Introduction to Transaction edition of "Crime and Custom in Savage Society"

James M. Donovan, University of Kentucky

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CRIME and CUSTOM in SAVAGE SOCIETY

BRONISLAW MALINOWSKI

WITH A NEW INTRODUCTION BY JAMES M. DONOVAN

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Introduction to the Transaction Edition

Crime and Custom in Savage Society represents Bronislaw Malinowski's major discussion of the relationship between law and society. To better appreciate the significance of the book, we must first place it in the context of his wider anthropological corpus. Throughout his career Malinowski endeavored to construct a coherent science of anthropology, one modeled on the highest standards of practice and theory. Methodology steps forward as a core element of the refashioned anthropology, one that stipulates the manner in which anthropological data should be acquired.

Scholars such as W. H. R. Rivers (1913) had earlier preached the view that scientifically meaningful ethnographic data would best be obtained through trained workers deeply involved in the mundane routines of ordinary living—the participant observation influentially described in Malinowski’s introduction to Argonauts of the Western Pacific (1922). Malinowski was the first, however, to turn this ideal into a practical anthropological method, one formalized in theory and then, more importantly, implemented in the field. His extended immersion in the daily lives of the studied group, mastering the native language to record theoretically informed data, modeled a constellation of attributes that would transform the discipline. Perhaps his conscientious
attention to method, both in execution and justification, derived from his prior training as a physicist and mathematician; we see the same cluster of influences behind the founder of American anthropology, Franz Boas.

The second, equally enduring impact of Malinowski’s work centers upon his conviction that even as anthropology records the range of human cultural diversity it should be with the goal to find within that dazzling array the commonality of humankind. This orientation emerged at a time when many ethnographic accounts, frequently reported by missionaries and travelers without benefit of formal training in the social sciences, delighted in scandalizing the reader with tales of shockingly alien rituals practiced by “savages.” By contrast, Malinowski believed that the “fundamental [is] more important than [the] freakish.” Malinowski’s predilection for finding similarity in diversity and the general in the particular is one of the grounds of his achievement as an anthropologist” (Young 2004, p. 76, quoting Malinowski). Present in all his work, this goal to document the recognizable ordinariness that connects the many faces of our species emerges as perhaps the largest theme of Crime and Custom.

Law and Anthropology

Malinowski’s choice of law as the conduit for his broader themes was not inevitable, but neither was it unmotivated. Anyone interested in understanding the social structure and organization of societies cannot long avoid dealing in some manner with the concept of “law,” even if, as was often the case, it is only to deny its presence. In fact, law and anthropology have shown a natural affinity for one another, sharing a largely beneficial history of using the methods and viewpoints of one to inform and advance the other.

As members of the older discipline, lawyers made the first contributions to the collaborative exchange, and for good reasons grounded upon their unique interests and training. The Western legal tradition has its roots deep in the texts and interpretations of Roman law. This was not, however, a drily conservative retention of earlier forms, but, as Berman argued, a “turning to the Greek and Roman and Hebrew texts for inspiration, and transforming those texts in ways that would have astonished their authors” (Berman 1983, p. 2). While some might mechanically mouth these legalist formulae, stronger arguments to advance a case would draw upon more than mere recitation of the texts. Relevant, too, in order to identify the intended scope of the juristic principle, would be information about the social context in which the rule lived and developed. The influential works of legal historian Alan Watson (2007) amply demonstrate the rich understanding of law that can come from placing it in its original historical and cultural settings.

Lawyers were thus already engaged in the task of reconstructing the understanding of law within a long-vanished civilization. Little prodding would have been necessary to apply the method in the novel cultural environments which nineteenth-century lawyers encountered in the unsettled American continent.

Sir Henry Maine’s Ancient Law (1861) offers an easy example of this pattern. A Cambridge law professor studying the development of the Western legal system, he demonstrated its foundations in the cultural worldview of Roman civilization. While the eastern portion of the empire maintained the metaphysical philosophical tradition of the Greeks, in the West law became the lens through which the rest of society was analyzed. “Roman law provided the architectonic of the Western mind” and consequently fostered the pragmatic codes that would influence European law throughout the subsequent millennia (Scala 2007, p. 7). Unlike many who
had earlier attempted their own descriptions of legal development, Maine’s famous dictum that the progress of law moved “from Status to Contract” was not a rule of universal legal history, nor, as he says elsewhere, does it “determine the absolute origin of human society” (Maine 1883, p. 192). It is rather one grounded in the full details of a specific people, intended “to trace the real, as opposed to the imaginary,” and to make clear the course of law and society, not everywhere, but in that single environment.

Another lawyer, the American Lewis Henry Morgan, wrote at approximately the same time as Maine. He had the advantage over Maine of access to the Native Americans of New York. Morgan’s 1845 field trip to observe an Iroquois installation of chiefs followed upon his membership in a fraternity modeled after “the structure and principles of the ancient League” (Tooker 1983, p. 141, quoting Morgan). Understandably methodologically rudimentary, his studies represent a tentative step toward the scientific ethnographic technique that Malinowski would champion a half-century later.

Because of works such as these, law served as both the prototypical example of social order, and as a royal road toward the ethnographic description of any society. To know and understand a people’s law is to know them. For these reasons, early writers on the so-called “primitive” societies did not neglect to include sections on legal institutions in their works. The problem was that writers were often unable to view their encounters with a neutral eye. As a typical example, their own Christianity would serve as the prototype of religion for nineteenth-century reporters, against which other religious forms routinely suffered by comparison and were disparagingly diminished as “cults,” “sects,” or mere “superstitions.” Similarly, Western forms became the gold standard for “law.” To lack analogues of the sine qua non of our own legal institutions such as codes and courts put the society at risk to be deemed that worst of all possible conditions, lawless.

We should not be surprised, then, that law does not appear as a separate category to be recorded by those consulting the early editions of Notes and Queries on Anthropology. This handbook of survey instructions, whose first edition appeared in 1874, was created to “promote accurate anthropological observation on the part of travelers, and to enable those who are not anthropologists themselves to supply the information that is wanted for the scientific study of anthropology at home” (Notes and Queries 1874, p. iv). The fourth edition, published in 1912, was frequently consulted by Malinowski during his own fieldwork (Malinowski 1967, p. 30). Yet as he points out in the introduction to Crime and Custom, “law” appears neither in the index nor in the table of contents, and the few lines devoted to it under the heading of “Government: Politics,” excellent as they are, do not correspond in any way to the importance of the subject” (p. 29). Indeed, the handbook arguably encouraged the attitudes toward native law against which he would later rail: the “authority by which uncivilized communities are regulated is often very slight and informal” (Notes and Queries 1912, p. 172). Any effort that Notes and Queries exerted to correct the parochialisms in regards to morality (Ibid., p. 175) seems to have not yet fully impacted the observation of local legal systems.

By contrast, the fifth edition of 1929 (which credits Malinowski for “advice and criticism”) would include a specific section titled “Law and Justice.” James Urry suggests that this growing interest to obtain information on the social regulation of native communities can be traced to Britain’s increasing need to govern an empire:

Military officers had for a long time contributed works to anthropology and now the rise of colonialism and the increased
use of administrative officers shifted the focus of interest in anthropological material. While the missionary accounts had always tended to stress language and belief systems, the administrative accounts also concentrated on law and politics. (Urry 1972, p. 49)

The close relationship between British colonial needs and anthropological inquiries into law would reach perhaps its fullest fruition in Isaac Schapera’s A Handbook of Tswana Law and Custom (1938).

**Early Twentieth-Century Theory**

While all such historical and political influences must be considered in any exhaustive account of the ethnographic attention to legal institutions, they do not tell the complete story. A different explanation for this early oversight springs from the conviction of some that law is not to be found as a distinct institution within indigenous societies. E. Sidney Hartland, for example, lectures that

> every part of the civilization of a relatively primitive people [is] indivisible without great difficulty from the rest. It draws no line between law and morality, religion, medicine, or art. All these are part of the social and mental fabric, and the traditions by which they are governed are the same. The savage... is hemmed in on every side by the customs of his people, he is bound in the chains of immemorial traditions... These fetters are accepted by him as a matter of course; he never seeks to break forth. (Hartland 1924, p. 138)

Here we see the consequences of what might at first strike readers as a simple lack of sophisticated theory and methodology. Because of the special role that law holds for us, where we do not recognize it we tend to draw the most pernicious of conclusions. Hartland’s words illustrate the ease with which investigative crudity—failing to appreciate the institutional nuances of native groups—becomes grounds to support extreme conclusions about native psychology. In the eyes of early writers indigenous individuals were not like the turn-of-the-century traveler, lacking only the material rewards of technological advancement or the cultural and intellectual benefits of literacy. They instead embody something different, alien at least to the extent of missing the motivations and interior personality assumed as natural and ascribed to any modern citizen. These “savages” are not only bound to the observance of indistinguishable custom, but it would never occur to them to have it any other way. This characterization of the individual as wholly and uncompromisingly submerged within the demands of the communal would become the principle target of Malinowski’s new ethnography, and law the means by which he would argue the fundamental uniformity of mankind.

Due to the brevity of *Crime and Custom*, Malinowski wastes no time directing the reader’s attention to this larger objective. The first paragraph points out that the “modern anthropological explorer... is bound... to arrive at some conclusions as to whether the primitive mind differs essentially from our own or is essentially similar; whether the savage lives constantly in a world of supernatural powers and perils, or on the contrary, has his lucid intervals as often as any one of us” (p. xi). The contrast, as he impugns the credentials of those arguing otherwise, is meant to cut against those who, like Hartland, characterize the native as holding a “deep reverence for tradition and custom” that he obeys “slavishly” (pp. 33-34).

As Malinowski argues, anthropologists arrive at this erroneous result through a very simple syllogism. Because in
our own minds we need “central authority, codes, courts and constables” to enforce laws, “we must come to the conclusion that law needs no enforcement in a primitive community and is followed spontaneously” because it lacks those elements (p. 37). Malinowski does not deny that on the whole law should be obeyed “willingly” or, in Lowie’s (1920[1947], p. 398) term, “spontaneously,” but only that this pattern distinguishes the native society from our own. In any environment, the “threat of coercion and the fear of punishment do not touch the average man” (p. 36).

The challenge then becomes to isolate the forces that inspire such spontaneous compliance with the law. Once robotic obedience is taken off the table, it must be replaced with “psychological and social inducements” of some kind. In Crime and Custom Malinowski intends to “discover and analyse all the rules conceived and acted upon as binding obligations, to find out the nature of the binding forces, and to classify the rules according to the manner in which they are made valid” (pp. 37-38). A typology of rules should result, he hopes, to distinguish law from other kinds of obligatory rules based upon the mechanisms by which the person is made to feel the binding obligation to obey.

In all his works about law, Malinowski is ever endeavoring to perfect such a classification of social rules. His motivations are not difficult to discover. Because these groups lack the “codes, courts and constables” that characterize our own law, either they do not have law, or law must be distinguished on some other basis. The first route leads to Hartland’s and Lowie’s automatons; while that result should be avoided, an alternative is not immediately obvious. Malinowski would return to this project for the rest of his life, with his last published works offering continued refinement on the nature of law and its social functions.

Malinowski’s Early Attempts

In Malinowski’s 1913 article “The Family among the Australian Aborigines,” we find articulated the principle goals and means that would become the central threads for Crime and Custom. Law should be defined in such a way as “makes the Australian legal institutions correspond to what we call law and legal in higher societies” (1913, p. 11). In this, Malinowski’s first formal anthropological publication, he endeavors to “classify the norms and regulations according to the sanction they enjoy.” “A given norm or rule is Legal if it is enforced by a direct, organized, and definite social action. . . . Without the norm, the social action would be mere violence. Without the social enforcement, the norm would be a moral or customary rule; so enforced, it may properly be called a law” (1913, pp. 15, 14).

The potential difficulties with constructing such a classificatory system of the norms of social regulation became quickly apparent. Granting the absence of formal institutional distinctions, distinguishing an enforced religious sanction from a legal one could become an exercise in purest scholasticism. Inevitably one would need either to ignore the facts on the ground by holding that religious norms are those that are left to supernatural enforcement or pronounced by religious specialists, or dissolve any meaningful distinction between law and religion. Whenever the rule is enforced by “direct, organized, and definite social action,” it becomes a legal matter, even when the subject matter concerns obviously religious content. Such a muddle may suffice descriptively, but it offers little basis for the construction of a scientific explanatory theory.

Led perhaps by such complications, in the next work, his first field monograph, Malinowski voices a substantially different standard to identify “law.” The focus now is less on sanction and enforcement than on the substance of the
rule. In the process Malinowski introduces a fundamental distinction that he would maintain thereafter in one form or another, that between civil and criminal law.

Criminal law—which he claims anthropologists had recognized as the only kind of law among the natives (see for example Lowie 1920[1947], pp. 397-398)—addresses much that we would expect: “murder, bodily hurt, assault, rape, and other attempts on person or liberty . . . rules protecting a man’s property [as well as] public resentment which follows the violation by the individual of the essential rules which constitute the given social structure as, for instance, the rules of exogamy or of religion, etc.” (Malinowski 1915[1988], p. 193).

For its part, “under civil law in a native society we can understand the set of rules regulating all the normal relations between persons, as kinship, marriage, economic co-operation and distribution, trading, etc.; and between persons and things, property inheritance, etc. Civil law being thus a set of rules regulating social mechanisms in its stationary, normal course, criminal law being the safety arrangements, putting things aright whenever there is any hitch in their normal course” (1915[1988], pp. 193-194).

Malinowski (wisely) does not assert that this dichotomy finds parallels in native thought; rather, he finds it a useful analytical distinction. All “fundamental rules . . . must be observed. The infraction of these rules is a lurking temptation, and there are always individuals who succumb. As a preventative, or reaction, to this there exist some measures of restriction and redress; broadly speaking, some restraining forces” (1915[1988], p. 193). These “restraining forces” are conceptually related to, but quite different than his earlier invocation of sanctions and punishments. Under this analysis civil law, which is “normal” and thus ordinarily unexceptional, may require one kind of restraining force to contain the “lurking temptations,” while criminal law, invoked during breaches of the normal, another. Here we see fully formed the problem that Malinowski would confront in Crime and Custom.

Crime and Custom

Having criticized others for caricaturing primitive man as unthinkingly obedient to customary practices, Malinowski realized that the proper solution may not be to claim that this characterization isn’t true. Rather, the more prudent strategy denies that it offers a complete account of social regulation. “The force of habit, the awe of traditional command and a sentimental attachment to it, the desire to satisfy public opinion—all combine to make custom be obeyed for its own sake” (p. 78). Even under that description custom accounts for only a minor portion of the rules that hold together a society. The fieldworker quickly finds that rigid compliance describes no more of native behavior than of our own.

While others had sought to counterbalance reflexive compliance with custom against a fear of supernatural reprisals for any failures to conform, Malinowski is able to assert from his own data that “primitive law does not consist exclusively or even chiefly of negative injunctions” (p. 82). In its place he reports that law is obeyed not from fear, but out of he calls “enlightened self-interest” (p. 56). People have good personal reasons to obey the laws, and these are more effective than negative sanctions over the long term.

Armed with these views, Malinowski begins by looking not at the breaches of normal order, an approach favored by today’s legal anthropologists and first formalized in the “trouble-case” method advocated by Karl N. Llewellyn and E. Adamson Hoebel (1941). He notices instead the ordinary social organization of canoe building and operation. Maintaining a canoe is a complicated affair requiring “a strict
distinction and definition in the rights of every one" involved (p. 42). From this brief description—his fuller account appears in the earlier Argonauts—he concludes that "a rigid system of mutual obligations, into which a sense of duty and the recognition of the need of co-operation enter side by side with a realization of self-interest, privileges and benefits" (p. 43).

The real reason why all these economic obligations are normally kept, and kept very scrupulously, is that failure to comply places a man in an intolerable position, while slackness in fulfillment covers him with opprobrium. The man who would persistently disobey the rulings of law in his economic dealings would soon find himself outside the social and economic order—and he is perfectly well aware of it. (pp. 68-69)

Malinowski extrapolates this need to achieve personal goals through cooperative endeavor to account for the psychological motivation to adhere to all cooperative norms, including law. The mortar that holds social groups together, he says, is reciprocity.

This principle is easily seen in civil law. Civil law emerges from dense networks of social activity in which one must give in order to receive. Law, unlike other types of social rules, is "felt and regarded as the obligations of one person and the rightful claims of another" (p. 81). Malinowski does not deny the existence of other motives, but argues only that in the calculations of social debt and rewards we find the essential distinguishing element of law as ordinarily experienced. It creates the "definite binding obligation" that is expected of any normative system called "law," and which serves to distinguish it from mere custom; and, because it is a transactional calculus of costs and benefits, it is elastic and adjustable in a way that religious norms are not.

Here the reader may believe that Malinowski has arrived at a defensible contrast between law and other forms of social regulation such as custom and religion. Such hopes dash on the rocks of complicated reality. Malinowski's thinking on the typological nature of law reflects his conflicted views on how law relates to custom. Although he definitely argues that law is a category collateral to custom (and religion and etiquette), at other points he adopts a different, contradictory stance.

In Chapter X, "The Rules of Custom Defined and Classified," he proposes that "the sum total of rules, conventions, and patterns of behavior" is what we should understand as "the body of custom" (p. 78). In that view law is not a sibling concept but instead a simple subset of the larger body of local custom. This second version potentially undermines his criticism of the earlier ethnographers who had argued that natives were obligatory adherers to custom. If all norms are indeed custom, then such claims are not the false characterizations he vilifies, for it does not then follow that descriptions which emphasize the importance of custom entail that there "is no civil law or its equivalent in savage societies" (p. 63). At worst, the position is only an overly-broad account that fails to display the requisite conceptual refinement. But this is hardly the situation Malinowski believes has prevailed until his own work, and would render his insights a fairly minor corrective rather than the radical reconceptualization he intends. For that reason alone we should view this second attempt to categorize the norms of social regulation to be one of the text's weaker assertions.

Whatever the typological placement of law, we should pause here to better appreciate just what it is that Malinowski appears to have accomplished. For much of our intellectual history, certainly since Locke and other natural law theorists, law had been understood as something that people had in addition to their basic state. Thus it was something people could gain or lose as circumstances dictated. Malinowski completely redefines the fundamental relationship between
law and society. In his view, law was inherent to social organization itself, not an optional possibility enjoyed by some but unrealized by others. "Law represents rather an aspect of their tribal life, one side of their structure, than any independent, self-contained social arrangements" (p. 84); "Law and order arise out of the very processes which they govern" (p. 135). People in groups must act cooperatively, and cooperation entails the balancing of personal and group objectives that he has described. Law emerges out of that need to compromise. He elaborates this point in a later work:

Every cultural activity again is carried out through co-operation. This means that man has to obey rules of conduct: life in common, which is essential to co-operation, means sacrifices and joint effort, the harnessing of individual contributions and work to a common end, and the distribution of the results according to traditional claims. Life in close co-operation—that is, propinquity—offers temptations as regards sex and property. Co-operation implies leadership, authority, and hierarchy, and these, primitive or civilized, introduce the strain of competitive vanity and rivalries in ambition. The rules of conduct which define duty and privilege, harness concupiscences and jealousies, and lay down the charter of the family, municipality, tribe, and of every co-operative group, must therefore not only be known in every society, but they must be sanctioned—that is, provided with means of effective enforcement. (Malinowski 1939, p. 949)

In this view, law necessarily becomes a cultural universal, present in every society. The only remaining questions of interest concern local details of any specific legal system. If we take as given that law is present in all environments, researchers become free to investigate the myriad forms it may assume.

In Crime and Custom Malinowski concludes his account of normal civil law with this oft-quoted summary:

There must be in all societies a class of rules too practical to be backed up by religious sanctions, too burdensome to be left to mere goodwill, too personally vital to individuals to be enforced by any abstract agency. This is the domain of legal rules, and I venture to foretell that reciprocity, systematic incidence, publicity and ambition will be found to be the main factors in the binding machinery of primitive law. (p. 90)

In this statement appears a basic difficulty within Malinowski’s thesis that will grow more obvious as he proceeds. Throughout the present section he switches freely between speaking about law more generally and about civil law specifically. One would be justified in the belief that he expects his account of a reciprocity-based civil law to explain criminal law as well. This expectation is quickly frustrated.

The term “reciprocity,” which formed the foundation of Malinowski’s analysis of civil law, appears not at all in his discussion of criminal law. That fact alone alerts the reader that a wholly different argument is now attempted. The effort will be unsuccessful. Assigning appropriate cause to the shortcomings introduces its own starting points for theorizing about the nature of law in native societies.

The core event that Malinowski employs to segue into criminal law concerns a suicide provoked by a public accusation of breaching the rules of totemic clan exogamy. Kima’t, a Trobriand youth, had taken up with his maternal cousin. While the dalliance had passed largely unremarked, a rival suitor provoked a crisis by hurling public and vicious incest accusations. Shamed beyond redemption, the boy climbed a palm tree, and after declaring the cruelty of his accuser and urging his family to avenge him, threw himself from the tree onto the ground sixty feet below (pp. 97-98).

Malinowski had in his 1915 ethnography already identified the repair of breaches of marriage rules as one of the functions of criminal law. By his admission, here the public response
to the violation was markedly insipid. "Public opinion was neither outraged by the knowledge of the crime to any extent, nor did it react directly—it had to be mobilized by a public statement of the crime and by insults being hurled at the culprit by an interested party. Even then [the violator] had to carry out the punishment himself" (p. 99).

Following this anecdote the author progresses through fairly standard anthropological descriptions on a variety of topics. In addition to reviewing the background rules of exogamy, Malinowski also reports on the use of magical techniques to evade the consequences of criminal transgressions as well as sorcery as a tool to maintain social order. Suicide emerges as a means to both escape unbearable situations and "a protest against those who have brought this trespass to light" (p. 113).

The threads connecting this eclectic reportage are not readily discerned. Malinowski claims that "suicide, like sorcery, is a means of keeping the natives to the strict observance of the law, a means of preventing people from extreme and unusual types of behavior" (p. 114). He admits difficulty in clarifying precisely what he means by a "crime," frankly conceding that "the principles according to which crime is punished are very vague" (p. 114), and that the "criminal" aspect of law in savage communities is perhaps even vaguer than the 'civil' one (p. 111).

From the case study of this suicide John Conley and William O’Barr (2002, p. 869) offer as Malinowski’s implicit definition of crime “an act that (1) violates a fundamental social norm, (2) is not deterred by the ordinary incentives of reciprocity, (3) is made public, and (4) because of these other attributes, cannot be either ignored or resolved between individuals.” This reading offers a much more helpful overview of Malinowski’s points than he has provided himself.

But it perhaps goes too far in assigning a central role to reciprocity. The original distinction that Malinowski drew distinguished civil law as the ordinary social condition—"the law obeyed"—from criminal law as the ameliorating corrective to irritations through the veil of normalcy—"the law broken" (p. 95). Within the text, however, we sense that criminal law applies not to the breakdown of reciprocity-based civil law, but to a wholly different situation, the breach of rules whatever their source. Norbert Rouland (1994, p. 70) is arguably more accurate when, after studying the same passages, he offers his sense that Malinowski’s criminal laws are "norms that are likely to be infringed." Corley and O’Barr would perhaps lead us to assume that criminal law is reciprocity-based, but this is more than Malinowski ever actually states.

The deeper problem is not merely that criminal law bears no explicit relationship to the reciprocity used so effectively to model civil law. Malinowski offers little effective theoretical basis for the change of explanatory modes. As it turns out, Lawrence Becker, in his philosophical exploration on the role of reciprocity in society, reaches the result we can read from the strained passages in Crime and Custom, only now we find it clearly stated and convincingly argued: reciprocity cannot explain criminal law (Becker 1986, p. 293). It is hard to imagine that Malinowski was not aware of the problem. Conceivably his satisfaction with the result obtained in the first half of the book prompted him to tolerate the shortcomings of the second.

The unevenness of these results forces a reconsideration of the underpinning assumptions of the bifurcated legal vision on which it was based. It would be easy but somehow unsatisfying to conclude that while Malinowski is able to offer significant advances in understanding civil law, a similar achievement for criminal law would await later work. We may even entertain the suggestion that the inability of reciprocity to account for criminal law indicates that Malinowski’s theory for civil law is wrong, and that we
must begin again. Yet we cannot overlook the possibility that if adequate theories for civil and criminal law cannot be individually marshaled, perhaps the error is in treating them separately.

By one tradition, civil and criminal law stand as different categories because of the locus of the injury: criminal law punishes injuries to the social welfare, while civil law addresses those between private individuals. This offers a more modern way to characterize the dichotomy that Malinowski describes. Whatever importance the conflict might assume in the lives of specific parties, the issues in civil law concern only those few people. Murder—arguably the archetypical criminal violation—threatens society as a whole not because of the individual killed, but because unchecked violence unravels the bonds holding the group together, and thus should be punished more severely. But this illustration also demonstrates the limitations of the division of law into these two types. In earlier societies murder was deemed a private wrong to be avenged by the family (whether directly or by initiating court action), and not an act that fell to the state to exact justice (Gagarin 1986, p. 89, n. 23). Such fluidity of categories testifies to the likely artificiality of the dichotomy on which Malinowski bases his discussion.

For anthropologists, the primary question should be whether the distinction is meaningful cross-culturally, or limited to certain local contexts such as Western jurisprudence. A reasonable consequence of Conley and O’Barr’s summary of Malinowski’s thesis would support the view of universality, but others hold different views. Radcliffe-Brown (1952, p. 212) notes the “confusion which has resulted in the attempt to apply to preliterate societies the modern distinction between criminal law and civil law,” and suggests instead the categories of “the law of public delicts and the law of private delicts.” Laura Nader, too, insists that “the existence of different native categories of law forces us to question the two powerful categories of Western law—‘civil’ and ‘criminal’—as cultural constructs that are the legacy of a specific Western lawyering tradition” (Nader 2002, p. 8).

The preponderance of the evidence compels us to conclude that although separating civil and criminal laws may sometimes serve as a heuristic for convenient theorizing, it does not map onto any reliable differences in the real world. We should not hesitate to discard the framework when it proves more distracting than enlightening, and that may be the situation in which Malinowski ultimately finds himself. On the other hand, our reasons for treating “law” as a meaningfully objective category of social reality appear on firmer footing, and that may be the more appropriate unit on which to build general anthropological theory. Malinowski’s argument for the importance of reciprocity remains inspirational, but it has not aged well as a theoretical variable explaining “law.”

**Malinowski’s Later Work**

Malinowski was perhaps aware of the weaknesses of *Crime and Custom*. He continued to work on the problem of the relationship of law to society, attempting various restructurings of the model’s major components.

Recall that in *Crime and Custom* law was better understood as a collateral type of social norm to custom. In 1934 Malinowski now favors the alternative stance that law is nothing more than a kind of custom: “Our own law is nothing but intrinsically valid custom” (1934, p. xxx). He now discerns “valid, sanctioned customs” on the one hand, and “customs which are neutral or different” on the other (p. xxvi). The meaningful feature is sanction, the criterion he first employed in 1913.

In this same essay he fully joins his theories on law with his work on institutions and the biological needs of the individual in order to more explicitly push his view that the
“savage” differs from us in no fundamental way. In brief, man as a physical animal has basic needs that must be satisfied if he is to survive. The tools he creates to satisfy those needs—collectively glossed as “culture”—in turn generate a new layer of needs whose satisfaction can be as urgent as the first:

[Through] the roundabout, indirect satisfaction of his primary needs man in a way changes his purely animal nature. His biological endowment, with its limited list of physiological needs, is supplemented by what might be called derived or instrumental needs; such as that of education, legal order, economic organization, social grouping; needs which have to be satisfied as urgently as biological requirements if man is to survive. (Malinowski 1934, p. xxxvi)

“What was universal in mankind for Malinowski,” George Stocking (1995, p. 287) reminds us, “was not a psychic unity conceived of as a principle of rationality . . .; it was rather a biopsychic unity, based in instinct and passion, but expressed in pragmatic, instrumental behavior directed toward adaptive ends.”

Reciprocity still commands a place of honor, but it serves an arguably different role than Malinowski first presented. Compliance brings rewards, which create new obligations, and so on, while failure to comply unleashes “a whole series of rebukes, reprisals and disservices” (1934, p. xxxvi). These words bear a superficial resemblance to the arguments to be found in Crime and Custom, but a new structural relationship arises between reciprocity, law, and society.

In the earlier book, reciprocity had formed the basis for the emergence of the civil law. The criminal/civil contrastive pair is now gone, meaning that reciprocity must be employed to account for all law. Malinowski attempts this feat by converting it to the positive correlative of negative sanction which he had earlier (1929, p. 56) denied was a primary foundation for law.

Now, the “positive aspect of compliance to primitive custom, the fact that obedience to rules is baited with premiums, that is rewarded by counter-services, is as important, in my opinion, as the study of primitive sanctions” (1934, p. xxxvi).

In Crime and Custom reciprocity generated law directly through the creation of rights and duties. Now the relationship appears more distant. Reciprocity binds individuals into groups, with more being required to then create law. Some societies will not achieve this final phase. Where before law stood as a cultural universal, Malinowski now admits that “some simple societies have no law” (1934, p. xxxv, quoting Radcliffe-Brown).

The result, we find, is that on the one hand Malinowski has taken great strides to remedy the major weaknesses of Crime and Custom. Eliminating the two types of law, he now needs only one theory; combining reciprocity with sanction, Malinowski better positions himself to accurately describe the whole of legal phenomena rather than merely one part. The new account appears to be more theoretically sophisticated, but this accomplishment comes at high costs. In the most precious of these, law is no longer coextensive with social life. To concede that law is not universal will render some societies vulnerable to the judgment of being lawless and in need of intervention from more evolved outsiders. Whatever his intent, this would have been a welcomed result to an empire which viewed itself as an enlightened law-bringer to its “savage” subjects.

Lest we think that we have exhausted the perplexing variety of Malinowski’s variations on this theme, we can note that years later he would return again to the 1926 characterization of law as being of two fundamental kinds, one kind of “law of order and law maintained, as opposed to [another that is] retributive and restitute social action,” and which are “exclusive of each other” (1944, p. 1244). In the end, it may
not be possible to draw any firm conclusions about “the” Malinowski theory of law and society.

Final Thoughts

How then are we to judge Crime and Custom? What value does it hold for the modern reader? Whatever the shortfalls of his text, Malinowski merits highest respect for his vision of what the task of anthropology would be ever after. More specifically, while he faltered in achieving the final answers he sought, his work, and Crime and Custom in particular, framed the basic questions with which legal anthropology still grapples: What is “law”? How should it be differentiated from the other norms of social regulation like custom, religion, and etiquette? Is law a cultural universal? Why do people typically obey the law? What happens when the rules are violated?

Within his words one recognizes the precursors of the major ethnographic achievements that would soon follow. As two examples, his wish to characterize native law as directly analogous to ours reaches its most forceful argument in Max Gluckman’s (1955) The Judicial Process among the Barotse of Northern Rhodesia. And his description of the unique constellation of qualities that create the legal—“A given norm or rule is Legal if it is enforced by a direct, organized, and definite social action. . . . Without the norm, the social action would be mere violence. Without the social enforcement, the norm would be a moral or customary rule; so enforced, it may properly be called a law” (1913, p. 15)—would be systematically modeled in Leopold Pospisil’s (1958) theories of legal attributes and legal dynamism.

Malinowski may have been mistaken (though, if so, he erred in good company) in using the term “law” for all types of binding obligation, regardless of their sanction; he may have given us an unbalanced and inadequate account of the Trobriand reaction to crime; and he certainly cannot be upheld in the distinction that he makes between civil and criminal law. But anthropologists, even if they disagree with his views on such matters, have learned much from his general approach to the study of law and from his contention that the basic problem is social control generally. (Shapera 1957, p. 154)

Perhaps, then, the best lesson Malinowski leaves us with comes in the last paragraphs of Crime and Custom in Savage Society: “The true problem is not to study how human life submits to rules—it simply does not; the real problem is how the rules become adapted to life” (p. 138). On that question, he has left us richly inspired to continue the quest.

James M. Donovan
University of Kentucky College of Law

Note

1. A word about vocabulary is required. Malinowski reflects his time when he refers to the studied communities as “savage” or “primitive.” At the turn of the last century the term “savage” lacked the necessarily pejorative connotations that the label has since acquired. Because it was the term used by Malinowski, I have retained the label but always place it in quotation marks to remind the reader of the dated terminology. “Primitive,” on the other, has been retained for similar reasons, but should be understood to refer solely to level of technology, and not “civilization.”

References


