals today. I have no reason to believe that my students are representative. Surely, I did not choose them at random. They are a self-selected group of upper-level law students who decided to take a course with a provocative title. From my experience in the classroom, the students were by no means a monolithic group, but I do not intend to treat them as a sample. Instead, my goal is to map *their* collective carceral imagination.

The survey read, at the top: "This is an anonymous survey, but please vote conscientiously. Suppose you are a member of the Illinois legislature, how would you vote on the following?" The survey offered four possible

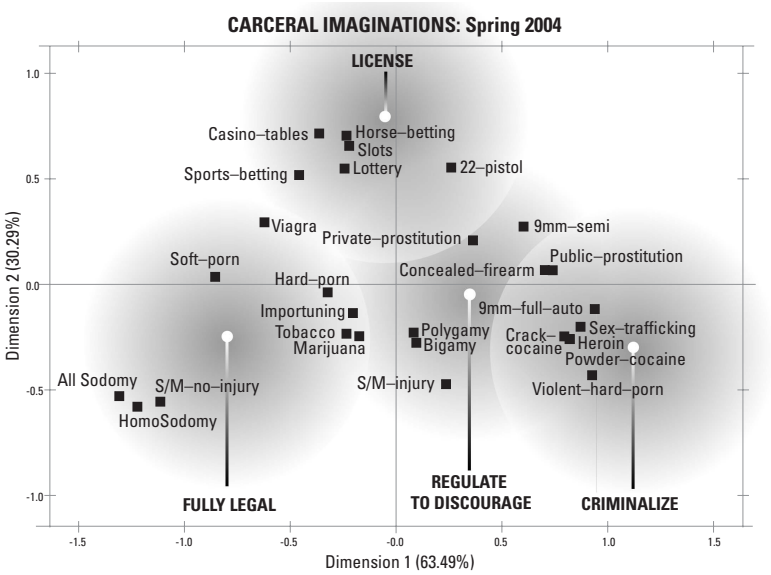
votes—"fully legal," "licensing scheme," "regulate to discourage," and "criminalize." On being asked the difference between a licensing scheme and regulation to discourage, I gave the example of a drivers license on the one hand, and a heavy tax on tobacco to discourage consumption on the other. The survey then listed 28 activities, which I defined or clarified orally when necessary in the following terms:

1.	Sodomy	Defined as oral and anal sexual intercourse
2.	Homosexual sodomy only	Defined as same-sex sodomy
3.	Importuning	Defined as soliciting sex in a public space, e.g. men's room
4.	Bigamy	Defined as marriage to two people
5.	Polygamy	Defined as marriage to more than 2 people
6.	S/M with no injury	Self-explanatory
7.	S/M with injury	Defined as broken skin or bleeding
8.	Tobacco	Defined as consumption
9.	Marijuana	Defined as consumption
10.	Powder cocaine	Defined as consumption
11.	Crack cocaine	Defined as consumption
12.	Heroin	Defined as consumption
13.	Viagra	Defined as consumption
14.	.22 caliber pistol	Defined in terms of possession
15.	9 mm semi-automatic	Defined in terms of possession
16.	9 mm full-auto machine gun	Defined in terms of possession

17.	Right to carry concealed firearm	Self-explanatory
18.	Lottery	Self-explanatory
19.	Horse or dog race track betting	Self-explanatory
20.	NFL sports betting	Self-explanatory
21.	Slot machines	Self-explanatory
22.	Casino table games	Self-explanatory
23.	Soft porn	Defined in terms of nudity only
24.	Hard porn	Defined in terms of explicit sex
25.	Violent hard porn	Defined in terms of violent explicit sex
26.	Public prostitution	For example, street prostitution
27.	Private prostitution	For example, escort services
28.	Consensual participation in sex worker trafficking	Self-explanatory

In order to visually capture their imagination, I conducted correspondence analysis[23] on the survey results and produced correspondence maps. Correspondence analysis is a multivariate statistical technique that is useful in visually representing the associations between cross-tabulated categorical variables. Its primary goal, very simply, is to "transform a table of numerical information into a graphical display, facilitating the interpretation of this information."[24] It is not a method of testing a hypothesis, although it does draw on the logic of Pearson's chi-square statistic in computing distances for purposes of graphic representation. The technique takes a contingency table made up of categorical variables and represents the table in a two dimensional graph that allows a reader to interpret the relationships between the categorical variables.

The first correspondence map represents the survey responses of 40 students who took my course in the Spring of 2004. I administered the survey on the last day of class, after we had spent the full quarter reading about, discussing, and debating these topics. Here, then, is their carceral imagination:



This map reflects several clusters of conduct. The first, in the lower left-hand corner, includes sodomy generally (in other words, regardless of the gender of the participants), homosexual sodomy, and non-injurious S/M sex. This is a cluster of private, consensual, non-injurious sexual relations that nevertheless diverge from classic heterosexual vaginal sexual intercourse. I will call this cluster the "legal/deviant sex" cluster. Along Dimension 1, which appears to line up neatly with the legalization/criminalization spectrum, this cluster of activities is by far the group of activities that is most closely associated with full legalization. Along this first dimension, soft pornography (simple nudity) is also close to the legal/deviant cluster.

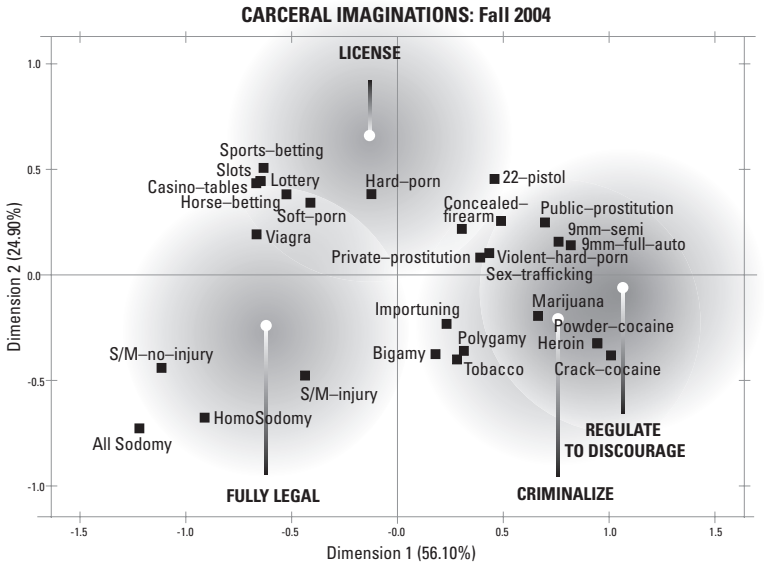
A second cluster of conduct revolves around gambling activities, and it is located at the top middle portion of the map, near the licensing scheme pole. In descending order from legalize to license, these include betting on professional sports games, table games at casinos, state lotteries, horse-track betting, and slot machines. I will call this grouping the "gambling/license" cluster. On Dimension 1, the activities are grouped between

full legalization and licensing, with an apparent tilt toward licensing. They also form the extreme along Dimension 2 — as opposed to the legal/deviant sex cluster at the bottom — suggesting that the second dimension may relate to a public-private distinction. Most of the activities at the top of Dimension 2 involve conduct that takes place in the public sphere, in the company of many others, not hidden from view. The gambling activities are generally done in open and involve many members of the general public. In contrast, the conduct at the bottom of Dimension 2 — whether the legal/deviant sex cluster or other activities in the lower right portion of the correspondence map, such as injurious S/M sex and violent hard pornography — tend all to be performed in seclusion and are generally surrounded by social opprobrium and risk. What is interesting here is that the second dimension cuts across the legalization/criminalization spectrum, so that there are, in effect, permissible yet very private acts and impermissible yet also very private acts. Privacy alone — and perhaps consent, though this is more controversial — does not explain the regulation spectrum.

A third group of activities is clustered around the "criminalize" pole in the lower right-hand corner of the map. These activities include violent hard pornography, commercial sex trafficking, use of crack- or powder-cocaine and heroin, and the possession of a 9mm fully-automatic weapon. Along Dimension 1, these are the activities that call for the most strict criminal enforcement. I will accordingly refer to this group as the "criminalize" cluster. Notice, perhaps surprisingly, that the furthest activity along Dimension 1 is the 9 mm full-auto, with violent hard pornography next. In other words, possession of a 9 mm fully-automatic weapon is viewed as worse, in penal terms, than using heroin or crack-cocaine.

Two other clusters are worth noting. One is located at the center of the map, and it includes hard pornography, importuning, marijuana and tobacco consumption, polygamy and bigamy. Along Dimension 1, tobacco is viewed as requiring *more* regulation and supervision than marijuana. This cluster is located in the middle of both dimensions, and I therefore refer to it as the "middle group." The other cluster is located on the right-hand side of the map, again near the middle of Dimension 2. This cluster includes the possession of a 9 mm semi-automatic weapon, prostitution (both street prostitution and more private escort services), and carrying a concealed weapon. These conducts are clustered in a region close to "regulate to discourage" along Dimension 1, somewhere between regulation and criminalization. Notice here that street prostitution is more frowned upon than escort services. They also tend to be in an intermediate zone along the public-private spectrum of Dimension 2. The cluster groups together guns issue and prostitution, and for this reason, I refer to this group as the "guns/prostitutes" cluster.

I conducted a similar survey of my students on the first day of the same course, *Advanced Criminal Law*, the following quarter, Fall 2004.[25] I obtained the following map:



There are several similarities with the previous map. The legal/deviant cluster remains in the lower left-hand of the map and the gambling/license cluster at the center-top. The other clusters are, for the most part, approximately in the same areas. There are, nevertheless, some notable differences, the most important of which is that, along Dimension 1, the "criminalize" and "regulate to discourage" categories have switched places. This is somewhat confusing because it destabilizes the meaning of Dimension 1. One interpretation is that, for this group of respondents, criminalization is viewed as less effective than regulations to discourage, such as burdensome tax schemes, and, as a result, as less punitive.[26] In other words, the respondents may have felt that regulation will deter drug consumption more — especially cocaine and heroin — than criminalization, and that these activities require more, not less, intervention.

Other sharp differences have to do with the location of S/M with injury, marijuana consumption, and soft and hard pornography. With regard to the first — S/M practices that cause injury — the Fall 2004 respondents were far more permissive, locating the conduct practically in the legal/deviant cluster. In contrast, marijuana consumption is far closer to regulation and criminalization, and both soft and hard pornography

have moved in the direction of licensing. One final thing. The gambling/license grouping is far more closely clustered in the Fall 2004 responses. This reflects, I suspect, the fact that we had not yet studied gambling in class before I administered the Fall 2004 survey and, as a result, had not yet investigated the different pay-outs and relationships of exploitation that exist in the different contexts of slot machines versus lotteries versus sports betting, etc.

Overall, what is remarkable, though, is the similarity. There seems to be some collective consensus that certain traditionally "deviant" sex acts—such as sodomy and non-injurious S/M—should be fully legal; that gambling activities should be licensed; and that the criminal law and/or heavy regulatory mechanisms should govern drug use, guns, and prostitution. In this sense, there are remarkable consistencies in the imaginations of the two groups of students. Their combined collective imagination is represented on the first page of this essay.

So what do you think? What do these correspondence maps looks like? Do they resemble the Acropolis? A Mies van der Rohe? A Gehry? The reality, I suspect, is that they reflect a historically unique, contingent, and complex amalgam, the product of conflict and resistance, imperialist tendencies, identity struggles, modernization, conservation *and* liberation movements. On these maps lie the ruins and the monuments of generational battles—the traces of renewal projects, the blueprints of progressive ideals, the foundations of classical thought. These are the maps of our collective carceral imagination. What do you think: decay or progress? A ruin or a masterpiece?

Notes

1 *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965).

2 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

3 *Carey v. Population Services Int'l*, 431 U.S. 678 (1977).

4 *Amicus* brief of the American Psychological Association and American Public Health Association in *Bowers v. Hardwick*, cited in JOYCE MURDOCH & DEB PRICE, *Courting Justice* 289 (New York: Basic Books, 2001).

5 "Your Trickiest Sex & Love Questions Answered by 2,793 Men," *Glamour*, Jan. 2004, at 140-41.

6 *Amicus* brief of the APA and APHA, cited in MURDOCH & PRICE, *Courting Justice* at 290.

7 *Lawrence v. Texas*, 123 S.Ct. 2472, 2485 (2003) (O,CONNOR, J., concurring).

8 *Id*.

9 *People v. Uplinger*, 58 N.Y.2d 936 (1983).

10 *Id*.

11 *Id*.

12 See HERBERT WECHSLER, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1426 (1968). The Model Penal Code was a proposed model of legislation drafted by the American Law Institute. It significantly influenced state legislation insofar as it was implemented or significantly influenced the enactment of new criminal codes in approximately thirty-four states during the 1960s, '70s, and '80s. See *Model Penal Code, Official Draft and Explanatory Notes*, at xi (1985) (Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of The American Law Institute at Washington, D.C., May 24, 1962) (1985).

13 See *Model Penal Code and Commentaries* (Official Draft and Revised Comments 1985) Pt. I, Vol. I, § 1.02(1)(a) (emphasis added).

14 See *id*. at 16 (comment on preventing defined conduct).

15 See *id*. at 17.

16 *Model Penal Code: Official Draft and Explanatory Notes,* at 196.

17 WECHSLER, *Codification of Criminal Law* at 1449.

18 Special thanks to my students Deborah Pugh and Brian Rubens for these insights.

19 For a discussion tracing the rise and triumph of the harm principle in criminal law, see generally BERNARD E. HARCOURT, *The Collapse of the Harm Principle*, 90 *J. Crim. L. & Criminology* 109 (1999) (tracing the rise of the harm principle and suggesting that the triumph of the harm principle over legal moralism paradoxically has eviscerated the limiting principle of harm). See also BERNARD E. HARCOURT, *Illusion of Order* 185–214 (Cambridge, MA: Harvard University Press, 2001).

20 See BERNARD E. HARCOURT, "*You Are Entering a Gay and Lesbian-Free Zone*": *On the Radical Dissents of Justice Scalia and Other (Post-) Queers.* [Raising Questions About *Lawrence*, Sex Wars, and the Criminal Law], 94 *Journal of Criminal Law and Criminology* 503, 524 (2004).

21 Cass Sunstein argues on grounds of judicial prudence for a narrow reading of *Lawrence* that stresses this last possibility—the idea that "a criminal ban on sodomy is hopelessly out of accord with contemporary convictions." See CASS SUNSTEIN, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2004 SUP. CT. REV. (2004).

22 See MARY ANNE CASE, "On 'This' and 'That'" in *Lawrence v. Texas*, 2004 SUP. CT. REV. (2004).

23 Correspondence analysis is popular and far more familiar in France, the Netherlands, and Japan, but is relatively unfamiliar in the United States. It is often referred to under different names, and may be familiar to readers under another name, most commonly, canonical analysis, principal components analysis of qualitative data, optimal scaling, multi-dimensional scaling, or, in French, *analyse factorielle des correspondence or analyse des données.* For a detailed discussion of correspondence analysis and its utility in socio-legal studies, see BERNARD E. HARCOURT, "Measured Interpretation: Introducing the Method of Correspondence Analysis to Legal Studies," (Symposium on Empirical and Experimental Methods in Law), *2002 University of Illinois Law Review* 979-1017 (2002).

24 MICHAEL GREENACRE, "Correspondence Analysis and its Interpretation," at 4, in *Correspondence Analysis in the Social Sciences: Recent Developments and Applications*, MICHAEL GREENACRE and JÖRG BLASIUS, eds. (San Diego, CA: Academic Press, Inc. 1994); see also SUSAN C. WELLER and A. KIMBALL ROMNEY, *Metric Scaling: Correspondence Analysis* 7 (Newbury Park, CA: Sage Publications 1990).

25 In my Fall 2004 course, I had 17 students attend the first day of class and therefore have 17 respondents.

26 Special thanks to my student Paul Clark for this interpretation.