

the treatment of syphilis. And now, you see that because he was in that sanctuary town, he could not be prosecuted.

### David Cayley

Herman Bianchi's study of the control of crime in old Europe and classical Rome began from his desire to gain some perspective on the contemporary image of justice as punishment. The same desire led him to look into the law ways of non-European peoples. There he made essentially the same discovery as he had amongst the peoples of Europe before the rise of modern criminal law. Until the time of Western colonial expansion, law amongst most non-European peoples was not separated from other social considerations. Law and religion overlapped, and the need to hold people together limited the isolation and punishment of offenders.

One of Bianchi's informants was an old man of the Seneca Nation, whom he met on a visit to the United States.

### Herman Bianchi

He said, "Are you Christian?" I said, "Yes, I was baptised, but it's a moral question you're asking." He said, "Well, I was, but I've returned to the religion of my ancestors. But do you know the Bible?" I said "Yes." He said, "Very often the Bible is wrongly translated, because it's not said, 'A sinner you should forgive'; the word that's used there is just 'criminal' in the Hebrew." And I said, "Yes, I know." "Now, the law among the Hebrews," he said, "was that if someone has committed a crime against you, you should invite him to redress and restore the damage he has done. And you should invite him seven times. And Jesus said, 'Not 7 times but 70 times 7 times.'" He said, "Now, the Indian idea of law is this: If someone commits a crime against you, you have to invite him ten times to give restoration, to redress the harm he has done. If he refuses ten times, then he is thrown out." I said, "Yes, I fully agree with you. What we do is, instead of offering to a criminal the possibility of repairing the harm he has done, we throw him out immediately."

The Germanic tribes in the early Middle Ages had the werewolves. Werewolves existed. You know what werewolves were? They were criminals who had refused to offer restoration or redress, and then they were thrown out of the community. They had to live in the forest, and because they could no longer cut their hair, they looked like wolves. In the middle of the night, they would come to a farm and steal a chicken for food. And they were usually criminals who had been thrown out.

So I agreed with that Indian chief... He said that the word "chief" was a wrong translation. I said, "Yes, I know that as well." "We have no chiefs," he said, "We never had chiefs. But the foolish Europeans thought, 'Well, where is your chief, where is your king or where is your baron?' because they were used to have a chief or a baron, and so they wanted us to have one as well, but we never had one. The Indian word for 'chief' means 'peacemaker.'" I said, "Well, we agree 100 per cent. With you, I find wisdom."

### David Cayley

The justice of the Seneca, as this man represented it, attempted to reconcile, rather than estrange, offenders. The threat of banishment gave the demand for restitution real bite but was actually used only as a last resort. Bianchi found the same emphasis on reconciliation in Indonesia, a former Dutch colony.

### Herman Bianchi

The Dutch introduced European Dutch law into Indonesia when it was still a Dutch colony, although very often they adapted the Dutch ideas of law to the Indonesian *adat*. *Adat* is the Indonesian word for law. But *adat* is not legislation. *Adat* is the feeling of justice. That's *adat*.

Now, what has happened? They never had prisons. The Dutch introduced prisons because you send criminals to prison, don't you. So they built prisons in Indonesia for the criminal. But what happens when a man has been in prison for two, three years, still today, when he comes back into his community? It's a big feast. They put tables on the street, and they make a lovely meal. "You are the prodigal son. You have done the duty of penitence, and now you're back, you're again with us."

I once gave a lecture on that in Germany, I remember, and there were several young judges there, and they said, "Exactly. That's now what we want, what we should do. We can make our system just if the criminal who has served his sentence is called back to the court, and then he is purified of all blame and becomes one of us again." But we don't do that. We put the person in prison, but the sentence continues afterwards. For the rest of his life, he is a lost man.

Now, the Indonesians did not understand imprisonment, but, all right, let's try to diminish the consequences of imprisonment by receiving the man back into his community. They say, "You are our brother again. We love you again." That's something beautiful. That's *adat*. The Western concept of legal justice, of justice is so

bloodily unjust and awful.

### David Cayley

The origins of this Western and now worldwide conception of justice, Bianchi believes, are to be found in the Middle Ages. The key change for him was the appearance of public prosecution. At Rome in an earlier era, an official called a *praetor* had been elected each year to hear complaints from the citizens. He decided what rules of law applied in the disputes brought before him and enforced settlements, but he had no power to initiate cases or punish Roman citizens. In Europe during the first millennium, overlapping bodies of folk law and penitential Church law established a framework for settling criminal conflicts. Only towards the end of the twelfth century were there stirrings of a system in which a public authority demanded satisfaction for private injuries.

### Herman Bianchi

Public prosecution means that a representative of a king or any higher authority prosecutes a crime even if the victim does not bring in a complaint, and so there is no plaintiff. Before, no authority could do anything if there were no plaintiff. It began with Henry II, the English king who had Thomas Becket murdered, and a count in Flanders, Philip of Alsace. There was a lot of contact between England and Flanders, and I'm speaking about 1180, and so they knew of one another, and they introduced the first legislation of public prosecution. That's the first sign of criminal justice in the modern sense.

It took another 300 years to develop. Around 1500, it was there. And then the authorities would prosecute wherever they liked, using it for political reasons and for social reasons and whatever, and they were doing it so in the time of Henry VII in England, the father of Henry VIII. Punitive criminal justice was developing so rapidly that Thomas More said, "What are we doing? Shouldn't we, rather, bring thieves to a workhouse than hang them and flog them all the time?" That was Thomas More in his *Utopia*. So he, being an intelligent man, a very gifted man, he was aware of what was going along. "We're going too far. We should not cruelly punish everyone who's doing any wrong. It's crazy." So in 1500, it had already developed very much, but it started in 1180.

### David Cayley

But how can something new appear? Where does it come from?

### Herman Bianchi

I have two theories: Why did criminal justice develop in Western Europe? Is there any other part of the world where it developed? Yes, I found another part of the world where it developed: China. China also had public prosecution already 2,000 years ago. Why? Because there was a modern state. In order to have public prosecution, you need to have a public prosecutor. China was a highly developed state. It was perhaps the first modern state of the world. China had a huge empire, with a good taxation system, and authorities who had money to pay civil servants. They even had famous Mandarin exams in China. They had punitive criminal law. You need civil servants in order to have a criminal law. The Romans didn't have civil servants. The Greeks didn't have them. They didn't have them in the early Middle Ages. Where from? They hardly had a money economy.

So, yes, Henry II was the first one who appointed a man to prosecute publicly. But as I said, the development was very, very slow. They were helped by the Inquisition. The Inquisition was also an organized attempt to influence society, and they introduced torture. Torture was forbidden in Roman law unless on slaves. You could not torture a Roman citizen. That was impossible. And so slave law, which was introduced because the Inquisition allowed torture. And the idea of torture, which was unheard of in the earlier Middle Ages, appeared at the same time as public prosecutors. The first criminals they prosecuted were heretics—not thieves or killers—heretics, witches.

### David Cayley

The Inquisition became an institution of the Roman Church during the thirteenth century. Its purpose was to discover and prosecute heresy. Inquisitors had wide powers to deploy police, notaries and other assistants and were able, like modern prosecutors, to start an action without a complaint.

The change in the Church which the Inquisition expressed had begun at the end of the eleventh century, with the so-called Papal Revolution. "During the first millennium"—and here again I'm quoting historian Harold Berman—"there was as yet no separate, corporate, organized Roman Catholic Church in the West, no unified legal entity. Instead," Berman says, "there was an invisible spiritual community of dispersed local dioceses, churches and monasteries, all subject to secular authority." This began to change in the year 1075, when Pope Gregory VII initiated what many medieval historians have recognized as the first Western revolution: the attempt to withdraw

the Church from the world and establish it as a separate corporate entity, exerting spiritual authority over the world. The Pope alone is the one whose feet are to be kissed by all princes, Gregory declared. The Church, as he pictured it, was to be a perfect society, called to reform and perfect the world.

A crucial element in the Papal revolution was the Church's attempt to systematize its laws and create the bureaucracy to execute them. The Church would henceforward be ruled by law—and law understood in a new way: as a body of independent principles, standing apart from custom or community. Thomas Aquinas expressed this new conception when he defined crime not as a concrete injury but as “a defiance of the law itself.” And because the injury was to the law itself, he said, only punishment could repair the damage. Law now stood above society as its absolute and unequivocal ruler. According to Saint Anselm, not even God can set aside His own laws. It's for this reason, Anselm says, that Christ had to pay by His crucifixion the price of Adam and Eve's disobedience. The first German law book, the **Sachsenspiegel**, published around 1220, summed up this new attitude in a formula: “God is Himself law.”

The Inquisition expressed the terrible power of this new confidence in law. A legal institution was created to regulate the relationship between God and His people. “What heresy was to the Church,” Bianchi says, “crime eventually became to the state and its rulers. Crime was no longer viewed as a conflict demanding remediation and redress but as a social heresy.”

### **Herman Bianchi**

The organization of the Inquisition, with torture and prosecution et cetera, gave an example to the worldly authority to develop something like that against crime. The Church did not tell them to do so, but they had an example, and that's why criminal law developed as torture. Torture in Holland continued until the eighteenth century. And so in France, in Italy, in Germany—everywhere. The English often say, “There was never torture in England.” That's not true. Under Henry VIII and Elizabeth and Henry VII, there was a lot of torture in England as well. It was only after 1600 that torture, for criminal reasons, gradually disappeared.

Why did the Inquisition torture heretics, and why did the worldly authority later on torture criminals? There was some logic behind that: They believed that the heretic is committing a grave sin before the Lord, a grave, grave sin.

And if he did not confess, he would burn in Hell into eternity. You could not sentence a person without confession, without pleading guilty. It was impossible. And so they helped him to confess by torture. And if he had confessed and if he was burned alive, he went right to Heaven. That was mercy.

### **David Cayley**

Herman Bianchi offers two main explanations for the violently repressive character of the criminal justice system that emerged in Europe after 1500. The first is his view of Western legal science as a secular theology, in which crime is seen as a social heresy. The second is his idea that public prosecution and punishment developed because the state, following the Church's lead, became able to organize and finance the necessary bureaucratic machinery. However, this capacity, he says, remained quite limited up until the end of the eighteenth century. Hangings and public floggings, as Thomas More remarked, were already common in the England of Henry VIII. But a comprehensive system of criminal justice was still well beyond the state's means. This is evident, Bianchi says, from the records of Amsterdam's main prison during the seventeenth century.

### **Herman Bianchi**

The prison wardens were not paid. They had to live from the prison. Today we would call that corruption. They didn't call it corruption in those days. They needed to live from the prisoners. So in the seventeenth century, Amsterdam was already a city of 300,000 inhabitants, but in the city prison, very often there were no more than 20 or 30 prisoners. That's very few for a city of 300,000. If the prisoner could not pay, then the jailer would let him go, let him escape, because he didn't pay. Somebody, perhaps the prisoner's father, had to pay to give him good food every day. That was cheaper than paying the damage the son did. Because parents in those days—a wonderful principle—were responsible for the acts of their children. So if your son was a hooligan, the father had to pay. So there were very few hooligans, I can tell you. Today the parents are not responsible for the acts of the children as soon as they're older than 16 or 18 years.

The state was still very poor in the seventeenth century. The taxes that were levied were used for the military or if there was a king, for the royal household. That was all: military and royal household. For all the rest, there was no money. There were no civil servants. Very few, very, very few. Certainly no jailers. That's why prisoners had to work. It was a workhouse in Amsterdam. They made red

paint from red wood from Brazil. But it didn't work economically. So the city of Amsterdam had to add money to the prison, and the city officials said, "Are they crazy? Criminals in there and we have to pay for it? No, never, ever." So it was a big prison. There could certainly be 200 people in it. Usually there were only 12, 15.

### David Cayley

And when did it change in Amsterdam?

### Herman Bianchi

With the new government of the Batavian Republic and the French Revolution, 1790. The modern prison came into being with the modern state.

### David Cayley

Many explanations have been advanced for the birth of the modern prison around the beginning of the nineteenth century: utilitarian philosophy, distaste for corporal punishment, the Quaker conception of the prison as a penitentiary and the application of industrial-style discipline to offenders.

Bianchi offers a very practical reason: money and the civil service it could buy. Now the last ragged vestiges of sanctuary right and private settlement could be swept away in favour of a uniform system of criminal justice. The Enlightenment had produced a paradox: It had established the Rights of Man and then withdrawn them from those successfully prosecuted for crime.

With the achievement of the full modern system of public prosecution, the offender, in Bianchi's view, had been denied any right to act on his own behalf. "Modern criminal justice systems," he writes in **Justice as Sanctuary**, "behave like the inscrutable God of Calvinist theology. Whatever offenders may offer as good works," he goes on, "whether they be remorseful, repentant or willing to do their utmost to repair the harm they have caused, they can never contribute to their own social salvation. On the contrary, once found guilty, they are lost and in a shameful way." Imprisonment, Bianchi says, leaves a permanent stain.

Herman Bianchi's objection to a system of criminal justice based entirely on prosecution and punishment is the way it works against the possibility of a criminal conflict ending in healing or reconciliation. Such a solution, he admits, is not always possible, but where it is, he does not see why the state should subvert it by insisting on punishment. The difficulty is illustrated by a case in which

he was involved a number of years ago in Amsterdam.

### Herman Bianchi

There were two boys in Amsterdam, two brothers of 18 and 19 years old or 17 and 18. And they held up a cab driver and tried to get his money. The man defended himself, and then they hit him with their boots into his loins to the effect that the man ended up in a wheelchair. That was a case before the court in Amsterdam. And then a lawyer and defender, who had been a student of mine, gave me a phone call and said, "Can't you come into court? I want to summon you as a witness to explain to the court a little bit of your ideas."

Now, it's a fact that all these silly cartoons like "Tom and Jerry" that are watched by children of three or four years old are very stupid. You have the clever mouse and the stupid cat—and the cat throws a bomb to the mouse, the mouse catches the bomb, throws it back, then the cat explodes, but one minute later he is back again in shape and goes after the mouse. So lots of stupid children think that if you throw a bomb at someone or if you kick him with your boots in his loins, it will be just as it is with those people of the "A-Team": the car explodes, and they get out and walk away.

So these boys, who were not that intelligent, thought that if you hit a man with your boots in his loins, he just gets up. No, not true. He ends up in a wheelchair. So they were in prison, in jail, awaiting their trial, and they repented. Now, everyone laughs, "Repentance—come on, come on!!" No, they said, "My God, what have we done, what have we done? How stupid we were. And the poor man."

So the attorney said to them, "Well, write him a letter and offer him something." So they wrote a letter, saying, "We are willing to take care of you for 25 years. We'll make a contract." The man was 36 years old, not married, will never get married in a wheelchair, will be living from social assistance for the rest of his life. Awful. So they offered to take care of him for 25 years.

No answer. The attorney said, "Write him again." They wrote him a second time. Then the man had been thinking, had been discussing it with other people. And some friends said to the cab driver, "Why don't you accept it? Accept it. They will do their utmost to make your life bearable." So he wrote back, "Okay, I accept."

That was brought before court. I said, "Well, do that. This is now a wonderful case, as it should be. This is divine



justice. Now do it.” “No,” said the public prosecutor, “all these boys attacking cab drivers have to learn a lesson.” So they go eight years to prison, and after that they can take care of the cab driver. Now, they have never taken care of the cab driver. Of course not, because then they had the feeling, We have already suffered ourselves, eight years in prison. Why should we take care of the cab driver?

### David Cayley

This case goes to the heart of what Herman Bianchi thinks is wrong with contemporary criminal justice. It insists on punishment, even where a settlement satisfactory to the parties is available. How much good will is wasted in this way, how many enemies created unnecessarily is impossible to know. The only way to find out, in Bianchi’s view, would be to create a parallel system of justice based on the old principles of sanctuary and restitution. Hostile procedures would then have to be invoked only if this first system failed. How such a way of doing things might work will be Herman Bianchi’s theme in the final program of this series.

### Herman Bianchi

I have never been so stupid as to think that we will ever be able to get rid entirely of a punitive system of criminal law, but I hoped that we could develop another system of restitution and restoration and redress next to the present system, the punitive system. We should offer all criminals, without any exception, a possibility to redress the harm they’ve done. If you offer that seven times or ten times, many times, if they continue to refuse, if they stand in the evil they’ve done, then we throw them out. Then we use a prison, because we can no longer send them into the forest, we can no longer send them into the desert. Well, we have a desert; that’s a prison.

And then I think that in Holland we would no longer have 12,000 people in prison but perhaps 1,000. And we need a prison for the very dangerous people. I don’t want to be killed on the street. Would you? No, nobody would. So there are very dangerous people. We have the duty to protect ourselves against violence. Then there is no solution.

So I just go back to old Hebrew law, to old Church law, to old Indian law: If people commit harm, commit an evil deed, give them the opportunity to redress what they’ve done. And that is civilized law.

### David Cayley

On *Ideas* tonight, you’ve listed to Part 2 of “Justice as

Sanctuary,” a profile of Dutch criminologist Herman Bianchi. I’m David Cayley, and I’ll be back next week at this time with the third and final program in this series.

**David Cayley**

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

**Herman Bianchi**

In my book of 1979, I had a fancy: I said, One day I'm walking in Amsterdam, and I meet a man from outer space, an ambassador of God or whatever. And he asks me, "Show me the world." I take him along. And we happen to see a man killing another man, and he's awarded the Victoria Cross. The next day we walk on the street, and we see another man killing another man. He's put into prison for life. So the man asks me, "Explain that." And I can't. I can't explain why one killing is awarded and another killing is punished. God will never understand it.

**David Cayley**

Herman Bianchi is a Dutch criminologist, historian and poet. Until his retirement in 1989, he was professor of criminology at the Free University of Amsterdam, where he had also been dean of the law school. During his career, he became well-known in the Netherlands and throughout Europe for his criticism of imprisonment. Imprisonment, he said, was sometimes justified as a public safety measure, but it could never be an instrument of justice. Justice for him meant peacemaking, not just socially sanctioned revenge on the offender. As an alternative, he suggested in his book **Justice as Sanctuary**, we ought to look to the past and revive older and more humane practices, like the right of sanctuary and the duty of reparation.

This series is based on an interview I recorded with Herman Bianchi at his home in the Netherlands in May of 1997. The first program sketched his intellectual biography and his search for an account of justice that includes what's good as well as what's right. The second examined old traditions of justice in the classical civilizations, in old Europe and in the non-Western world and how these traditions were abandoned in favour of our current system of proportional punishments for crime. Tonight in the third and final episode of this series, Herman Bianchi looks at how the criminal law sows discord and dissent and at how a system aimed at peace and agreement might be constructed.

In the civilization of the West, a powerful philosophical consensus favours punishment as the just and proper response to crime. In Plato's **Gorgias**, Socrates says that any man who escapes punishment for his misdeeds must

be miserable far beyond all other men. Hegel calls punishment a right and states that an offender, by being punished, is honoured as a rational being. Simone Weil claims that punishment is a vital need of the human soul. And Immanuel Kant, in an often-quoted passage from his **Philosophy of Law**, says that if a civil society were to dissolve itself tomorrow, it would first have to execute the last murderer lying in prison so that blood guilt—his expression—would not fall on the people.

The central difficulty with this consensus is identified in the **Gospel of John**. The Pharisees bring before Jesus a woman "taken in adultery," as the **King James Bible** says. The Pharisees site the Law of Moses, calling for such an offender to be stoned to death, and then ask Jesus His opinion. He, at first, affects not to hear, but when they continue to press Him, Jesus finally says, "He that is without sin among you, let him cast the first stone at her." This answer, like a number of Jesus' other parables, is interesting as much for what it does not say as for what it does. It doesn't challenge or contradict the law, nor does it object in principle to punishment. Rather it asks, Who is qualified to punish? This, in essence, is Herman Bianchi's question about punishment.

All of the philosophers I just quoted, Plato, Kant, Hegel, Weil, speak from the point of view of the offender's soul or of society or of the divinely ordained order of things. They suppose a perfectly disinterested punisher, someone like the ideal judge imagined by the eighteenth century French philosopher Montesquieu, who says a judge should just be a mouth who pronounces the words of the law. But who is it, Bianchi wonders, who can do evil to others without himself being touched by it?

**Herman Bianchi**

If you ask people like judges and public prosecutors to punish, you're doing harm to them. I've given so many lectures to public prosecutors, to attorneys, to judges, and once I was present at a discussion they had. They were discussing what a judge, when he is interrogating a criminal in a pre-trial condition, how you should treat the criminal, the suspect. And several of them said, "Oh, yes, I never offer him a chair because he should feel it, that he is standing. I am sitting and he has to stand." And then another one said, "You seem to take delight in it." "Why shouldn't I? He's a criminal. He should feel it."

If you harm a criminal, you're doing harm, you're doing exactly the same thing as he did. You're doing harm to another being. That's wrong, doing harm to another

human being. So punishment is the criminal answer to a criminal act. Punishment is crime, is doing harm. Who are you? Who is giving you the right to do harm to another human being? Who are you?

After a few lectures of that kind, I've never been invited by the judiciary anymore. They didn't hear what they wanted to hear. They wanted to hear that they were doing a good job by doing harm to people every day. Day in, day out, day in, day out, they do harm to people. It's administration. You administer punishment. It's daily work, five times a day.

I could understand this: If you punish with love, like the ideal father who slaps the face of his boy, but he loves him, and very often he would tell him, "Sorry that I hit you. You deserved it but I didn't mean it. I love you. Here are my kisses," okay, fine.

### David Cayley

Punishment, to be just, Bianchi says, must be carried out with heartfelt concern. But this cannot be done in the real circumstances of the criminal justice system. "If you punish someone," said Maimonides, the great Jewish philosopher-rabbi of the twelfth century, "he becomes your brother." Maimonides spoke as someone who believed in punishment. If a criminal is not punished, he says in his **Guide for the Perplexed**, "injurious acts will not be abolished, and none of those who design aggression will be deterred." But he also recognized that punishment could be justified only as an effort to awaken the conscience of the offender and not as vengeance. "A judge," he says, "must act entirely for the sake of heaven." Simone Weil says something similar when she calls punishment, "a method of procuring good for men who do not desire it." When punishment fulfills merely repressive purposes, she says, "it becomes something even more hideous than crime." Punishment then can only be just as an agonizing personal commitment to someone's correction.

A criminal justice system is another matter. Prisons, as nearly everyone knows, are violent, exploitative places, and people are sent there, not for their own good, but as an object lesson to their fellow citizens. To characterize this system, Herman Bianchi uses the term *anomie*, a term he borrows from one of the founders of modern sociology, Emile Durkheim. This term has been given many inflections since Durkheim first put it into circulation and now often evokes a sense of aimlessness and dis-ease. But it comes originally from the Greek word for law, *nomos*,

and means literally "lawless, without law." In calling the criminal justice system anomic, Bianchi uses the word "law" in the double sense that Jews give to the word *torah*. The *Torah* is the Five Books of Moses and the many positive legal injunctions contained in those books. But it is also the law in a larger, more living sense, the law as an intuitive, inward experience of how things should be. Bianchi first finds the word *anomie* used in this way in the New Testament in Paul's Letter to the Romans.

### Herman Bianchi

Paul was a Jew. He even had got a rabbinical education. And so when he used the word *nomos*, which is "law" in Greek, he didn't mean the Greek law; he meant the Law, *Torah*. He was very proud of being a Roman citizen, but he was a Jew and a Roman citizen, which was rare for Jews in those days because they were at war with the Romans, as you know. And he said, "Although the Romans have no law, they are not anomic because *torah* may be present in other nations as well." Don't forget, he was trying to leave Jewry, Judaism and to found the Christian religion. They are several theologians today who say we should not speak about Christianity but about Paulism because he made that religion. And so he said, "The Romans are not anomic, because they have the law of God in their heart. The heathens, the pagans, have the law of God in their heart. Not only the Jews. Everyone has. And we have to make them aware of it." That was the message of Saint Paul, which made him leave Jewry and Judaism.

### David Cayley

What was true of Paul, Bianchi says, was also true of Emile Durkheim 18 centuries later. Durkheim too was a Jew and the son of a rabbi. He chose the Greek-derived term *anomie* to describe the alienation he saw around him. But Bianchi believes that he gave it the Jewish, rather than the Greek, sense of law.

### Herman Bianchi

I think that the majority of sociologists have not understood what Durkheim meant with *anomie*. He did not mention the word *torah*, but what he meant was having no *torah* feelings in your behaviour. A bit like Saint Paul, he thought *torah* is in your heart, the law is in your heart. It is the everlasting attempt to bring peace into this world. And you need to have the qualities of the law to bring peace. When the law, when legislation does not give you the tools to bring peace, it's a bad law, it's anomic, it's an anomic law. It's law. Because when Saint Paul said, "The Romans have no law," he knew that there was a legal

system, one of the best of the world.

Now, Durkheim used the word *anomie*, to begin with, because he wanted to understand why so many members of well-to-do, wealthy Jewish families in France committed suicide in his days. That's his book on suicide. He didn't understand why the Jewish businessman, well-to-do, committed suicide. There were quite a few suicidal attempts in his days in France. Now, his explanation was, "Listen. When the Jews were still living in the ghettos, it was not that bad because they could live by *Torah*." He didn't say that, but he said they were eunomic, they were not anomic. But then freedom for the Jews came with the nineteenth century. All the anti-Jewish legislation in all the countries of Europe was lifted, was no longer there. Jews were considered normal citizens, like anyone else. But then they had to live according to another legal system, which is not based on *torah*, and that's why they ran into great problems, and that's why they couldn't understand the world any longer, the world they had to live in, and they committed suicide, because life had lost its sense.

Now, Durkheim is describing all that without using the word *torah*. This is the strange thing. He didn't want to. Of course, he knew it. His father was a rabbi. He went to rabbinical school, although when he was 10 or 12 years old, he was sent to a Roman Catholic *lycée* in France because his father wanted him to be a boy of good learning.

### David Cayley

*Anomie*, in the sense that Bianchi thinks Durkheim intended, characterizes the contemporary system of criminal justice. This system has an abundance of legal rules. The Canadian Criminal Code runs to some 300 pages. But in Bianchi's view, it fails to manifest or convey the experience or feeling of justice. It makes offenders suffer but offers them no living example to emulate.

The Apostle Paul, in his Letter to the Corinthians, draws a distinction between the letter and the spirit, the word written "in tables of stone" as against what he calls the word written "in fleshy tables of the heart." "The letter kills," he says, "the spirit gives life." Bianchi draws a similar distinction between anomic justice and the eunomic or law manifesting justice he would like to see. In his book **Justice as Sanctuary**, Bianchi says that there are three possible ways of modelling justice, which he calls consensus, dissensus and assensus. The current system is based on the assumption of consensus in society.

It derives from the idea that society is based on a contract to which all have implicitly agreed.

### Herman Bianchi

The consensus idea comes from the Enlightenment. You find it in John Locke and in Rousseau's *contrat social*. Rousseau said, "We are born free, but long, long, long, long ago, we had a consensus about the way we should be ruled. We have given up parts of our liberties, of our freedom, just to continue society." That's the consensus, the *contrat social* of Rousseau. We have a consensus about what is murder and what is theft and how we should deal with it. So the judge in a modern court thinks, I'm doing good work because the whole nation supports my work. I do it for the society, for the community. I punish the criminals and everyone agrees with it. There is consensus on our work in this society. That's what they believe.

### David Cayley

The second possible model of justice is dissensus, a term which derives from Marxist sociology. Dissensus implies that the members of society are divided by class, and, therefore, will never agree on a set of general norms. The most obvious example of dissensus is the conduct of international affairs, where conflicts are finally settled by war and only the law of superior force prevails. Those who view criminal justice in terms of dissensus will argue that crime always has a political character, that it reflects conditions of oppression and can only be understood as a misguided response to these conditions. No common interest, in this view, unites the powerful and privileged dispensers of justice with the unfortunate persons whom they imprison.

Bianchi thinks that there is something to both these models but that neither of them is adequate. Crime, for him, does have a partially political character, but this does not absolve individuals of responsibility for criminal acts. A consensus does deplore certain crimes, but this need not lead automatically to punishment. The consensus and dissensus models of justice split the truth in two. Each reveals something by denying something else. The idea of consensus papers over the unequal distribution of power. The idea of dissensus denies the universality of certain norms.

Bianchi has, therefore, coined a third term, assensus, and argued for the adoption of an assensus model of crime control. His idea is to try to affirm the reality of justice without claiming that there is an agreed-in-advance



consensus about what it is.

### Herman Bianchi

We have to work to find out where justice is. We will never find it really. So assensus is a development towards agreement. And I have it from Cardinal Newman, a man I have admired very much, the Anglican theologian who became Roman Catholic. He wrote a book called **A Grammar of Assent**. He tried to explain why he became a Roman Catholic, and at the same time, it was a basic criticism of the Roman Catholic ideas. What he was against was that both the Anglican Church but most certainly the Roman Catholic Church said, "We have the truth. God has bestowed His truth upon us." And Newman said, "No, we will never know the truth. We have been thrown out of paradise. We will try to. We have to assent to it"—and that's also an Augustinian idea—"we have to ascend towards the City of God, and in the end, we will be there. But as long as we are not, we have no complete truth." So it was also, in a way, a basic criticism of the Roman Catholic Church, which said, "We have the truth." He became a Roman Catholic because he expected more from the Roman Catholic Church than from the Anglican Church, the Church of England. I'm not discussing that, whether he was right in that or not. But his **Grammar of Assent** I admired very much. This is my basic philosophy. We will never know the truth entirely.

### David Cayley

In his **Essay In Aid of a Grammar of Assent**, Newman distinguishes between real assent and what he calls "notional assent." Notional assent is superficial. Real assent is substantial understanding, involving the whole person. In Bianchi's interpretation of Newman, the important properties of real assent are, first, that it may take considerable time to achieve; second, that it cannot be forced; and third, that it emerges within a community and not just out of solitary reflection. In Bianchi's view, this sustained, collective reaching for assent is how justice ought to unfold and, indeed, how it does unfold in much of daily life. We are endlessly engaged in discussions we never finally settle about what is right and what is good. The question of justice, as Mennonite leader Dave Worth has said, is, How are we going to live together?

Criminal justice, however, presents a different picture. There the issue is cut and dried, a matter only of determining the degree of the offender's guilt and assigning a proportional amount of suffering. Winning the offender's assent to justice is no part of the process, nor does he have any power to propose a solution to the

problem he has created. The victim is similarly powerless. Punishment is the sum and total of what a criminal trial can produce. "When justice is practised in this way," Bianchi says, "conflict is perpetuated and even intensified."

An assensus type of justice would seek grounds for reconciliation and correction. A current example of how this might work is to be found in South Africa, where the National Truth and Reconciliation Commission is trying to deal with South Africa's past. Bianchi believes it to be a model and admires the part Anglican Archbishop Desmond Tutu played in its establishment.

### Herman Bianchi

I'm a great admirer of Bishop Tutu in South Africa. He says, "No political procedures, no trials. Because then we will get a civil war. Don't do it. Forget your vengeance." And the black people are listening. Mandela is listening. He said, "Yes, no political procedures, no punishment. Then we will get a civil war." The same happened in Spain. Why is Spain a democracy? There were no political procedures, no trials of the Francoists who did all these wrongs. Let's forget it. Let's look forward. Don't punish. Spain is a democracy because they had no political trials when it became a democracy. And Mandela and Tutu are trying to do the same thing. I'm a great admirer. And Tutu has said, "I'll do everything I can to prevent trials from coming up." He founded the Reconciliation Commission. If people admit the crimes they have done, there is amnesty. Only admit it, admit what you have done. That's reconciliation. This man understands it.

### David Cayley

In European societies before the eighteenth century, diverse and sometimes contradictory legal regimes co-existed. The right of sanctuary is an example. A sanctuary was a place where a criminal could not be arrested, a place where secular authority did not apply and the laws prevailing all around were suspended. Such an institution, by its very existence, recognized that the laws of God and the laws of man were not always the same. No single, uniform procedure could answer all circumstances. The eighteenth century English jurist William Blackstone, in his **Commentaries on the Laws of England**, lists as many as ten different kinds of law which all prevailed simultaneously in the England of his day. He includes, amongst others, natural law, divine law, the law of nations, the common law, the local customary law and ecclesiastical law.

This diversity, in Herman Bianchi's view, had important consequences. It allowed appeal from one kind of law to another, and it acknowledged the imperfection of any single type of law. "People living within a variety of legal regimes," Bianchi writes in **Justice as Sanctuary**, "were inclined to doubt that society could be ruled or controlled by law and law enforcement alone."

This changed, he believes, with the Enlightenment, the French Revolution and the emergence of the modern administrative state. A new confidence was expressed in law as a tool of governance. The definition of law narrowed until it comprised only the legislative and administrative rules enacted by national states. Crime control became a state monopoly, and public prosecution and punishment of criminals became mandatory. Theoretically this new idea of law was in the interests of equality and the control of power. All would be equal before the law, and all would be subject to the same scale of penalties for crime. What has happened in fact, Bianchi says, is that a new judicial tyranny has been erected, while the prisons continue to be full of those who have grown up poor and abused.

His solution is to stop trying to shoehorn all cases into one uniform procedure and return to what he calls "dialectical thinking" about justice. This would involve setting up two systems of criminal justice side by side: one, the present punitive, anomic system; the other, a new eunomic system, in which offenders would have the opportunity to negotiate and act on their own behalf.

### Herman Bianchi

I've always been impressed by dialectical thinking: Plato, Augustine, Hegel, Marx. You cannot know the good without evil. You cannot know beauty without ugliness. You cannot know God without the Devil. To understand the city of God, you have to know the city of the world. And I thought, we will never succeed in having a pure, just system of criminal justice. So I thought a righteous criminal justice system should be a double system, a dialectical system, a system that's good, a system that's not good. You can know the good system because there is a wrong system. The wrong system is punitive. The good system is, in a way, correctional, it's restorative, it's redress et cetera, et cetera. Not to mention all the feelings of retribution that people foster. A judge in the criminal court who is able to think a little will say, "Listen, we have to do what we do. If not, people will dish out retribution by themselves, so it's better that we do it and keep it under a certain control. If you leave it to the people... So your

system will lead again to vengeance, to feuds et cetera, et cetera, et cetera." That's the common remark. And I say, yes, that's true, but we should have a double system.

In proposing a dialectical system, I stand rather alone because the other abolitionists want a complete abolition of criminal law and prisons, the complete abolition of it. They say, "It's wrong. When you are a pacifist, you are against war. What you like is a little war, a little war instead of a big war. You want a few prisons instead of many." I say, "We will never reach it, the complete abolition of prisons, because there are dangerous people and there are people unwilling to do redress. And if you force them to redress the harm they've done, you've come back to a punitive system, because you have to force them."

### David Cayley

This is Herman Bianchi's proposal in a nutshell: Create a restorative, reconciliatory mode of criminal justice, and employ hostile procedures only when this first mode fails or is rejected or abused. For the mechanics of such a system, he reaches back to the old right of sanctuary or asylum. If the offender is to have the right to propose redress for the harm he has done, Bianchi says, he must have a safe space from which to negotiate. How this originally worked is illustrated by procedures at the Minster of Beverley, a medieval English monastery in Yorkshire that possessed the right of sanctuary from the tenth to the sixteenth centuries.

### Herman Bianchi

A homicidal criminal was allowed sanctuary for 30 days on condition that he was willing to negotiate with the victim or the relatives of the victim. During those 30 days, he was treated as a guest and allowed to have his meal at the abbot's table. The next 30 days, he was no longer treated as a guest of the abbot, and he had to eat in the kitchen together with the serfs of the minster. After that, he was allowed another 30 days, and then he had to work in the garden. So his status was lowered gradually. After 90 days, he had to leave the minster if he had not been successful in the negotiations. And either the monks would bring him to the coast and find a ship for him to leave the country, perhaps going to Holland across the North Sea—so they dumped the criminals in Holland—or he could stay in the minster, in the fabric of the minster—a minster in those days was a precinct with houses and vegetable gardens and so on around it for the livelihood of the monks. And then he had to work in the garden. He could stay there, but it was a kind of prison then for life

term, because as soon as he left the precinct of the minster, he was in great danger of vengeance. So that's how it worked.

And now, I thought to myself, Why not try to have a sanctuary, an officially allowed sanctuary? Not necessarily a church because a modern church is unsuited for lodging lots of people. There are no showers, there are no bathrooms, there is no real kitchen et cetera. So just have a sanctuary somewhere. There are lots of monasteries that are no longer in use. They would be very suitable. And people can stay there on condition that they are willing to find a solution and a settlement of the dispute with either the relatives or the victim or a representative of the state. Because there are also victimless crimes, very dangerous crimes without a victim. And then the prosecutor is the state. You have to find a solution. It may last very long before a solution is found. And those people have to stay in the sanctuary.

Then lots of people say, "Then it's a prison." I say, "No, because in a prison, you are not allowed to negotiate. You just have to subdue yourself to the sentence. The sanctuary may look like a prison, because police can be around it to prevent you from escaping, because after all, you're a very dangerous person, but it allows you to find a solution. You've caused the conflict, so you have to find a solution." Then people say, "What kind of solution?" I say, "Use your imagination, use your imagination."

In the Middle Ages, very often they did pilgrimage to Santiago de Compostella. That makes no sense today because within a short time there would be a special plane service to Santiago de Compostella, and it makes no sense. And there is no longer the same suffering. Even to go by foot to Santiago de Compostella today means nothing. It's not suffering. You can sleep in nice hotels on the way, five-star hotels everywhere. So that makes no sense. There were no five-star hotels in the Middle Ages. So it may well be that you offer yourself to do some good work in Africa, where there is war and pestilence perhaps. It would purify your soul. It may well be that lots of people, criminals, are unable to do that, and there is no solution but staying in the prison. I'm sorry.

### **David Cayley**

Bianchi's proposal, as he notes here, does not assume that everyone who has committed a crime will be able or willing to try to find a way out of the resulting trouble. It only opens the possibility. This has two important advantages: The first is that it conserves good. If an

offender is contrite and willing to make amends, it allows him to try, rather than forcing him into a hostile attitude by despising and wasting his better feelings.

The second is that it imagines a procedure in which justice as peacemaking is actually manifested. Punitive justice answers violence with violence. It addresses the offender on the same plane on which he has acted. You've done wrong to somebody, so we're going to do wrong to you. Justice as assensus would actually model a better way of settling disputes. Those who end up in prison are often people who have simply adopted the behaviours prevailing around them as they grew up. It is vain to hope that imprisonment will teach them to do justice when they have never experienced justice. The ways of justice must first of all be just, Bianchi says. Otherwise, people are being punished for not seeing what they have never been shown.

### **Herman Bianchi**

The research we have done so far points to the fact that the better education you have had, the more you are attuned to the idea of reconciliation, dispute settlement. Why? Because you know how to settle a dispute. You've learned that. That's why intellectuals have a much better chance before court than others, because you've learned to discuss things, to talk. I learned that quite well. I can talk and talk and talk and talk. I would over-talk the court if I were before court. I would out-talk them. But all the intellectuals always have a much better chance before court, of course. So also in settling a dispute, you are less scared. The lower education you have, the more retributive feelings you have because you do not know how to settle the dispute. So they should be helped. That would be a new task for probation officers, to help settle disputes based on a criminal act.

### **David Cayley**

A system of criminal justice oriented to resolving conflict and redressing harm would remedy what Bianchi sees as the central defect in the current system: the powerlessness of the offender. Justice requires the offender's assent to justice, and so there can be no justice, Bianchi states bluntly, where the offender is made powerless. Without assent, punishment only strengthens and hardens resistance. An offender is redeemed only by what he agrees to undertake by way of penance or restitution. The point is important in view of current concerns about overcrowded prisons and the emergence of an informal consensus within the Canadian justice system that this pressure ought to be relieved by increasing non-custodial

sentences like community service. Community service, Bianchi says, is still imposed punishment rather than agreed restitution. It is, therefore, not a real alternative but simply more of the same.

### **Herman Bianchi**

My feelings are this: that so-called community service is not new. That's a very old-fashioned punishment. The gas pipes in London were laid in the streets of London in the 1820s by community service, by criminals. In black-and-white striped pyjamas, they were on the street. Today in Holland, for instance, you can get a community-service sentence that you have to wipe the corridors in a hospital. Of course, all the patients in the hospital or the elderly people in a home for the elderly know that you are a criminal doing community service. Of course, they know. That's very humiliating. Why not give him a black-and-white striped pyjama, like they did in the 1820s? That's forced labour, it's forced labour. It's an old term, it's not new, it's not new at all. You find it a lot in the eighteenth and the early nineteenth century. Lots.

### **David Cayley**

But what's wrong with it, aside from it's not being new? That's not necessarily a fault.

### **Herman Bianchi**

Because it's slavery. You have no labour protection. You can be exploited for everything, especially if the prosecution hires you out for commercial purposes. Then you work for Phillips in the computer department without pay, and Phillips makes great profit. It's the re-introduction of slavery. We should not forget that the Romans had no punitive system, but if you were in great debts because of a crime, you could end up as a debt slave. Let's say you had killed someone, then you negotiated. You might have to pay 500 horses or 500 gold coins. You didn't have them. Then you could be sold into slavery for the rest of your life, or you became a slave of the prosecutor—not the public prosecutor but the plaintiff—became his slave. That happened a lot. A lot of slaves were debt slaves in Rome. So you become a slave of Phillips. It's a very bad thing. It's going back to slavery. It's going back to forced labour. It's slavery.

### **David Cayley**

The amount of community service being assigned by Canadian judges has increased substantially since the fall of 1996, when Parliament amended the Criminal Code. At that time, a section was added respecting what was called "conditional sentencing." It allowed sentences of less than

two years to be served in the community so long as judges were satisfied there was no threat to public safety. The sentences imposed under this section so far have generally involved many hours of community service.

Bianchi's critique of community service argues that these changes should not necessarily be regarded as significant reforms. They may save money and reduce the pressure to build more prisons, but they leave untouched what Bianchi regards as the real problem: the servitude of the offender. This difficulty can be addressed only by a conception of justice which stresses the free consent of everyone involved in the criminal conflict to what will reveal itself as right during the course of possibly prolonged discussion. Such a conception obviously has implications that go far beyond the question of what to do when a crime is committed. Indeed, if a philosophy of assensus governed society generally, Bianchi says, most of what is now prosecuted as crime could be prevented. Policing, for him, is a good example. It ought to concentrate on prevention, he says, but instead it concentrates on repression after the fact.

### **Herman Bianchi**

When I was a little boy before the war, I remember, police were going around on pedal bikes. Many of them. And I remember football in the streets was forbidden in those two days—they wouldn't even dream of forbidding it now—but we were playing football on the streets, and sometimes it happened that the football fell into a little garden in front of a house or was even smashing a window, and then those policemen on their pedal bikes, two of them, would appear. So they were controlling the streets.

Now all the police are sitting behind computer screens, that's what they are doing. That's technology. Although New York has really been successful in bringing the policeman back into the street, two of them going around, having little telephones with them to protect themselves or ask for assistance when necessary. So people should see policemen on the street. That's preventive. I believe all social problems can be prevented by the right action and the right authorities. But police are now too busy with the drug problem, with this problem, with that problem. They do it behind their screens, and you never see them on the street, and that's a very bad thing. It's always repressive. Whatever they do, it's repressive. Police have become entirely repressive because of the technological means they have. They did not do that before the war because then they were very much more preventive, looking at



people, and people felt safe because there was always a policeman around the corner on his pedal bike or walking. And now they are sitting in police cars. So preventive measures. Police on the street, no longer behind computer screens.

But policemen say nobody wants to go on the street. I say, Yes, but you are semi-military organization. Are you a police officer? Just send your men into the street. They have to obey, haven't they? You're a semi-military organization, aren't you? Yes, that's true, but the policeman in the street has, in the police corps, a very low status. If he wants promotion, he has to work behind a screen, because that's better paid. In the street means lower pay. I say, Then improve the salary of the policeman in the street. Give him a good salary, and give a lower salary to the man behind the screen. That sort of thing.

But police are too independent. Now, the Lord Mayor in Rotterdam has appointed a new chief commissioner for the police, and he is not from the police force himself. He's from outside. Great problems. They don't want to obey him. They don't want to obey orders. Because he's not one of us. That sort of thing. And so the police are not well-organized any longer. It was better organized, say, 75 years ago.

And all these things have to be improved so we have an all-over system of preventive measures, and then we don't need that community service any more. That's putting the horse behind the cart. That's an old Dutch saying. And of course, the top authorities are aware of the problems, but they have no time to take the right measures. It's something wrong with our social control system. That's the main problem. And community service is, as I said, the cart before the horse. It's too late. That doesn't help.

### David Cayley

The prevalence of crime, in Bianchi's view, represents a breakdown of social control, not a deterioration in human nature, as so many seem tempted to believe. Crime as an element of human nature is a constant. All of us, he believes, would be capable of crime under certain circumstances. Many of us have committed crimes without they're being detected or punished. The frequency of crime for him is a mirror held up to society and not just an expression of the moral dis-ease of individuals. He asks us to look with the eyes of the English Puritan John Bradley, who, when he saw a man being led to the scaffold, said, "There, but for the grace of God, go I."

This sense of crime as a collective predicament does not absolve offenders or free them from the liability their acts have created, but it does locate them within our community and make them worthy of an opportunity to make amends. Responding to a breakdown in social control by an increase of punishment is futile and self-defeating, Bianchi says, first, because it perpetuates and even strengthens the evil and, second, because it turns attention away from the source of the harm that is being done. Even an assensus type of justice, though it might mitigate this harm, would not undo it. Justice consists, first of all, in how we live, and it is in how we live, Bianchi says, that the real solution to crime is to be sought.

In 1989, Herman Bianchi retired as professor of criminology at the Free University of Amsterdam. **Justice as Sanctuary** was his farewell to criminology and his testament. Since then he has taken up a new career as a novelist and poet. A volume of poems in English called **A Breviary of Torment** was published in 1991 under the pen name Thomas Caset. Bianchi's immediate hopes for reform have obviously been disappointed. The Netherlands today has many more people in prison than when he began, and the idea of reinstituting sanctuaries has not been taken up by the people whom he hoped to influence: the philosophers and practitioners of law.

And yet I think there is something of enduring importance in Bianchi's work. In Canada today, there is considerable interest in alternatives to imprisonment. One stimulus has been official concern about a rate of imprisonment that has grown steadily in the '90s and must soon lead to new prison construction if the growth is not stopped. Another has been a growing recognition of the futility of imprisonment as a crime control measure.

I think Bianchi introduces a crucial distinction into the discussion of alternatives. We presently have a uniform, one-size-fits-all system of criminal justice, a system entirely focussed on what writer Howard Zehr calls, "assigning blame and giving out pain." Bianchi recognizes two concepts of justice: the present retributive approach, symbolized by the prison, and a peacemaking, agreement-seeking approach, symbolized by the sanctuary. His genius, to me, has been to suggest that we ought to have both, rather than getting caught in a sterile "either-or" debate. Creating such a dual or dialectical system of justice would have several advantages: It would protect emerging alternatives of the peacemaking type from co-optation by a punitive system with which they're