



Justice as Sanctuary

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David Cayley

Good evening. I'm David Cayley and this is *Ideas* about justice.

Seventy-five years ago, in a book on English prisons, George Bernard Shaw described the modern system of criminal justice as "an organized attempt to produce white by two blacks. It presents us," Shaw said, "with the grotesque spectacle of a judge committing thousands of horrendous crimes in order that thousands of criminals may feel that they have balanced their moral accounts."

But if crime is not to be answered by a retaliatory crime against the offender, how is it to be answered? That's the question posed by tonight's program, the first in a series of three broadcasts about the ideas of Herman Bianchi, a Dutch jurist, poet, historian and criminologist, who has been one of Europe's most prominent critics of imprisonment as a punishment for crime.

Herman Bianchi

There's so much cruelty, and the most cruel people are those who do not realize they're cruel. The judge, when he sends a person to prison for many years, is unbelievably cruel. He doesn't even realize it. Every prison sentence is life-term. You never get back your old job. People don't accept you.

David Cayley

Imprisoning people as punishment follows from a view of justice as retribution. What Herman Bianchi proposes is justice as reconciliation. Justice for him is not a scales to be balanced or a form of moral accounting. It's an experience.

Herman Bianchi

You can only judge whether justice has been done afterwards. When it has been substantiated that truth came to people, that help came to people, that reconciliation came to people, then there has been justice. You can only know afterwards. The fruit of justice is peace, and if there is no fruit, then what's a tree without fruit?

David Cayley

The relations between formal, legal justice and substantial, experienced justice have pre-occupied Herman Bianchi throughout a long career as a teacher and writer. Now retired, he was formerly dean of the law school and professor of criminology at the Free University of Amsterdam. As an historian, he has sought the origins of our present repressive system of crime control and tried to

uncover the ways of doing justice that this repressive system replaced. As a criminologist, he has offered a draft of how a non-punitive system of crime control might work in contemporary circumstances.

I'll take up these aspects of Bianchi's work in the second and third programs of this series. Tonight, in part one of "Justice as Sanctuary," Herman Bianchi's attempt to introduce into criminology a new vision of justice.

Recently in Quebec, three men were sentenced for the confinement and rape of a teenaged girl. The girl, who was pregnant by one of the men, was held captive for 12 hours, repeatedly assaulted and, at one point, dangled over the edge of the balcony of a Quebec City apartment. The case attracted attention because the judge sentenced the men to prison terms of 2 years less a day, rather than the 10 to 12 years the Crown had asked for. A number of women's groups expressed outrage at the shortness of the sentence.

So let's imagine that these three men, all in their twenties, had been given the sentences the Crown wanted. Then most of us would probably never have heard of the case. But would justice have been done, the likelihood of rape diminished, the offenders corrected, the victim's wounds healed? These questions expose the problems that imprisonment tends to hide. Most citizens certainly want offenders punished, but few, I think, really believe that such punishment deters crime, rehabilitates offenders or restores the victim's dignity and confidence. Who can believe that acts this repulsive and degraded were committed in view of likely consequences? Who thinks that if these men were held for ten years and then released, still in their thirties and with few, if any, remaining social supports or controls, they would be more fit to live in society than when they went into prison? Who wants to spend the million dollars it would cost to maintain and guard them in a federal penitentiary for that long?

These questions are not intended to minimize the ugliness or the gravity of the crime. They are meant only to suggest that conceiving justice as a calculation of the correct amount of prison time begs a lot of questions. It overlooks the social milieu which produced these events and might produce more of the same. It leaves unconsidered the effect public confrontation with their actions has had on these men. Has the shock of seeing their own evil in the light of day produced some opening to the good, or do they remain unrepentant? And it fails to ask whether there are any resources in the families or communities of these men that might help to turn them away from their

viciousness.

These evasions are hidden behind the blank wall of the prison, in a place that is, in a sense, no place. When the prison gates close, justice is seen to have been done, and until there's a riot or the prisoner is released, there's an end of the matter. Prisons, in short, won't bear much thinking about. They're meant to give the offender his just desert. Their collateral effects on their inmates, their staff and the society that must presently re-admit their graduates are usually not weighed in the scales by which we traditionally picture justice. Prisons represent justice but enact injustice. This is the dilemma at the heart of penal law and the germ from which Herman Bianchi's argument for penal abolition has grown. He acknowledges that dangerous people ought to be held in custody so long as they threaten public safety, but he denies, in the words of a proverb my grandmother taught me, that two wrongs can ever make a right. Justice for him must be more than a necessary evil. It must be itself good.

Herman Bianchi's quest for a more sufficient and satisfactory account of justice first came to my notice through a book called **Justice as Sanctuary**, which he brought out in English in 1994. The title refers to the old practice of allowing criminals a safe place or sanctuary from which to seek a way of redressing whatever harm they had done, a practice still extant in some parts of Europe up to the end of the eighteenth century. I was impressed by the historical and theological depth of Bianchi's argument, so I wrote to him at the Amsterdam address furnished by his publisher to ask whether he would be willing to do an interview. He responded that in 1989 he had retired from his position as professor of criminology at the Free University of Amsterdam, leaving criminology behind and now devoting himself almost entirely to literary writing. A volume of his poems, he said, had been published in English in 1991 under a pseudonym that distinguished the artist from the sociologist. However, if I wished, he would be quite willing to make an exception and discuss criminology with me for a couple of days.

At the end of May 1997, he received me at his snug, converted farmhouse in the northern province of Friesland, which has been his home away from Amsterdam for many years. There, over two days, I recorded the conversations on which this series of broadcasts is based. Tonight's program traces the development of Bianchi's thinking from his incarceration in a German concentration camp in 1944 to the publication in 1964 of the book in which he, in

effect, came out as a penal abolitionist.

But before coming to that, I want to begin with two stories he told me, stories that I think frame the question with which these programs are concerned.

Herman Bianchi

A friend of mine was an attorney in Amsterdam, and I knew him still from the university. And one day he told me his story: He had two sons. His oldest son had fallen in love with a girl, but there was another lover, and the other lover killed the son of the attorney. It was what the French call *un crime passionnel*. And he told me what happened. He said, "The same evening after it had happened, my eldest son said, 'I'm going to kill that fellow!' My daughter gave a similar indication. And I realized that the other lover had not only killed my son; he was killing all of us because of our vengeance feelings. That's fatal to your soul." And he thought, "How can I find a solution, how can I find a solution? Well, the next day or two days later, after two sleepless nights, I thought I had the solution: I must speak to that lover."

The boy was in prison. So my friend contacted the public prosecutor and said, "Can I see that boy who killed my son?" "Well," said the public prosecutor, "you're crazy but I can't stop you. Do what you want." He said, "I went to the cell where the boy was sitting, the lover. I didn't know what to say. Neither did he. We sat there for half an hour without speaking. I left. Then a few days later, I said, 'I'll go again.' Then the lover said, or the criminal said, 'I feel so sorry.'" My friend said, "We both wept." I almost start weeping myself, as I'm telling you. This is how it should be, but it never happens. He said, "Then my wife and my daughter and my other son also visited him. We prayed together."

This is the solution. Even if the lover would be in prison for a couple of years, that wouldn't do harm to his soul. Then it's good punishment. Better would be if he said, "All right, I'll join the Flying Doctors and go and do a lot of good things to plague sufferers in Africa." That would be better, exposing himself to the plague for what he's done. That's penitence. Not sitting in a cell and quarrelling with the other prisoners.

David Cayley

Punishment can be called "good" in this case, even if penance would be better, because punishment here is aligned with the will of the offender and operates in a context of healing and reconciliation. A second story

points in a different direction...

Herman Bianchi

About ten years ago, I believe, I was telephoned by a woman in Amsterdam, a woman who spoke Dutch with an accent. And she said, "I was born in Germany, but I'm married to a Dutchman. I live here. I want to talk with you about my father. Can I meet you somewhere?" I said, "All right, let's drink a cup of coffee somewhere, in a restaurant." So we went to a restaurant. She said, "My father is an engineer, and I've never understood him. One day he kidnapped a little girl from rich parents." And in spite of the fact that he was an engineer and had a good salary—so he was not poor—he wanted a ransom of something like 1-million D-marks. He had done it one or two days before Christmas, and so it was a famous case in Germany because during the Christmas days, police were trying to find him. They found him eventually, and the girl was dead. He had killed her. So it meant, of course, life term. And she said, "I'm travelling once a month. It's, after all, my father. I visit him once a month. Now he has heard about you. Because your books have been translated in German, he has heard about them. He would much like to meet you." I said, "What can I do? I can't do anything." I said, "No, I don't feel like that at all. Why should I?"

But then she phoned me again a few weeks later. She said, "Have you still thought it over?" I said, "I don't know what I can do, but next month I'm travelling to Switzerland by car. The man is in a prison in Mannheim, so I can go along by Mannheim."

And I was there and I met the man. Now, I didn't get the opportunity to speak. He was speaking all the time, and he was criticizing the German prison system and said, It's awful this and awful that and awful this and awful that. After a quarter of an hour, I said, "Now stop. Let me now, please, say something. Perhaps I agree with you about the prison system. It's not worse than the prison system in Holland or France, but all prison systems are bad. I agree with you. But I thought you wanted to talk about what you'd done. Have you written letters to the parents of that girl? Have you..." "No, I didn't ask you to come for that. I wanted to discuss prison systems with you." "I'm sorry. Bye-bye." I felt then that I couldn't do anything. This man's mind had gone completely astray. He was completely without any feelings of compassion—nothing of the kind. I thought that he wanted to do some reconciliation with those parents, and I would have gladly helped him in that respect. But that was my experience.

So with some people, it simply doesn't work, and they are very dangerous, and we have to protect ourselves against violence. So there are two types of prisons that will remain necessary forever: prisons, for very, very dangerous people and prisons for those people who have received the opportunity to do penitence, to come to reconciliation, to settle the dispute, and refuse, refuse, refuse. Then there is no other solution than a prison. Those are the two types of prisons. All the rest should be abolished.

David Cayley

These two stories present Herman Bianchi's doctrine in a nutshell: Prisons are a necessary last resort in the interests of public security, but they should be used only where there is no alternative.

Redress was once the primary response to criminal injury. What Bianchi has tried to understand is how it came to be replaced by exemplary punishment and how old ideas, like sanctuary, might be redeployed in a new, more civil account of justice.

Herman Bianchi was born and grew up in the Dutch port city of Rotterdam. When he was just a boy of 16, the city was bombed.

Herman Bianchi

It was at 2:30 in the afternoon on the 14th of May 1940. And I remember that bombing as if it was yesterday: the whole city in flames. And although our house was not bombed—so we survived, no problem—then began five years of occupation, the horror of the German occupation for five years. In 1944, I was arrested by the Germans. I was two months in prison, and then I was taken to a concentration camp in Holland, in the Netherlands, a German concentration camp, and I stayed there until November '44. Great suffering.

And then I was released by an intervention of the Swedish Red Cross, along with about 25 people who were in a very bad state of health and who were, in the eyes of the German, not that dangerous. They didn't even know what I had done. Only that I was in the house that was raided—that's all they knew. So 25 people were released, and we were taken by a Red Cross car, taken to The Hague, and there I was released. All the other people in the camp were taken to Germany, and most of them never came back.

David Cayley

You were arrested for resistance?

Herman Bianchi

Well, hardly, it was so little. It just happened to be that I was then 19 years old, and the starvation was beginning in the country. Very bad food situation. The Germans were taking away everything, and they just didn't mind that we were starving. And so I met some people who said, "If you bring by train—"—the train was still running—"if you'll take little notes and packages to Amsterdam now and again, because you're young, the Germans may overlook you, and then you'll get a good meal." So I went to Amsterdam, and there were resistance people who had good food, in one way or another, so I got a good meal and I went back to Rotterdam. That was all my resistance. I never knew what was in those packages.

And then one day, I arrived in Amsterdam, and then there was a curfew that evening, because a German military had been killed somewhere, and I couldn't go back. So I stayed there, and that night that house was raided by the Germans, so I was also taken to prison. All the other people in that house, I've never seen them back, never seen them again.

David Cayley

What were the conditions in the concentration camp?

Herman Bianchi

Bad.

David Cayley

And who was at this one that you were at?

Herman Bianchi

Anyone who did anything the Germans disliked. And because there was no real justice at all, you were not sentenced to concentration camp; you were just locked in, locked away. It was a concentration camp.

My parents had given up hope that I was still alive, so when I rang the doorbell... You could not have correspondence with your family when you were in a concentration camp—imagine—so they thought I was dead. And I think that my mother fainted when she saw me. And then she wept and took me, big as I was, as a boy of 19, took me on her lap and wept for a long, long time.

What I have inherited from the concentration camp was fear. You know that the whole Dutch judiciary collaborated with the Germans? Several members of the Supreme Court were Jewish. They were arrested by the Germans immediately. No protest. The whole Supreme

Court should have quit under protest!! It just went on.

I was in prison, a Dutch prison, in 1944. The staff was Dutch. They worked for the Germans. Imprisoned me. So I had fear of the judiciary, of prisons. I tried to get rid of the concentration camp by studying history and Dutch language, poetry. I always have had a great love for poetry, and that's why I thought when I retired, I've done my duty. It was a hard duty. It was awful. I've done it. Please, give me a few years with poetry and the beauty of the world. That's what I'm doing now. I work on art history, I work on poetry. But I don't want to hear the word "prison" anymore. I've done my duty to fight against it. Perhaps it was even to protect myself.

I remember coming to Canada and going to Edmonton, because I had been invited to give a lecture there. And we passed a modern prison. Now, in Canada and the United States, they have the evil taste to build prisons that look like concentration camps, with those watchtowers. That's exactly a concentration camp. And I thought, How dare they? To construct prisons that look like concentration camps! And I said, "Drive on. It makes me mad to see that." It makes me mad to see such a precinct, with watchtowers, with heavily gunned people on the top of it. It's a concentration camp. That's where I was myself. I imagined really that I would be in there, not as a governor but as a prisoner. I'm so scared of it. It's awful.

David Cayley

After the war, Herman Bianchi began his studies at the Free University of Amsterdam. He liked the scholarly life and hoped to become a professor but had initially no inclination towards criminology. He was interested in history, literature, languages and law. What made him consider criminology was the fact that his university was then about to create a new chair in this field, and he was encouraged to prepare himself for the position. Weighing opportunity against disinclination, he reluctantly agreed.

The dominant voice in Dutch criminology at the time was the Institute of Criminology at the University of Utrecht. There the existentialist philosophy of Heidegger was providing a new perspective on the institutions of crime control. Since there were no lectures in criminology at the Free University before his own appointment, Bianchi travelled to Utrecht to follow the lectures of Professor Kempe, a leading member of the Utrecht school.

Herman Bianchi

He believed that he had made the great discovery of the

century in criminology. That's what he thought. He saw perspectives so wide that it even scared him. Such wonderful visions he had of existentialist criminology. And the idea was that a judge so far, he thought, was just a kind of a mouth that pronounces the words of the law. That is a saying of Montesquieu: just a mouth who pronounces the words of the law. And he said, "That's wrong. He is a human being, and he has to do with another human being, the criminal. In a way, they should love one another as human beings because they are together, 'thrown' into this world." That's an expression of the German existentialist philosopher Heidegger. "The judge and his criminal are two human beings who should understand one another and love one another in an existential love. They are both thrown into this world. And the judge may thank God every day for not being a criminal, and the criminal should thank God for not being a judge." He found a judge's vocation well-described in the Bible. He was non-religious, but he was also very much interested in religion. And somewhere in the Old Testament, the King of Israel appoints judges all over the realm. Then he addresses the judges he has appointed everywhere, and he says, "All ye judges, you are almost gods, and you must know that." They have great responsibility. He wanted to elevate judges to what they really are: people who, together with those criminals, find solutions. And his idea was a judge who would go to prison every day to look after his prisoner, after his criminal. I thought, a wonderful idea.

And then for a while, I thought, yes, when I learned the ideas of Kempe, then I thought, Perhaps something good can come out of criminology. Perhaps. Let me give it a try. Along these lines, I'm willing to continue with criminology.

David Cayley

One fruit of the continuation of Bianchi's studies was the dissertation by which he qualified himself as professor at the Free University. It was published in 1956, in his already very good English, under the title **Position and Subject Matter of Criminology**. His revulsion against imprisonment is already evident in his statement that, "There is no situation more inhuman." But the main purpose of this first book was to try to expand the philosophical and theological horizons of criminology. This involved an attack on positivism or the assumption that criminology has to do with a set of neutral material facts that can simply be taken for granted and studied with the methods of the physical sciences. Crime, in Bianchi's existentialist language, was a form of "bad faith," "a flight

from personality," "a deficient way of designing the world." It could never be separated from the universal human predicament or considered apart from the mysteries of sin and redemption. A broader, more ample consideration of criminology's subject matter was, therefore, necessary.

Herman Bianchi

All my writings have been manifestos in a way. Lots of people say, "You write sermons. You are preaching. You are not teaching; you're preaching. And whatever you write is a manifesto."

I found criminology so unbelievably stupid when I went into it in the '50s that I thought, I'm going to try to do something about it by using all my philosophical and theological and literary knowledge and by bringing it into criminology, to lift it to a higher level. You cannot just say, "What's the cause of crime?" Because there are no causes of crime. It's nonsense to look for them.

In the beginning of the century, they said, "Well, there is such a lot of poverty in the big cities and so on. That's the cause of crime." Now all the poverty is gone. The country has never been so wealthy throughout history. Lots of criminality. So it's not poverty. Plato said, 'The causes of crime are either poverty or wealth.'" [Laughs] That's true. All the drugs criminality, that's an opportunity criminality because society is so stupid as to make drugs illegal and create black market. That's exactly what the criminals wanted. [Laughs]

What's the cause of crime? That's sin. Calvin already gave the good answer: Man is created evil. John Bradley, the English Puritan in the seventeenth century, when he looked out of the window and saw a man taken to be hanged on the scaffold, said, "There, but for the grace of God, goes John Bradley." It's no more than coincidence, or the will of God, that I'm not a criminal. Because we are all criminals. Only circumstances prevent us from becoming criminal. Or our crimes are not detected. What about all the fraud we are doing and the little thefts we have been doing since we were little boys that have never been detected. We are honest citizens. Why, why are we not detected and others are? Because they're stupid. Yes, lots of criminals are stupid.

Murder is hardly ever found out because if you are a clever murderer, you commit a perfect crime, and perfect crimes do happen. Lots, lots!! How many people disappear, never seen again? What has happened to them?

In this country, hundreds a year. They leave the house in the morning and never come back. Where are they? Have they all gone to Brasilia or somewhere. They are not all going to Argentina or China. They disappear. So this is the perfect crime. Those people that are caught for homicide are usually people who commit a homicide that is not preconceived, but it just happens, and then they have not taken the precautions that would prevent them from being detected. And even then, only 1 in 12 is found out. Even then, the majority of the criminals who have committed homicide are never found.

David Cayley

Crime, in Bianchi's view, is a disposition from which none of us are ever entirely free. Those who become prisoners differ from their fellow citizens more by circumstances than by character. This idea drew on Bianchi's readings in existentialism, with its view of the world as a moral tangle, in which none can escape guilt and responsibility. But it also grew out of the Calvinist piety, in which his upbringing was steeped.

Herman Bianchi

My mother was a very pious Dutch Reformed person. My father was a Catholic but never went to church. Didn't interest him. So I got a very religious education, but my mother was not militant. She would pray on her knees before her bed, before she went to sleep. She never paraded it around like a lot of Protestants did and still do. She wanted me to become a minister in the Church, and because I got that religious education, I know the Bible by heart almost. I know exactly where it is, I can find it—that sort of thing. I never go to church. I'm not an old-fashioned believer. But I've always remained a kind of an amateur theologian.

There is another thing that took me to the study of religion, and that is the fact that in Western Europe and North America, with that strong Christian tradition behind it, criminal law, as we know it, retributive criminal law, is still very often justified by religious arguments. Retribution? Well, doesn't the Lord want us to retribute evil?

David Cayley

Understanding that contemporary criminal justice practices have grown from sometimes buried theological roots led Bianchi towards what he would later call his "homeopathic method": If these practices rested on a diseased understanding of the Judeo-Christian religious heritage, he reasoned, then perhaps the disease could be

cured by conceptions retrieved from the same tradition. This direction in his thinking was supported and furthered, right at the beginning of his teaching career, by a spirit that was then moving in the Protestant Churches of the Netherlands.

Herman Bianchi

In the early sixties in the Protestant churches in this country, there was a rapidly increasing interest in Jewish learning. Quite a few ministers in the Protestant churches in the Netherlands began to pay, in their sermons, a lot of attention to Jewish tradition, Jewish learning. To give an example, when pronouncing the Blessing during the service, they would no longer say Jesus Christ; they would say *Yeshua* of Nazareth—so pronounce the name of Jesus in the Hebrew way. Or they would no longer use the word Old Testament but *Tenakh*, which is the Jewish word for it.

Then there was a minister in the Protestant church in Amsterdam who really did a lot to explain what the meaning of the Old Testament was, of its general concepts, and he said, "The Christians have always been so arrogant. They stole the sacred book from the Jews and then said, 'We have a better interpretation than you have. You don't understand your own book.'" That was always the attitude.

And gradually it also happened in the Roman Catholic Church but much less. It was particularly strong in the Protestant Church. And don't forget that the Calvinist churches were always more Judaism-oriented than other Protestant churches—very much so. Already in the seventeenth century, Dutch theologians were interested in Jewish learning. But there was a strong impetus in the sixties.

And also it took the Western Europeans 20 years to really understand what had happened, that their efforts to protect the Jews had not gone far enough. They realized that. So there were guilt feelings: "Those are our fellow human beings, the family of Jesus Christ...We maltreated them, we didn't help them." Et cetera, et cetera.

And I met a rabbi of the Liberal Jewish community in Amsterdam, and he invited me a lot at his home, and we had Friday evening meals, the Sabbath meals, there together. And that interested me extremely much.

David Cayley

Through this rabbi, Bianchi was introduced to a

conception of justice that was to become central in his thought. It was called *tsedaka*, the Biblical term that corresponds to English's Latin-derived word "justice." Bianchi adopted the Hebrew word because he thought that translating it would introduce misleading modern assumptions and give an air of false familiarity to a conception that was actually profoundly alien to those assumptions.

Justice was classically defined by Aristotle as "giving everyone his due." Thomas Aquinas repeated the same definition in the Middle Ages, as did Kant and Hegel in the modern period. All agreed that justice consists in answering a wrong with the retribution due to it. But what is a criminal's due, and in what sense does prison time actually correspond to the injury it ostensibly answers? These questions led Bianchi to reject the image of justice as a scales. *Tsedaka* offered an alternative, an image of justice as an endless, never fully achieved reaching after peace and reconciliation.

Herman Bianchi

Instead of the silly expression "bring people to justice," I would say, "bring *tsedaka* to people." That is much better. Bring *tsedaka* to people. Bring people together. It is the communitarian concept. It's not separation. It's bringing people together. For instance, bring criminal victim together, and try to find *tsedaka* in their relation. Try to make a relation between criminal and victim. Instead of doing nothing for the victim and punishing the criminal, which is a stupid idea, try to bring truth and love, reconciliation—all these sorts of concepts. And so I use the expression *tsedaka* justice, because lots of people do not know the word of *tsedaka*.

David Cayley

Tsedaka pointed towards the experience of justice and away from the merely formal and procedural considerations that rule modern courts of law. It signified communal concord, not just the performance of a stately ritual. The idea of justice as enforced order, rather than negotiated settlement, Bianchi came to see, was partly a result of mistranslation from the Bible. Law in the Western tradition had been seen as an implacable and unbending institution, and this understanding had in effect been read back into the Mosaic law through doubtful translation.

Herman Bianchi

My great discovery was that in the sixteenth and seventeenth century in Protestant countries like England,

the Netherlands, Scandinavia, there came new Bible translations like the King James Version in England. We have the State General Version in the Netherlands, which was the official Bible translation of 1630. And they said, "Well, the Roman Catholic Church has always fooled you with the Bible. We are going to bring you the true translation." But they didn't. For instance, the word "retribution" does not exist in Hebrew, but the new translations save things like, "The vengeance is mine. I shall retribute," for instance. Both in the English and in the Dutch versions of the Bible translations, they bring the word "retribute" or "retaliate" where the Hebrew word is "*hishlim*," which has to do with *shalom*, peace. So the Lord in Heaven does not say, "I shall retribute." No, He says, "I'll make peace."

David Cayley

Bianchi's great teacher in the matter of Bible translation was the eminent German-Jewish religious scholar Martin Buber. Buber, along with Franz Rosenzweig, had undertaken in 1925 a modern German translation of the Hebrew Bible, a project he would not complete until 1961, four years before his death. Buber and Rosenzweig's translation was criticized in some quarters as more Hebraic than German, but what they wanted was a revelation of the book's original voice, free of national, literary and historical encrustations. "Do we mean a book?" Buber wrote in 1926. "No, we mean a voice." In order to make this voice audible, they freely coined new words and put the disclosure of meaning ahead of the niceties of German literary style.

Bianchi met Buber in Amsterdam in the early 1960s and relied on Buber's translation for his definition of *tsedaka* justice.

Herman Bianchi

The only trustworthy translation of the Old Testament is Buber's translation. He gives the right translation. For instance, he found out that that word *Gerechtigkeit* doesn't fit in—*Gerechtigkeit*, justice—because then you bring the whole business of Thomas Aquinas into the discussion. You are lost. You cannot use it. Also in English, I dropped the word "justice." Don't use it because you bring in all kinds of wrong thoughts that blur your thinking. And so he used, for instance, the word *Bewahrheitung*, "bring truth." *Tsedaka* means to bring truth, and he coined the word *Bewahrheitung*. The word didn't exist in German. He made new words in German. He was a great artist of language.

David Cayley

In **Justice as Sanctuary**, Bianchi proposes several English equivalents to Buber's German translations of *tsedaka*. One is "release from guilt," a term which highlights the tendency of Western justice systems to stigmatize offenders permanently. The taint of conviction and imprisonment rarely washes away. Powerful rituals certify deviance, but there are none to decertify it and certify re-acceptance in society. *Tsedaka*, therefore, must involve some practical way to achieve absolution.

A second criterion Bianchi calls "confirmation of truth." This does not just mean ascertaining what happened. Truth, as Bianchi conceives it, is relational, a matter of dialogue. Its tests are sincerity and reliability and not just conformity to facts.

Herman Bianchi

Truth is not, like Aristotle and Thomas Aquinas said, "Something is true or it's not true." *Tertium non datur*. There is no third possibility. It's true or not true. No, lots of things can be half-true or a little bit true or true at one occasion and not true at another occasion. What's a lie? If during the war you were hiding Jews in your home and a German knocked on the door and said, "Do you have Jews?" of course, you said no. It was a lie, but it was in fact the truth because you were protecting someone with your truth. You did truth to a Jew hiding in your house. That's truth, that's justice, although you were lying. But you weren't lying. You see, there is not only a *tertium datur*, but there are many possibilities between true and not true.

David Cayley

Bianchi's third and final criterion of *tsedaka* justice he calls "substantiation." Justice has been substantiated when no one has been lied to or given a stone for bread, when victims have been fully heard and offenders offered the possibility of redress and release. It is known, not by its intentions or forms, but by its fruits.

Herman Bianchi

You can only judge whether justice has been done afterwards, when it has been substantiated that truth came to people, that help came to people, that reconciliation came to people. Then there has been justice. You can only know afterwards. Justice has to be substantiated. If there is no peace in the end, there hasn't been justice. If there has been an atrocious crime, a homicide, and the criminal goes to prison for a couple of years or is even hanged, there is no justice because there is no peace in the end. Is

the victim happy, happier than before? No, it doesn't help him. If you help the victim to satisfy his retributive feelings, there is no peace. So the fruit of justice is peace, and if there is no fruit, then what's a tree without fruit?

David Cayley

Western penal justice, in Herman Bianchi's view, mixes contradictory conceptions of law. The classical Greco-Roman civilization saw law as the expression of an impersonal cosmic order. The Bible conceives law as the expression of a living will. According to Martin Buber, even the Ten Commandments should not be understood as an impersonal code of law but as a statement of the conditions of a personal relationship addressed by an "I" to a "Thou." Mixing these conceptions led Western societies to interpret Biblical injunctions as laws in the classical sense. Justice came to be understood as the enforcement of authoritative laws, and punishment became imperative when a law had been violated.

The renewed and purified understanding of Biblical concepts that Bianchi was exposed to in the early sixties allowed him to begin prying these two traditions apart. He stepped beyond his youthful hopes for a humanization of criminal justice and in 1964 published a book which challenged the very idea of punishment. It was called in Dutch **The Ethics of Punishing**, and it fit the moment of its publication perfectly.

Herman Bianchi

My book exactly coincided with the Free Speech Movement in the Netherlands and the appearance of the Provos. Holland was one of the leading nations of the feelings of the sixties. Free speech, it's never been as strong as here. And I experienced that as a great liberation, the sixties. I was very much involved in it. I mean, I didn't go into the street. I was already a professor. I was a drawing-room leftist. I've always been a drawing-room leftist, but it influenced me a lot.

So, first, I had my religious ideas. Then I had my existentialist ideas. And then came the ideas of the New Left of the sixties, which influenced me a lot. And that is already found in that book on **The Ethics of Punishing**, as I called it. And there I came with my blow attack on imprisonment, my blow attack on criminal law. And that was like a bomb in the country. It was discussed in the media, in weeklies, on television. It made me suddenly a well-known person in the country, and I had not expected that at all. I was not even so pleased with it because from then on, I was asked to come on the radio and on

television. I even got a column in a leftist weekly, and once a month, I wrote a column on criminal law—promoting my ideas, of course.

David Cayley

Despite the receptive mood that greeted Bianchi's book, he would later conclude that he had written somewhat prematurely, as he says in the introduction to **Justice as Sanctuary**. "I never doubted that my opposition to the punitive system was justified," he goes on, "and I knew I was on the right track in laying bare the utterly mistaken religious arguments conventionally used in favour of it. But the question asked by some readers, 'What are your alternatives?' was valid." One consequence was that he didn't get far with his intended audience.

Herman Bianchi

The theologians were jubilant. The lawyers said "The man's crazy." I remember that it was still in the earlier days of television. We only had one television channel in 1964. In those days, there was still a vicar at night, at eleven o'clock, who gave a closure of the day with a short theological sermon. They don't do this any longer, but they still did in the early sixties. And I remember that one evening he said, "My dear friends, a wonderful book has been written by a professor in law at the Free University. It's this book. Look at it. This is so fine. This is so beautiful. He really brings the word of God as it should be." It had not been my intention to bring the word of God. I wanted to address lawyers, legal philosophers. They did not accept it. And I have always, ever since, kept an image among lawyers that I was a half-theologian, trying to bring nonsensical concepts from theology into legal discussions. And they said, "Theology is there. Law is there. The twain shall never meet."

David Cayley

Bianchi had based his argument on the idea that human kind is innately religious, and, therefore, crime control practices must ultimately be based on religious beliefs. "Whether we like it or not," he wrote later in **Justice as Sanctuary**, "our system of crime control has such deep roots in the ethical ground of our culture that an examination of religious thought is almost unavoidable." For Bianchi, it followed that it would be better to make conscious use of reformed and reconsidered religious principles than to continue under the unconscious influence of old religious ideology. This was an argument his law colleagues simply couldn't accept. It was too fundamental a challenge to their profession.

Liberal society, as Canadian philosopher George Grant has said, "holds apart love and justice." Justice, in this modern view, is a social contract on whose unfailing execution the good order of society depends. Ideally it should function as a great machine, its adversarial procedures orchestrating justice in the same way that Adam Smith's invisible hand conjures an optimal organization of economic life out of the free play of self-interest. Citizens obey the law not because they are called to justice but because it's in their interest. Prompt, predictable punishment shows them that they have calculated this interest correctly. Consequently there can be no place in such a mechanism for repentance, forgiveness or other uncertain and unpredictable dispositions of the heart. This was Bianchi's dilemma. He was the dean of a law school, but he was acclaimed by theologians and dismissed as a dreamer by his more hard-headed colleagues.

His efforts to give his arguments more bite led him in two directions: first, into history and anthropology, where he studied pre-modern law practices and traced the origins of the modern system of criminal prosecution; second, into devising a more practical account of how a non-punitive justice might actually work in contemporary circumstances. These will be my subjects in the remaining programs of this series.

David Cayley

Good evening and welcome to *Ideas*. I'm David Cayley, and this is Part 2 of "Justice as Sanctuary," a three-part *Ideas* series about the work of Dutch criminologist Herman Bianchi.

In the year 927, King Æthelstan, the Anglo-Saxon ruler of England, granted to the Minster of Beverley, in Yorkshire, the privilege of sanctuary. The Minster was a monastery church, and the King's proclamation meant that within the vicinity of the monastery, including the town of Beverley, anyone fleeing vengeance would be safe from arrest or seizure. Several signposts outside the town indicated the distance a fugitive needed to travel to reach the sanctuary. Another milestone marked his arrival. Records from the fifteenth century, during the tumultuous period of the Wars of the Roses, show about 200 persons a year finding sanctuary in Beverley, most because of manslaughter. Refugees could stay in Beverley for one month so long as they were willing to try to settle their differences with whomever was after them. During this period, they were considered guests and sat at table with the canons of the Minster. If no settlement was reached by the end of this month, they were allowed a second month's stay but then had to take their meals in the kitchen. If negotiations were still unsuccessful, fugitives were required, during this third month's residence, to begin working for their keep. And finally, if an agreement still remained out of reach, they were either put on a boat for the continent, granted safe conduct to some other refuge or occasionally permitted to remain at the Minster as contributing members of the community.

The right of sanctuary existed wherever people believed divine mercy to be an element of justice. The temples of the ancient world sheltered fugitives. The Law of Moses provided for what the King James Bible calls "cities of refuge for the manslayer," allowing asylum to all but the premeditated murderer. In medieval Europe, every church was a sanctuary. Then in the period between 1500 and 1800, this right was gradually eliminated.

Herman Bianchi, whose ideas are my subject tonight, would like to see it revived. In his book **Justice as Sanctuary**, he argues that sanctuary was the key to a way of doing justice that put redress before retribution. From the safety of a sanctuary, an offender could try to find a way to make good the harm he had done. With the modern system of mandatory punishments, an offender became a burden to the state, whose sole duty was to suffer.

Herman Bianchi is a Dutch poet, historian and lawyer. Until his retirement in 1989, he was professor of criminology at the Free University of Amsterdam, where he also served as dean of the law school. In many books and throughout a long career as a teacher, Bianchi has spoken against understanding justice as punishment. Imprisonment, he says, is cruel, stigmatizing and often counterproductive. It should only be used where reconciliation and redress have manifestly failed. Bianchi supports his argument with both historical and anthropological evidence, showing that in pre-modern Europe and in many non-European societies before colonialism, reconciliation and redress were the common ways of addressing criminal conflicts.

Tonight's program is about those old ways, about how they were supplanted by the modern philosophy of criminal justice and about how retrieving them might inspire contemporary efforts at reform.

The interview from which this series is drawn was recorded during a visit I made to Herman Bianchi in the Netherlands in May of 1997. We sat in the living room of his old farmhouse in the northern province of Friesland, and he began this segment of our discussion by talking about punishment in the ancient world.

Herman Bianchi

The common way of thinking is that there has always been punishment, punishment is the normal reaction to crime. But, now, everything depends on what you understand by "punishment." Because of my literary and linguistic interests, my first question was, Where does the term "punishment" come from? The term goes back to Latin, *punire* in Latin, which you find in French, *punir*, and from French it went into English. The word "punishment" did not exist in Anglo-Saxon. But then I discovered that the word *punire* in Latin goes back to Greek. It comes from the Greek word *poene*. That's interesting because *poene* is no punishment. *Poene* is a sum you pay because of damage you've done. That's *poene*.

The Greeks did not have criminal codes. Neither did the Romans. The Romans had no public prosecution. Neither did the Greeks. You can say, "But the Greeks and the Romans have sentenced people, haven't they?" Yes, Socrates was sentenced but that was political. He had not committed a crime. There was no prison in Rome. People will say, "But what about Mamertine Prison, where Vercingetorix was imprisoned by Julius Cæsar?" It was political. He was an enemy. "Yes, but they punished, they

flogged people.” I say, “Yes, slaves. But slaves had no rights. The Roman citizen could not be flogged. Impossible.”

When the Apostle Saint Paul was on his missionary travels, he preached somewhere in a town in Asia Minor, which is today Turkey, and then he was placed in custody. And he said to the jailer, “I am a Roman citizen.” The man got terrified because it was not allowed to imprison Roman citizens. They had no prisons, they had no punitive law. What they had was indemnifications and restorative justice. That’s what they had. They used punishment only for political reasons, and then they were extremely cruel: throwing people to the lions. Those poor Christians had not committed crimes. That was political. They were very cruel. They threw people from the rocks. They threw them to the lions. Whatever. If a Roman citizen stole the horse of another Roman citizen, he could go to a praetor and ask for indemnification or that the stolen horse be given back. But the thief of the horse could not be thrown in prison, could not be sentenced—it was impossible—when he was a Roman citizen.

So what we have done, we have accepted the Roman slave law in our punitive system. It’s slave law that we are using. Until about the year 1200, there is no punitive criminal law in Europe. Not really.

David Cayley

The assumption that one makes then is that there was a widespread practice of vengeance, of disorganized retaliation.

Herman Bianchi

Not true. Of course, there was feud, but it happened so little that it’s mentioned in literature. It was possible. If you killed my brother, then I was allowed to kill you or your brother. But then you had a good cause to kill another brother of mine or to kill me. Within one or two years, it would be a civil war. It would extend itself. So people were very scared of that, and so they said, “All right, you killed my brother. You pay me a thousand oxen.” That was done.

Now, feud was hailed in literature, so if you look at, for instance, old Icelandic hero stories, it’s always about vengeance and feud. It was the most interesting thing to talk about. It was not interesting to talk about negotiations between two people and trying to solve the problem by paying 500 oxen or horses or whatever. The bravery of a hero and hero worship. So that’s why you find a lot of

tales about feud in the Middle Ages, but it was rare.

Another thing is, there was the law of asylum in churches. And before the churches, the temples in Egypt and the temples in Rome and Greece were famous places of asylum. And in the Bible too, there were towns of asylum in old Israel under the laws of Moses. So if you kill my brother and I got very angry, I would try to kill you or get hold of you, and then you would flee to a church or a temple. And then the church authority or the temple authority or whatever, the priests, would be an intermediary and try to channel the whole thing by negotiations until a solution was found, and then the thing was done. That’s criminal law of the early Middle Ages. So it was all private prosecution, not public.

David Cayley

Public prosecution today is taken for granted and assumed to be synonymous with justice. But it did not appear in Europe before the end of the twelfth century and then only sporadically. At Rome, as Bianchi has noted, criminal injuries inflicted by citizens were compensated rather than punished. Amongst the Germanic peoples of Northern Europe, conflicts were addressed in a local gathering called a “moot.” This word “moot” has come down to us with the sense of something debatable, perhaps even undecidable: a moot point. But it was once an assembly of household elders who composed a community defined by kinship and oaths of mutual service and protection. Violation of the peace of a household could lead to blood feud. But because of the danger of escalation, to which Bianchi has already pointed, negotiations to forestall feuds were far more common.

The first written law codes set out schedules of compensation in what seems, to a modern sensibility, almost macabre detail. In the Law Code of the first Christian king in England, Ethelbert of Kent, the 4 front teeth are rated at 6 shillings, the next 4 at 4 and the back teeth at 1. Amongst possible injuries to the ear are distinguished piercing, amputation, laceration and loss of hearing. Death also had its price, which varied by class. In the Edict of the Lombard king Rothari, the death of a freeman demands compensation of 1200 shillings but of a household servant, only 50.

In his masterful study of the origins of the modern Western legal tradition **Law and Revolution**, historian Harold Berman has summarized this old European legal order: “The basic law of the peoples of Europe before the tenth century,” Berman writes, “was not a body of rules

imposed from on high but was rather an integral part of the common consciousness, the common conscience, of the community. The people themselves, in their public assemblies, legislated and judged. Law,” he continues, “was not a matter of determining guilt and fixing judgment, not an instrument to separate people from one another on the basis of a set of principles, but rather a matter of holding people together, a matter of reconciliation. It was conceived primarily as a mediating process, a mode of communication, rather than primarily as a process of rule making and decision making.” According to Berman, legal orders of this kind were imbedded in communal life. Legal rules existed, but they could not always be clearly distinguished from religious or moral injunctions.

After the peoples of Europe were converted to Christianity, Church law was added to this existing folk law. The concepts of crime and sin overlapped. Beginning in the sixth century, abbots of monasteries compiled collections of rules called Penitentials, which assigned penances for various sins. These supplemented secular remedies but did not replace them. “Whoever violates right laws of God or man,” says the Law Code of Æthelred, an Anglo-Saxon king, “let him expiate zealously as well through divine penance as through worldly correction.” A common penance for serious offences was pilgrimage and a common destination, Herman Bianchi says, was Santiago de Compostella in northwestern Spain, where the Apostle James was believed to be buried.

Herman Bianchi

There was not yet a punitive criminal law system. And what did people do when there had been a homicide? Because even if the criminal is very repentant, he can't give life back to the killed person. If he has injured a person, he can try to help him to overcome the injury. But when he's dead, he's dead. And then very often the criminal himself offered to do penitence and go, for instance, to Santiago de Compostella. And some Spanish historians in recent years have discovered that the majority of the pilgrims going to Santiago de Compostella were criminals after a homicide. They came from all over Europe. That's why they went so far. Because if you wanted to do penitence for a homicide, you had to offer really something, and a trip walking from London or Holland or Germany to Santiago de Compostella, that took 6, 7 months. It was very dangerous. There were rogues and criminals on the way. There were wolves and bears still in those days in Europe, and it was very dangerous. You could suffer famine, no food, or if you took money with

you for food on the way, it could be robbed from you. And so it was very, very dangerous.

David Cayley

Because of these dangers, pilgrims, during the Middle Ages, often sought safety in numbers. In many of the older cities of Northern Europe, the southern gates, where they gathered to begin their journey, still bear the name of Saint James. Those who reached Santiago were given a shell, which they could take home as a sign that they had successfully completed their pilgrimage and thereby showed their penitence. Penance and the duty of compensation together comprised the criminal law. Getting back into the right relationship with God and neighbour was more important than satisfying the letter of law. The right of sanctuary was another aspect of this way of conceiving justice.

Herman Bianchi

God, as flesh and blood, is always present in the church because of the Eucharist and the Transubstantiation. So in a place where God is present, in the presence of God Himself, you cannot commit criminal justice. It's impossible because it would be too cruel. God would not allow that.

Every church in principle had the right of sanctuary. Every church. Also in England. Although sometimes a particular king bestowed particular right of sanctuary on a particular church, or the precinct of the church, which was usually a town. So you had certain small towns, for instance, the town of Beverley, near York, in Yorkshire, in England, which were sanctuary towns.

David Cayley

The law of sanctuary began to be eroded during the sixteenth century. The first crack appeared when some Protestants put forward a new conception of the church as just a meeting place rather than a sacred space in which God has a special presence. Powerful monarchs, like Henry VIII in England and François I in France, tried to eliminate the right of asylum as a relic of Roman power and an unwanted hiatus in their authority. But in some places, the right persisted. In Herman Bianchi's Netherlands, for example, sanctuary towns were able to retain their privileges because the central authority was too weak to challenge them.

Herman Bianchi

In the time of the Dutch Republic, there was no central power. So if a town had the sanctuary right and wanted to

continue, there was no power to prevent it from doing so. The provinces and the towns in the Netherlands were almost sovereign. Very often they made money out of it. A person who fled to a sanctuary town was afraid that if he left the town, he could still be arrested, and so the best thing was to become a citizen in that town because then he was more protected. And then they asked money to become a citizen of the town, to get citizen rights. So the fugitive paid, and the towns could make money out of that.

David Cayley

The Netherlands, Bianchi says, once had six sanctuary towns. The Dutch Calvinists, like the English Puritans, identified themselves as a new Israel, and so they followed the Law of Moses, which provided that there should be six sanctuary towns in old Israel, three on each side of the River Jordan. This identification waned with the Enlightenment, and the final two sanctuary towns were eliminated at the end of the eighteenth century. One town in Denmark retained its sanctuary privileges until 1827. Fredericia, as it was called, had been created in the seventeenth century.

Herman Bianchi

The King of Denmark wanted a strong settlement town, a stronghold, in the south of Denmark against the developing power of Prussia. That was King Frederick. So he built the town, he had the town built and gave it his own name, Fredericia. The town still exists in the south of Denmark. But there were no inhabitants. So he gave the town sanctuary rights for Roman Catholics and Calvinists—because Denmark was Lutheran—and criminals. And he used the Laws of Moses for that. He said, All criminals are welcome and get sanctuary rights in order to negotiate about the circumstances et cetera. Only premeditated murder is not allowed. That you find also in the Law of Moses. So you just apply the Law of Moses. And until 1800, the Laws of Moses were considered legal in most European countries. It was the law of God. The law of God is better than any human law. So you could always point to the Law of Moses.

David Cayley

The existence of sanctuaries promoted negotiated settlement of criminal conflicts. They prevented vengeance but made the offender a captive so long as he could not settle the case against him. Where settlement was impossible, sanctuary towns provided a living space for offenders who took up citizenship there. How this worked is illustrated by a case Bianchi likes to relate from the seventeenth century.

Herman Bianchi

Around 1660, there was a very important family in the Netherlands by the name of Heinsius. They had outstanding posts in the state. One of them was a minister for the State General, one of them was a member of the Supreme Court, and one of them was an ambassador in Moscow, an ambassador in Stockholm, Sweden, et cetera. So very important diplomatic posts. The ambassador had several sons, but one of his sons was a bad boy. He was drinking, having wrong friends. And one day he was drunk, and with a friend, he was walking through the streets of The Hague, and he got into a quarrel with a young butcher, and he killed him with a sword. Now, he was a member of the Heinsius family, and the killed person was just a butcher, but still killing is killing, also in those days. So he fled, he left the country, he went to Antwerp. His case was on trial before the court. He wrote to the court and said, "I'm willing to pay, say, a thousand gold coins to the family of the victim." The court was willing to accept that. It was possible in those days. But the father said, "No, I don't want to see that boy any more. He's going to give me troubles again and again and again." He said to the court, "No, don't accept his offer." So he was banished for life out of the province of Holland.

David Cayley

Young Heinsius emigrated to Rome and attached himself to the exiled Queen Christina of Sweden, whom he knew as a result of his father's having served as the Dutch ambassador to her court. She had been forced to abdicate as a result of her conversion to Roman Catholicism, Sweden being a Protestant country, which is why she was in Rome. Heinsius became her physician on the strength of a medical diploma which he had essentially purchased, but she was apparently content with his ministrations. When she died ten years later, he sought to return to the Netherlands.

Herman Bianchi

He went to a sanctuary town. There were two sanctuary towns in Holland in those days, and if you were there, you were protected by the mayor of the town. You could not be prosecuted by The Hague or any court outside. From the city of Culemborg, where he stayed—that's near Utrecht, it's still there, the city—he wrote to the court in The Hague, "Can't the banishment be lifted so I can get back to the province of Holland?" Utrecht is outside Holland, you see. But his father was still alive, unluckily. The father said, "No, I don't want to see that boy here again." And then he stayed for the rest of his life in Culemborg, where he died. He had a great practice. He specialized in