

**IV. Jurisprudence, Legislative Drafting,
and Sentencing During Crisis**

Consent and intuitions of justice: a comparative analysis of consensual v. non-consensual lawless societies and the implications for criminal law and justice policy

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Introductory Remarks – Terminological Observations

Given that they relate to society, identity, and interactions, the key terms used in this article are often contested and interpreted widely and varyingly. For this reason, it is important to spell out their intended meanings for the purposes of this article. But considering that they describe living communities and human behavior, one must equally acknowledge their mutability and possible future refinements. In his book *Leviathan*, Hobbes introduced in the discipline of political philosophy the idea of the state of nature.² According to Hobbes, the state of nature is the precondition of the social contract and the establishment of civil society. Under a mechanistic conception of human action, Hobbes posits that life without a government would be so onerous that people would be left with no other choice than to accede to the

¹ I would like to thank Paul Robinson for his valuable feedback on earlier drafts. Thank you also to the participants of the Criminal Law Theory seminar at the University of Pennsylvania Law School for the constructive exchange on the key content topics of this article. All remaining errors are my own.

² Thomas Hobbes, *Leviathan* (first published 1651, ed. Edwin Curley, 1994) Hackett Publishing, Chapter XIII para. 9.

proposed social contract under a sovereign. To this sovereign, they would cede rights in exchange of their survival.³ In Hobbes' state of nature there is no injustice due to an inherent absence of positive laws except for certain natural precepts. In this article, I understand "lawlessness" to encompass this type of situations that reflect an apparent lack of government under the Hobbesian formal sovereign structure. That is not to say that these situations also share an absent condition of governance. On the contrary, lawlessness refers to societies, where lack of formally enacted laws does not necessarily equate to complete scarcity of normative commands but to a different social convention dynamic. While lawlessness refers to lack of official prescript, it does not necessarily reflect the dearth of normative prescriptions resulting in absence of order or justice.

The first part of this article critically introduces the distinction between consensual and non-consensual lawless societies. It undertakes a comparative analysis among the several case studies to explore the dynamic of consent as a variable affecting the ability of lawless groups to succeed and do justice. The second part features a new case study, The Mesa, which can be used as a clear-cut example of a consensual lawless society and juxtaposed to the existing case studies for analytical expansion. Finally, the third part pairs the two cases of the Mesa and the Prohibition that share identical variables except for the variable of consent. I then delineate potential links between consent and the intuitions of justice debate in an attempt to offer insight to the latter and the criminal justice reform discussion.

Consensual V. Non-consensual Lawlessness

When reference is made to situations of lawlessness, we often presume as an axiom that these situations occur in a wanton and undesired fashion. The question lingers almost naturally: why would people consent to being part of a lawless community? Nevertheless, under a closer examination, we find at least two possible streams of lawless

³ *Ibid.*

communities. The first kind is the product of a sudden change of affairs, whether factual or normative, that leads to the imperative emergence of an ungoverned environment without the consent of the individuals involved. This is usually the type of community commonly and intuitively conceived as lawless. But there are also communities the individuals of which were given the possibility to either consent to their inclusion in the lawless commune and its *ad hoc* normative prescriptions, or to opt out. For the purposes of this article, I label the former as non-consensual and the latter as consensual lawless societies.

There are multiple of arguments within the political philosophy debate regarding this distinction and the individuals involved.⁴ But little attention has been paid to the role this element of prior consent to engaging in a community can play *vis-à-vis* the community's survival success and its ability to do justice. In this enterprise, I first attempt a simple quantitative analysis of the data provided in a set of case studies undertaken by Paul Robinson in 'Natural law & lawlessness: modern lessons from pirates, lepers, Eskimos, and survivors'.⁵ I interpret as consensual those communities where the individual was provided with the choice of creating or entering the lawless community in the first place. I understand the individual to be acting as a rational actor, therefore as an agent who is capable of making decisions based on a cost-benefit analysis and who has the adequate amount of information necessary to perform such test.⁶ On the other hand, the individuals in

⁴ See e.g., Carl Slevin, 'Anarchism', in Ian McLean & Alistair McMillan (eds.), *The Concise Oxford Dictionary of Politics* (Oxford University Press, 2003); Colin Ward, 'Anarchism as a theory of organization', in Leonard I. Krimerman & Lewis Perry (eds.), *Patterns of Anarchy* (New York: Anchor Books, 1966); R. B. Fowler, 'The anarchist tradition of political thought', *Western Political Quarterly* 25(4), 738-752 1972; George Woodcock, *Anarchism: A history of libertarian ideas and movements* (New York: The World Publishing Company, 1962), pp. 276-78.

⁵ See generally, Paul H. Robinson, 'Natural law & lawlessness: modern lessons from pirates, lepers, Eskimos, and survivors', *U. Ill. L. Rev.* 433 (2013); Paul H. Robinson & Sarah Robinson, *Pirates, Prisoners, and Lepers: Lessons from Life Outside the Law* (Potomac Books, 2015).

⁶ See John Scott, 'Rational choice theory' in G. Browning, A. Halcli, & F. Web-

the non-consensual cases either did not consent to their inclusion in the lawless community, or had no such option of consent in the first place. Finally, I understand as a key element in establishing the variable of consent in these cases the fact that the actor was provided with alternative options. If the individual was presented with no option of entering or leaving the lawless environment, then I consider them to be part of a non-consensual community.

The data

Tables 1 and 2 provide a comparative sketch between consensual and non-consensual lawless communities measured against their success of survival and their ability to do justice. For purposes of methodological clarity, I do not include the occasions of partial success or justice in the final rate deduction as they provide no clear information regarding the outcome of the cases examined. However, partial success and justice results can be used to assess the certainty or ambiguity each consent regime might offer to the communities emerging out of it. Finally, some of the case studies were purposely excluded from the analysis as they do not offer any specific information regarding the formation of the communities nor was such information easily inferred from the narratives. I conduct this data analysis with the purpose of examining whether or not I may infer a cause-effect relationship between consenting to a lawless community and the community's possibility of survival success and justice.

The methods and results of this analysis are limited to the data offered by Paul Robinson's case studies on "Natural Law & Lawlessness: Modern Lessons from Pirates, Lepers, Eskimos, and Survivors."⁷ As

ster (eds.), *Understanding Contemporary Society: Theories of the present* (Sage Publications, 2000); Lawrence E. Blume & David Easley, 'Rationality', in Steven N. Durlauf & Lawrence E. Blume (eds.), *The New Palgrave Dictionary of Economics* (Palgrave Macmillan, 2008), *The New Palgrave Dictionary of Economics Online*, Palgrave Macmillan; Gary Stanley Becker, *The Economic Approach to Human Behavior* (University of Chicago Press, 1976).

⁷ Paul Robinson, 'Natural law & lawlessness: modern lessons from pirates, lep-

limited as they may be, they can offer an early indication to further flesh out and test in a more elaborate study. They also open up the discussion to indexes, variables, and methodological approaches to the issue of establishing a criminal justice system with the highest likelihood of success and perception of justice being done. From the analysis of the cases in Tables 1 and 2, the aggregate results suggest that those communities which ran under a consensual rule add up to a 75% survival success rate and a 62.5% of doing justice. On the other hand, the non-consensual communities result in a 10% rate both in survival success and justice measurements. The partial success and justice rates are 25% for success and 12.5% for justice in the consensual communities while 60% and 50% respectively in the non-consensual communities.

Table 1

Consensual	Success	Justice
<i>Wagon Trains</i>	Y	Y
<i>Maroons</i>	Y	N
<i>Pitcairn</i>	P	N
<i>Anguilla</i>	Y	Y
<i>Gold Rush</i>	Y	Y
<i>Netsilik</i>	Y	Y
<i>Pirates</i>	Y	Y
<i>Jamestown</i>	P	P
%	75	62.5
% Partial	25	12.5

These data allow for certain further observations. Consensual communities have a discernibly higher rate of both survival success and justice over the non-consensual. Consensual communities also bear a

ers, Eskimos, and survivors', *U. Ill. L. Rev.* 433 (2013).

significantly low possibility of ambiguous outcomes leading to partial success. On the other hand, non-consensual communities convey a rather high degree of ambivalence leading to high rates of partial results. We can draw two safe conclusions from these observations. First, we may hypothesize that consent in creating or entering a group has a cause-effect connection with the potential of survival success and ability to do justice of these communities.⁸ Second, lack of consent does not appear as necessarily linked with a failure of survival and doing justice of those communities; nevertheless, lack of consent is indicative of a significantly lower level of success and justice. This may be interpreted in two ways: lack of consent leads to contesting elements in the community that consequently result in variant and contradictory circumstances within that community. Au contraire, the high rates of partial outcomes may suggest that there is no causal relation between lack of consent and the two variables of survival and justice. Despite this relative inconclusiveness regarding the cases lacking consent, the rates in the consensual communities are particularly strong to suggest a cause-effect relationship.

Drawing on the above, I will undertake a brief descriptive analysis of a similar community beyond that of Paul Robinson's case studies. The reason for choosing this particular community aims to test and further support or reject the cause-effect connection of consent with the chances of success and justice in the lawless environment. This community emerged and subsequently operated under a clear consent re-

⁸ See e.g. Judea Pearl, *Causality: Models, Reasoning, and Inference* (Cambridge University Press, 2000); P. Spirtes, C. Glymour & R. Scheines, *Causation, Prediction, and Search* (New York: Springer-Verlag, 1993); Herbert Simon & Nicholas Rescher, 'Cause and counterfactual', 33 *Philosophy of Science* 1966, 323-40; T. Verma & J. Pearl, 'Equivalence and synthesis of causal models', *Proceedings of the Sixth Conference on Uncertainty in Artificial Intelligence*, (July, Cambridge, MA) 1990, 220-227, reprinted in P. Bonissone, M. Henrion, L. N. Kanal & J.F. Lemmer (eds.), *Uncertainty in Artificial Intelligence* (Amsterdam: Elsevier Science Publishers, B.V., 1991), pp. 225-268; P. Menzies & H. Price, 'Causation as a secondary quality', 44 *British Journal for the Philosophy of Science* (1993), 187-203.

gime. It enjoys full survival success rates, legitimate procedures and procures just results. The way these added data interplay with Paul Robinson's initial case studies and analysis will contemplate any possible implications to the empirical desert theory and the modern criminal justice system.

A Consensual Lawless Case – The Mesa, New Mexico “Living Off the Grid”

The Mesa community in New Mexico prides itself for being one that lives “off the grid”. What is literally meant by this type of life is that it entails a home that is not connected to the electricity grid. But, far from the literal sense, living off the grid has attained a much broader definition for the residents of the Mesa. It means “becoming a ghost to the government, dropping out of society. No taxes, no job, living under the radar.”⁹ Covering 15 square miles, the Mesa is home to approximately 400 people. The individuals of the community range from war veterans to teenagers who have run away from their families and average people who have decided to withdraw from the general society. The community is clear regarding its relationship with the government: “We don't want their government and they can get out of here.”¹⁰ As a result, the official government has adopted a customary hand-off policy on the Mesa. While the Mesa may initially appear to be a seclusion refuge, its residents have created their own “lawless” community with their own rules.

“There are very few rules that we have out here: don't steal from your neighbor, don't shoot your neighbor.”¹¹ According to the residents “the real law [at the Mesa] is to be a good neighbor or otherwise you are not allowed to be out here. That's the main law.”¹² The community is premised on a barter system, “everybody borrows things out

⁹ R. D. Morano, C. Libertino, J. Stulberg, R. Stulberg & Still Point Pictures. *Off the Grid: Life on the mesa*. New York: Indiepix (2008).

¹⁰ *Ibid.*

¹¹ *Ibid.*, Mama Phyllis.

¹² *Id.*

here and it gets returned somehow.”¹³ At the helm of the community are “the elders” who are there to take steps toward helping the community by being its steering force and leadership. The elders are those who have effectively created the community or have spent the longest time at the Mesa. Gradually, the Mesa became an increasingly popular ambush for people from the outside coming into the community; this did not come without caveats as the Mesa residents witnessed an increase in criminal acts that came across as relatively unprecedented.

Thefts started being discovered all over the Mesa. Residents suspected Stacy, a teenage runaway, of committing the crimes. Someone had broken into the Mesa homes and had taken all food and vegetables. Stacy lived with a group of runaways called “the nowhere kids” who had recently moved to the Mesa. “The reason why we know it was that group who stole is that they are all vegan and we have other stuff at home like meat, cheese, milk but they never touched that, all they took were the beans!”¹⁴ The Mesa community members were also disturbed by the fact that those break-ins could have been more expansive in their plunder. They were especially concerned by the potential of the criminal acts diffusing if they became more systemic. “If you break into my house and steal my weapons, it puts those weapons in criminal hands. No one of us can afford that.”¹⁵ For the purposes of resolving the dispute and addressing the acts of theft, the Mesa community undertook a form of dispute resolution.

The council of the elders called for an emergency meeting to discuss the issue and come to a decision. While the elders would in practice adjudicate the case, there were people in the group “to defend the person who did the stealing.”¹⁶ “The elders are coming together so that we can keep peace on the Mesa, we don’t call the cops we take care of our business ourselves.”¹⁷ After the elders convened to discuss, the accused

¹³ *Ibid.*, Gecko.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Ibid.*, Mama Phyllis.

were called into the Council. "There will be a lot of yelling and screaming, and that's cool. Let them yell, let them scream, let them get it out of their system."¹⁸ The accused group of kids suggested to their defense that "if someone has something, doesn't utilize it, and leaves it then it belongs to everyone, to the entire society for people to use. "While this did not sit well with the Mesa residents, the elders seemed rather understanding: "this kid came from an intercity situation where this might have been true but we tried to let him know that this isn't a place for that. I would like to see a delegation go to them without guns to tell them they have to leave the Mesa."¹⁹

The group decided that the delegation in charge will be consisted of the mamas, the women of the group. "Had it not been the mamas going down there the same results would not have happened. We didn't condemn them, we did it in a nurturing way but it was also obvious we knew what was going on and that we wanted it to stop."²⁰ "To me that was a greater resolution than putting someone in jail or putting them on probation or whatever the system wants to do with them. Our more simple approach to justice is a more correct method and justice is usually served. Democracy is our most valued asset."²¹ The "nowhere kids" eventually managed to negotiate with the Mesa members and were permitted to stay on the community with a close watch by the elders.²² The Mesa community continues today with a similar structure and remains a haven for those who choose to live off the grid and within a consensually lawless community.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Ibid.*, Mama Phyllis.

²¹ *Id.*

²² *Id.*

THE MESA V. THE PROHIBITION

PRELIMINARY CONSIDERATIONS

A laboratory-like conditions comparison is necessary in order to establish the existence of a causal connection between consent in partaking in a lawless society and the society's potential for success and doing justice. In order to achieve this laboratory-like environment, one must be able to control and ensure the uniformity of the conditions in place shared by the compared objects. While such sterile lab-like conditions are not feasible in comparing human and societal behavior and dynamics, they are achievable in this context by eliminating other variables that may affect the results. The process of variables elimination can be achieved by selecting a pair that evidently shares all other variables except for the one that one wishes to manipulate in order to affirm the original claim. For these purposes, the case I have selected among the case studies analyzed in Paul Robinson's "Natural Law & Lawlessness: Modern Lessons from Pirates, Lepers, Eskimos, and Survivors"²³ to pair with the Mesa case study is the case of the Prohibition. By assessing the variables found in both of them, I then argue that consent in joining or being a member of a lawless society, *ceteris paribus*, bears a causal connection with the society's success and justice.

A BRIEF SUMMARY OF THE PROHIBITION CASE

At the end of World War I, laws prohibiting the sale and consumption of alcohol started gaining popularity among the U.S. The distinction between "wet" and "dry" politicians became commonplace in electoral campaigns and the rise of the women's movement made it impossible for "wet" politicians to stay in office.²⁴ In this political ambience, the Prohibition of manufacture, sale, or transportation of alcohol became the 18th Amendment to the U.S. Constitution on January

²³ Paul Robinson, 'Natural law & lawlessness: modern lessons from pirates, lepers, Eskimos, and survivors', *U. Ill. L. Rev.* 433 (2013).

²⁴ *Supra* note 4, "Prohibition" 178.

16th, 1920.²⁵ The lack of enforcement of the prohibition laws generated an opposite dynamic allowing for organized crime around the manufacture and sale of alcohol to flourish and become influential. Despite the expectations of the prohibitionists that a blanket ban on alcohol would lead to a consequent reduction of crime rate, the reality was different. Prohibition effectively led to worse social conditions than those experienced prior to the 18th Amendment demonstrated by more lethal forms of alcohol, increased crime rates, and the establishment of a black market dominated by organized crime.²⁶

THE MESA & PROHIBITION CASE DYNAMICS

The Mesa and the Prohibition case studies share several identical variables which allow for the relatively lab-like environment desired. Even though the methods and results of this article do not claim to be “scientific” due an inherently narrow scope and study material, they do contend to be at least an indication that can be further tested via more elaborate empirical study. As shown in Table 3 below, the Mesa and the Prohibition Cases share identical results in the variables of duration of the group, prior planning, common shared goal, prior relationship, hierarchy among the members of the group, consistency of the group, and freedom to break from the group. Despite their identical variables however, the two cases diverge in the area of overall outcomes produced; while the Mesa appears to be both successful in terms of success and capability to do justice, the Prohibition Case alludes to directly opposite directions. The question therefore arises as to the differentiating factor that may be responsible for procuring such opposing results. I hypothesize that consent to the lawless society is the missing variable, the extra factor, which interferes and alters the final result

²⁵ ‘Prohibition wins in Senate, 47 to 8’ (PDF). *New York Times*: 6. 19 December 1917.

²⁶ Charles Hanson Towne, *The Rise and Fall of Prohibition: The human side of what the Eighteenth Amendment has done to the United States* (New York: Macmillan, 1923), pp. 159-162.

when all the other variables identified are equal. I will then proceed to examine where and how the element of consent can be isolated, and what its relation to the intuitions of justice debate may be.²⁷

Table 3

Case	Success ²⁸	Justice ²⁹	Duration ³⁰	Prior planning ³¹	Common goal ³²	Strangers ³³	Hierarchy ³⁴	Group type ³⁵	Free to leave ³⁶
The Mesa	Y	Y	M	N	N	Y	N	IG	P
Prohibition	N	N	M	N	N	Y	N	IG	P

The course of the two cases can be described as follows: The Mesa is a lawless community as defined in the first part of this article. Despite the lack of officially enacted laws,³⁷ the community runs on a set of

²⁷ Paul H. Robinson & John M. Darley, 'Intuitions of justice: implications for criminal law and justice policy', 81(1) *Southern California Law Review* 8 (2007).

²⁸ Success: Y = Successful, N = Unsuccessful.

²⁹ Justice: Y = Group punishes wrongdoing justly, N = Group fails to punish or punishes unjustly.

³⁰ Perceived duration of the group: M = Medium term, no set indefinite plan.

³¹ Prior planning: N = No planning coordination adopted but had the opportunity to plan if desired.

³² Common Goal: N = The group shared no common goal.

³³ Strangers: Y = The members of the community as a whole had no prior relationship.

³⁴ Hierarchy: N = No hierarchy, group decision-making.

³⁵ Group Type: All members of the group are part of an absent or ineffective government.

³⁶ Free to Leave: P = Partial, could leave but with inherent difficulty in the relocation.

³⁷ *Supra* note 10.

shared norms. These norms are generally respected and when not, they are enforced via adjudication resulting in what is considered to be a just result. Under this continuous interaction between the shared norms and the community itself, these norms gain moral credibility and are consequently embedded in the normative prescriptions of the community. At the Mesa one observes very rare deviations from these rules. On the other hand, the Case of the Prohibition tells a rather opposite story. The prohibition movement produced formally enacted laws. However, the enforcement of these laws was never achieved leading society to a situation of lawlessness much like the one envisioned by Hobbes, despite the existence of a central governmental authority. We observe two very distinct situations of lawlessness here: one where lawlessness equals to order and justice, and one where lawlessness equals to chaos and injustice. How is it then that two cases which share all identified variables can lead to such opposing results?

The additional variable of consent may illuminate the discussion. As discussed in the second part, the members of the Mesa had the opportunity to consent to entering the lawless community. The Mesa bears a characteristic of what John Stuart Mill called an "experiment of living",³⁸ and what can be identified as "a wide and diverse range of communities which people can enter if they are admitted, leave if they wish, and shape according to their wishes."³⁹ The Mesa stands at the extreme end of the consent spectrum, exemplifying voluntary deference to a community and its set of rules. On the other hand, the Prohibition is a paradigmatic case of lack of consent towards the normative system established and its societal results. If one assumes consent to be a critical variable in the success of a normative criminal justice system, whether at a nascent state such as that of a lawless society, or a more complex like that of modern societies, the issue of manipulating that variable comes into play.

³⁸ John Stuart Mill, *On Liberty* (London: Longman, Roberts & Green, 1869) Chapter III.

³⁹ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), Chapter X.

By paying a closer look at the consensual cases of Table 1 and the dual comparison of Table 3, the element of consent in entering or remaining in the lawless communities seems to depend greatly on whether the normative system of the community in question reflects the intuitions of justice shared by the community members. In the case of the Wagon Trains in Paul Robinson's case studies, a drafted agreement is passed before the group embarks on the trail the normative prescriptions of which have been agreed upon by all members of the community.⁴⁰ The Anguillans as a tribal group shared and had consented to some pre-established "universal truths" among all members of the society.⁴¹ The Gold Rush miners all gather together to determine what the norms ought to be according to what they consider as just in the realm of their society.⁴² The Inuit live in a society where they have all agreed as to the norms governing their day-to-day interactions.⁴³ Finally, the pirate crews draw up charters according to what they consider just governing principles of their communities.⁴⁴ By the same token, people at the Mesa have decided upon central normative principles which they consider just to abide by within their "free" community. There is therefore a close link between the variable of consent and the extent to which the normative prescriptions of the communities analyzed reflect the moral intuitions of justice shared by the members of the community. The Prohibition is an exemplary *argumentum a contrario* suggesting that there was lack of consent in being part of the normative prescriptions of the society because those normative prescriptions were not in line with the community's intuitions of justice. This brings us to two culminating observations: (1) there seems to be a link between the moral intuitions of justice on the one hand and consent to engage with a normative societal regime on the other; (2) consent carries a cause-effect like connection with the prospect of success

⁴⁰ *Supra* note 5, 'Wagon trains', 33.

⁴¹ *Supra* note 5, 'Anguilla', 137-8.

⁴² *Supra* note 5, 'Gold rush', 169.

⁴³ *Supra* note 5, 'Netsilik Inuit', 186.

⁴⁴ *Supra* note 5, 'Golden age of piracy', 42.

and justice enjoyed by the communities. As a result, an indirect causal connection emerges between moral intuitions of justice and a society's success and capacity to do justice.

The question that remains for the modern criminal justice debate is how to establish the deference of consent in the sphere of a large society where no individual consent to the society and its normative framework is possible in order to increase the levels of success and justice of the criminal justice system. The use of moral intuitions of justice may serve as the way to gain a form of indirect consent between the proposed or established normative prescriptions and the members of the community. In other words, a system built as a reflection of the normative intuitions of its people is more likely to have received a form of indirect consent by them therefore bearing a higher possibility of being successful and doing justice. This can serve as a different justificatory argument in the criminal justice reform debate in favor of tracing the moral intuitions of justice shared among the community members and creating a system reflective of them as much as possible.

Conclusion

This article, though limited in scope, has sought to identify the effect of the variable of consent in being part of a lawless society to the potential of success and justice of that society. It is set out to substantiate three primary claims. First, consensual lawless societies see dramatically higher results of success and justice done than non-consensual ones. From a brief comparative analysis, a causal relationship between consent and ability of success and justice is inferred. Second, in order to prove a causal relationship, a pairing of two cases that share identical variables save for the variable of consent is necessary. For this reason, I analyze the case study of the Mesa and then pair it with the case of Prohibition. Third, I observe a connection between the element of consent and whether or not the normative system of the community reflects the moral intuitions of justice shared by the people present or entering it. The conclusions drawn support the argument

that a criminal justice system that reflects the moral intuitions of its people will gain stronger deference and be more successful both in reducing crime and in procuring just results. After all, a criminal justice system will have truly succeeded when it no longer needs to justify itself.