

# The Past on Trial: Birmingham, the Bombing, and Restorative Justice

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## INTRODUCTION

Since 1989, state and national law enforcement authorities have reopened or begun investigations into at least eighteen civil rights-era murders across the South. Of those, seven cases resulted in murder or manslaughter convictions. In almost as many cases, one or more of the primary suspects had already died. Most other civil rights-era cases can no longer lead to viable prosecutions due to immunity issues, the passage of time, or political inertia.<sup>1</sup> These trials have captivated a national audience as elderly Klansmen sat before juries, answering for their attempts to keep Southern society racially segregated and, for many observers, personifying the society that the civil rights movement had struggled to eradicate. Birmingham, Alabama followed suit, convicting two such Klansmen in 2001 and 2002 for its most notorious civil rights-era atrocity, the Sixteenth Street Baptist Church bombing.<sup>2</sup>

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1. *Civil Rights Era Murder Cases Re-Examined*, JACKSON CLARION-LEDGER, Jan. 24, 2007, available at <http://www.clarionledger.com/apps/pbcs.dll/article?AID=/20070124/NEWS/70124047>. For example, a grand jury recently failed to indict the last remaining suspect in the Emmett Till murder case. See Shaila Dewan, *After Inquiry, Grand Jury Refuses to Issue New Indictments in Till Case*, N.Y. TIMES, Feb. 28, 2007, at A16. For an examination of the Emmett Till case in the context of restorative justice and critical race theory, see Margaret M. Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101 (2005).

2. Jamie Kizzire, *An End to An Era: Cherry Convicted in Killing of 4 Girls*, BIRMINGHAM

The Sixteenth Street Baptist Church bombing trials were vitally important for victims' families, who had waited nearly four decades for perpetrators to be brought to justice. City leaders hoped that these attempts to reckon with the South's history of unprosecuted racial violence would change national perceptions of the area.<sup>3</sup> But despite the great victory of achieving convictions in these stale cases, questions continue to surround these trials. Many citizens and scholars worry that the portrayal of the trials as benevolent state actions masks the complicity of law enforcement and other officials in the non-prosecution of these crimes for over forty years. Others wonder if these were simply show trials, designed to close an embarrassing chapter of our history. Some question the very possibility that justice can be served after such long delays, by trying men who committed these crimes as youths and who have lived long lives unthreatened by prosecution. These dissenting voices point to the unsettled legacy of these cases for the affected communities and prompt the question: how far can a murder trial go toward addressing the uncertainties and injustices that surround these events? Citizens' basic inquiries—What happened? Why? Why did prosecution take so long? Who is responsible?—can only be partially answered in a courtroom setting.

The community, media, and scholarly responses to these trials point to the way that a crime's effects can reach far beyond the individual perpetrator and victim. In the context of unresolved civil rights-era violence, one murder or bombing inevitably expands outward and into the larger story of segregation and massive resistance; into the systemic, racially-based injustices of southern law enforcement; and to the New South's willingness to move quickly forward without reconciling its troubled past. Restorative justice theory, a reform movement within the criminal justice system, can help contextualize the broad consequences of these crimes. Taking the Sixteenth Street Baptist Church bombing as an example, I use restorative justice theory to expand the concept of harm resulting from this one incident. Rather than understanding the crime in traditional terms as an abstract harm against the state, we must imagine it as an act with consequences for the victims, the community at large, the offenders themselves, and the relationships among all three. By viewing this larger harm through the lens of restorative justice theory, we can expand our concept of "victim," and explore the need to think creatively about extrajudicial remedies that may begin to restore the damage wrought by crime.<sup>4</sup>

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POST-HERALD, May 23, 2002, at A1.

3. William C. Singleton, III, *Improving Tarnished Image: City Leaders Hope Guilty Verdict Eliminates Negative Reputation*, BIRMINGHAM POST-HERALD, May 23, 2002, at A4.

4. By "extrajudicial remedies" I mean some of the processes, beyond the trials themselves, through which restorative justice theories can be applied to address expanded concepts of victims and harm. One example is a truth and reconciliation commission patterned on the South African model. See Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225, 1265-66 (2003). This Comment explores the boundaries of other potentially restorative processes as well.

In Part One, I briefly survey the development and practical applications of restorative justice theory in the United States, touching specifically on its application to murder and other serious crimes. Part Two presents a historical survey of the Sixteenth Street Baptist Church bombing trials in Birmingham, while Part Three uses restorative justice theory to examine observers' and scholars' responses to these trials. By enlarging both the concept of "harm" and the definition of "victim," we can begin to consider an expanded, restorative remedy for Birmingham.

## I

## RESTORATIVE JUSTICE

A. *The Development of Restorative Justice Theory*

Restorative justice is an international movement that first emerged in the late 1970s.<sup>5</sup> Its theories evolved from a combination of the work of legal anthropologists on informal justice systems; sociologists' and criminologists' analysis of restitution as a functional alternative to the current criminal system; the victim rights movement; and religion-driven reform movements targeting prisons and the justice system generally.<sup>6</sup> At its core, restorative justice attempts to present a practical solution to the myriad of problems facing criminal justice today: overextension, overcrowding, and recidivism; a lack of community involvement in crime reduction coupled with a sense that crime is ever on the increase; and the necessity to better address the needs of victims and their families.<sup>7</sup> Supporters often find historical antecedents in the restitution-based justice systems of pre-modern Europe, as well as alternative dispute systems among indigenous cultures in North America, the Pacific, and Africa.<sup>8</sup> Programs based on restorative justice principles have been widely adopted in New Zealand, Australia, Canada, and many U.S. jurisdictions.<sup>9</sup> In

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5. Tony Marshall, *Restorative Justice: An Overview*, in A RESTORATIVE JUSTICE READER 28, 30 (Gerry Johnstone ed., 2003).

6. DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE 15-21, 24-28 (2002).

7. Marshall, *supra* note 5, at 30-31.

8. JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 5 (2002). See also Elmar G.M. Weitekamp, *The History of Restorative Justice*, in A RESTORATIVE JUSTICE READER, *supra* note 5, at 111-23. For a critique of this and other "myths" of restorative justice theory, see Kathleen Daly, *Restorative Justice – The Real Story*, 4 PUNISHMENT & SOC'Y 55, 55 (2002). This area of legal theory subsumes some varieties of mediation and can assume several names, including "transformative justice," "relational justice," "restorative community justice," and bleeds into other reform concepts such as restitution for historical injustices and truth and reconciliation commissions. See VAN NESS & STRONG, *supra* note 6, at 28.

9. See VAN NESS & STRONG, *supra* note 6, at 32-35. See also Allison Morris & Gabrielle M. Maxwell, *Juvenile Justice in New Zealand: A New Paradigm*, 26 ANZJ CRIM. 72, 72-90 (1993). The American Bar Association has expressed great interest in restorative justice principles. See <http://www.abanet.org/dch/committee.cfm?com=CR100000>. Victim-offender mediation involves the counseling of the offender(s) and victim(s), followed by a mediated exchange among those parties and invested community members. See discussion Section B, *infra*.

1993, in the United States alone, over 26,000 individuals participated in victim-offender mediation, the most commonly used form of restorative justice practice. Over one hundred of such programs exist in the United States and Canada.<sup>10</sup> As of 2003, fifteen states were developing or using some form of victim-offender contact program specifically for violent offenses.<sup>11</sup>

Restorative justice reconceptualizes the effects of crime. Instead of an offense against the state in the abstract, crime is defined as a multidimensional harm affecting the victim, the offender, the community, and the relationships among all three.<sup>12</sup> The goal of restorative justice is to implement processes that can repair those relationships. It provides an alternative to both retributive and rehabilitative rationales for punishment by redefining both “crime” and “punishment.”<sup>13</sup> The crime thus becomes a violation against the victim and the wider community, not simply the state, while the goal of punishment shifts from incarceration to repairing that larger harm. This theoretical approach has been described as “changing lenses,”<sup>14</sup> “a shift in thinking,”<sup>15</sup> and “a practice motivated by radically different values than those which underpin conventional penal practices.”<sup>16</sup> It is truly a paradigm shift in our understanding of criminal law, bringing restoration of relationships, rather than punishment of the offender, to the fore.<sup>17</sup>

Moving away from a retributive model does not undermine the need for the offender to take responsibility for his or her actions. Offender accountability and repair of the victim’s harm, to the extent possible, remain central to this concept of justice.<sup>18</sup> The goals of criminal justice are generally understood to be public safety and justice for the victim; restorative justice, however, disputes the current process of criminal law. Punishment as currently envisioned simply does not result in safer communities or rehabilitated offenders. As of 2006, over fifty percent of all felons released from California prisons had returned to prison within three years.<sup>19</sup> Victims very often suffer

10. Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1258 (1994).

11. MARK S. UMBREIT ET AL., *FACING VIOLENCE* 1 (2003).

12. See HOWARD ZEHR, *CHANGING LENSES* 181-82 (1995); VAN NESS & STRONG, *supra* note 6, at 37; Howard Zehr & Harry Mika, *Fundamental Concepts of Restorative Justice*, 1 CONTEMP. JUST. REV. 47-55 (1998).

13. See VAN NESS & STRONG, *supra* note 6, at 10-14.

14. ZEHR, *supra* note 12.

15. See VAN NESS & STRONG, *supra* note 6 at 10.

16. *Introduction to A RESTORATIVE JUSTICE READER* 6 (Gerry Johnstone ed., 2003).

17. ZEHR, *supra* note 12, at 186-88.

18. *Id.* at 200-04.

19. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION OFFICE OF RESEARCH, *RECIDIVISM RATES WITHIN ONE, TWO, AND THREE YEAR FOLLOW-UP PERIOD FOR ALL FELONS PAROLED TO CALIFORNIA SUPERVISION, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION RELEASED FROM PRISON FOR FIRST TIME IN 2003 BY PRINCIPAL COMMITMENT OFFENSE*, [http://www.cdcr.ca.gov/Reports\\_Research/Offenders\\_Information\\_Services\\_Branch/Annual/RECID3/Recid3d2003.pdf](http://www.cdcr.ca.gov/Reports_Research/Offenders_Information_Services_Branch/Annual/RECID3/Recid3d2003.pdf) (last visited Mar. 17,

further harms through judicial intervention, or the feeling that they have been ignored or victimized anew by the trial process.<sup>20</sup> The adversarial mentality of standard criminal prosecution encourages communities to transfer responsibility for their own safety to outside agencies rather than work proactively to create safer spaces.<sup>21</sup> Restorative justice seeks to create lasting deterrence by re-engaging offenders with the larger community and, in turn, engaging the community with those people and actions that it criminalizes. To address the complex issues of shifting focus from incapacitation to restoration, many proponents of restorative justice reserve a space for traditional punishment within a restorative justice system<sup>22</sup> or envision dual channels within the criminal justice system that would allow traditional criminal justice processes and punishments to work in tandem with restorative group practices.<sup>23</sup> The key to any restorative justice process, however, is that all participants perceive it as fair.<sup>24</sup>

### B. *The Practicalities of Restorative Justice*

Based on the concept of “reintegrative shaming” pioneered by John Braithwaite,<sup>25</sup> restorative justice presents practical strategies for dealing with crime and punishment alongside its re-conceptualization of how society should best respond to criminal behavior. Braithwaite describes his theory of restorative justice as a “vision . . . of holistic change in the way we do justice in the world.”<sup>26</sup> Advocates hope that the values that underlie restorative justice theory—accountability, empowerment, restitution, prevention of future injustice, forgiveness—and the emphasis on restorative processes as well as outcomes will enable all legal institutions (not merely those touching the criminal law) to be restructured, from which “the justice of the people will more meaningfully bubble up into the justice of the law and the justice of the law will more legitimately filter down.”<sup>27</sup> While restorative justice employs a rhetoric of high-minded reform, a refreshingly broad cross-section of the criminal justice system is beginning to look to its principles for direction. In the criminal justice setting, restorative justice has sparked many different

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2008).

20. See VAN NESS & STRONG, *supra* note 6, at 41-42.

21. *Introduction to A RESTORATIVE JUSTICE READER*, *supra* note 16, at 1-2.

22. *Id.* at 4.

23. See *Introduction to RESTORATIVE JUSTICE* xvi (Declan Roche ed., 2004).

24. Lode Walgrave, *Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative?*, in *A RESTORATIVE JUSTICE READER* 255 (Gerry Johnstone ed., 2003).

25. See JOHN BRAITHWAITE, *CRIME SHAME AND REINTEGRATION* 4 (1989) (“Shaming is counterproductive when it pushes offenders into the clutches of criminal subcultures; shaming controls crime when it is at the same time powerful and bounded by ceremonies to reintegrate the offender back into the community of responsible citizens.”).

26. John Braithwaite, *Principles of Restorative Justice*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE* 1 (Andrew Von Hirsch et al. eds., 2003).

27. *Id.* at 18; see *id.* at 7-10, 18-19.

techniques to more meaningfully engage victims, offenders, families, and community members with the justice process.

Restorative justice practitioners deploy a variety of techniques to shift the focus from the larger and more abstract harms to those suffered by victims, offenders, and communities. Frameworks for repairing relationships include victim-offender mediation, group family conferencing, youth courts, prisoner education, and victim outreach. Central to each of these formats is a narrative or storytelling element—victims and offenders tell their stories, ask questions, and achieve a collaborative restoration and sense of justice through such communication.<sup>28</sup> The most popular form of restorative justice practiced today, victim-offender mediation, exemplifies this typical structure: screening of the case for suitability for mediation; preparation of participants, which includes the offender's acceptance of accountability and the victim's willingness to meet; face-to-face meeting of all parties; and follow-up supervision of the offender's compliance with restitution orders.<sup>29</sup> While victim-offender mediation does not always result in reconciliation, many participants report a sense of closure and satisfaction with the process.<sup>30</sup> Victims often enjoy psychological benefits and credit mediation with helping them to overcome the trauma of the crime.<sup>31</sup>

Nonetheless, the extrajudicial format of most restorative justice programs has garnered some criticism. One critique is that by partially or wholly eliminating the determination of guilt and the sentencing phase, offenders may be denied essential due process protections.<sup>32</sup> This concern raises questions about the role of the state generally in administering criminal law, and the dearth of practical solutions for balancing state and individual interests in any large-scale reforms.<sup>33</sup> Critics have also asserted that the content and context of participation may mask the influence of race, class, and gender power structures, thus inadvertently replicating discrimination within the restorative justice context.<sup>34</sup> One of the most contentious propositions is that restorative justice is not practicable for very serious and violent crimes, an objection often motivated by concern for the victim or philosophies of retribution and a lack of rehabilitative potential.<sup>35</sup> While there have been successful programs,<sup>36</sup> this remains an often-cited concern, with some critics questioning the true impact of

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28. See *Introduction to RESTORATIVE JUSTICE*, *supra* note 23, at xii.

29. Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 756-57 (2000).

30. Mark S. Umbreit, *Violent Offenders and Their Victims*, in *MEDIATION AND CRIMINAL JUSTICE* 99, 102-07 (Martin Wright & Burt Galaway eds., 1989).

31. *Id.* at 102.

32. See Brown, *supra* note 10, at 1287-91.

33. See Andrew Ashworth, *Responsibilities, Rights and Restorative Justice*, 42 BRIT. J. CRIM. JUST. 578 (2002).

34. See VAN NESS & STRONG, *supra* note 6, at 168.

35. *Id.* at 185.

36. Umbreit, *supra* note 30, at 99-112.

sometimes quite limited intervention sessions.<sup>37</sup>

Yet many restorative justice advocates are ardent in their belief that such practices can confront the problems of serious crime. Remarkably effective programs at San Quentin Prison and the San Francisco County Jail illustrate the benefits of restorative justice principles in helping offenders to take responsibility for their actions, reduce violence overall in the prisons, and contribute to the community through youth intervention programs. These restorative practices have even facilitated successful reconciliations between victims and offenders.<sup>38</sup>

But what can this criminal justice reform movement teach us about approaching historic unsolved crimes from the civil rights-era? The responses of communities, the media, and scholarly observers to renewed civil rights-era investigations were critical and mixed. Some saw justice long-delayed, but ultimately achieved. Others questioned the value of trials delayed for so long. Most simply wondered about the years of non-prosecution. Murder trials have a limited ability to address broad concerns about systemic injustice and the passage of time between an offense and its prosecution. These infamous crimes exposed the harm inflicted on whole communities through the violence of segregation and selective enforcement of criminal laws, a harm that cannot simply be understood as *Alabama v. Defendant*.

According to restorative justice theory, a whole community can be victimized by a crime. The community as a body must go through the same steps as an individual victim in its search for meaning.<sup>39</sup> A larger community harm often generates the need for a public display of justice, a symbolic restoration of the wholeness of that community: "For a community, reparation often requires some sort of symbolic action that contains elements of denunciation of the offense, vindication, reassurance, and repair."<sup>40</sup> Part of this reparation emerges from the process itself. Restorative justice pioneer Howard Zehr points to recent studies of individual perceptions of justice, showing how a feeling of justice often results from the manner of decision making rather than

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37. Sharon Levrant et al., *Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?* 3 CRIME & DELINQ. 19-22 (1999). By contrast, juvenile justice is the most widely accepted avenue for restorative justice practices, likely due to assumptions about the effectiveness of diversionary tactics with youth versus adult offenders. Restorative justice processes in lieu of criminal proceedings take the form of youth courts or other guided mediation. Yet some question the growing use of restorative justice techniques in juvenile justice—the pre-trial diversion of first-time and minor offenders, they argue, enables the elimination of social services that would serve youth before their encounters with criminal justice. Kevin Haines, *Some Principled Objections to a Restorative Justice Approach to Working with Juvenile Offenders*, in RESTORATIVE JUSTICE FOR JUVENILES 93, 103-04 (Lode Walgrave ed., 1998).

38. Victim-Offender Education Group Meeting at San Quentin, San Quentin State Prison, San Quentin, Cal. (Apr. 2, 2007); Sunny Schwartz, Michael Hennessey, & Leslie Levitas, *Restorative Justice and the Transformation of Jails: An Urban Sheriff's Case Study in Reducing Violence*, POLICE PRAC. & RES. 399, 399-410 (2003).

39. See ZEHR, *supra* note 12, at 194-95.

40. *Id.* at 195.

from the specific outcome of the case.<sup>41</sup> These studies further demonstrate how perceptions of justice turn on the involvement of both victims and their communities in the process.

Restorative justice theory can help us grapple with the full range of harms resulting from both the original racially motivated crimes and the decades of their non-prosecution. By expanding the concept of harm, we include all stakeholders in the victim calculus and hence must explore remedies beyond the trials themselves. Taking the Sixteenth Street Baptist Church bombing as an example, I apply restorative justice theory to address the lingering sense that, although these recent trials were important civil rights accomplishments, they were unable to address the full effects of the original crime or to truly close a troubling chapter in our history.

## II

### THE SIXTEENTH STREET BAPTIST CHURCH BOMBING TRIALS

#### A. 1963: *The Bombing*

At 10:22 AM on Sunday morning, September 15, 1963, twenty sticks of dynamite exploded against a sidewall of Birmingham's Sixteenth Street Baptist Church.<sup>42</sup> The bomb went off during Sunday school, when much of the congregation had gathered in the building.<sup>43</sup> Eleven-year-old Denise McNair, and fourteen-year-olds Addie Mae Collins, Carole Robertson, and Cynthia Wesley, were killed while preparing for Youth Day in the church basement. Sarah Collins, Addie Mae's sister, survived but lost her right eye.<sup>44</sup> Twenty-two other members of the congregation were wounded.<sup>45</sup> The force of the explosion crushed parked cars. As news of the bombing spread, riots broke out across Birmingham, pitting angry blacks against whites and city police.<sup>46</sup>

Later that afternoon two other black children were killed in separate incidents. A policeman responding to a report of "negroes throwing rocks at whites" shot James Robinson, aged sixteen, in the back.<sup>47</sup> That same day, on his way home from a segregationist rally, a sixteen-year-old Eagle Scout shot Virgil Ware, aged thirteen, twice in the head while Virgil and his brother were riding a bicycle near their home.<sup>48</sup>

The Sixteenth Street Baptist Church bombing capped a year of escalating

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41. *Id.* at 202-04.

42. Tom Lankford & Irving Beiman, *The Day a Church Became a Tomb*, BIRMINGHAM NEWS, Sept. 16, 1963, at 6; *Council Asks All Facts on Two Deaths*, BIRMINGHAM NEWS, Sept. 16, 1963, at 1. See also FRANK SIKORA, *UNTIL JUSTICE ROLLS DOWN* 11-13 (rev. ed. 2005) and REV. DR. CHRISTOPHER M. HAMLIN, *BEHIND THE STAINED GLASS*, at x (1998).

43. SIKORA, *supra* note 42, at 9-10; HAMLIN, *supra* note 42, at x.

44. SIKORA, *supra* note 42, at 3-4, 15.

45. Lankford & Beiman, *supra* note 42, at 6.

46. SIKORA, *supra* note 42, at 14.

47. Lankford & Beiman, *supra* note 42, at 1.

48. *Id.*

white resistance to desegregation. Civil rights activity in Birmingham and accompanying white violence first made national headlines in the spring of 1963. Selective buying campaigns, sit-ins, and mass demonstrations led by Reverend Fred Shuttlesworth and Dr. Martin Luther King, Jr. prompted violent repression by Eugene “Bull” Connor, Birmingham’s Commissioner of Public Safety. As legal and extralegal coercion began to whittle down the numbers of adult marchers, King and Shuttlesworth recruited school children to participate in the downtown demonstrations. When the Birmingham jail filled to capacity with protestors, some children were transferred to makeshift quarters at the fair grounds, and Bull Connor began using fire hoses and police dogs to deter the large crowds. International outrage at the sight of children being pummeled by fire hoses, the continuing economic pressure of the selective buying campaign during the Easter season, and the intervention of the federal government eventually convinced leaders of Birmingham’s business community to negotiate with the civil rights leaders.<sup>49</sup>

The spring demonstrations resulted in an agreement between business representatives, King, and Shuttlesworth to end the protests in exchange for the hiring of African Americans in downtown stores, the removal of Jim Crow signs designating “white” and “colored” segregated facilities from the same businesses, and formal plans for inter-racial dialogue about the continuing process of desegregation. Designed to repair some of the damage done to Birmingham’s national reputation by Bull Connor’s violence, the well-publicized accords depicted downtown businessman as independently negotiating with African Americans and peacefully integrating—suggesting that further federal intervention was unnecessary. These meetings, however, had very little impact on the racial status quo.<sup>50</sup> The new city council, installed by leading businessmen in early spring of 1963 in an attempt to curtail Bull Connor’s power, evaded desegregation by closing all city playgrounds and parks rather than opening them to all races on equal terms.<sup>51</sup> As the summer wore on, it became increasingly clear that even these halting agreements would not be enforced. Despite the victorious snapshots of King and Shuttlesworth announcing white leaders’ concessions at the spring accords, Birmingham remained a stronghold of legal and extralegal white resistance.

Although agreements to integrate downtown businesses had little effect on segregation in the city as a whole, federal school desegregation orders loomed nonetheless. White anti-integration activity increased as the start of the school year approached; white supremacists and nightriders bombed at least five locations during the summer.<sup>52</sup> The Ku Klux Klan held well-attended public

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49. See GLENN T. ESKEW, *BUT FOR BIRMINGHAM* 217-43, 259-92 (1996).

50. *Id.* at 154-55. *See id.* at 292-96 for a discussion of the spring accords; *see id.* at 299-309 for examples of continued municipal and vigilante resistance.

51. *Id.* at 178-79, 181-92.

52. *Bombings or Attempt Bombings in Birmingham, 1950-1965*, FINDING AID FOR

speeches and rallies and on the very day of the church bombing, police halted a planned Ku Klux Klan motorcade through downtown Birmingham.<sup>53</sup>

On Wednesday, September 4, eleven days before the church bombing, two black students enrolled at all-white Greymont Elementary School. Responding to both this and the desegregation orders pending in other Alabama cities, Governor George Wallace sent state troopers to close the school system. On Monday, Wallace used the Alabama National Guard to blockade the schools in defiance of a new federal court order. President Kennedy federalized the National Guard the following day and token school desegregation went forward in the Birmingham.<sup>54</sup>

Within this atmosphere of militarized and extralegal violence, the bomb planted at the Sixteenth Street Baptist Church violently exposed the true state of race relations in Birmingham.<sup>55</sup> The church was the symbolic center of Birmingham's civil rights movement, acting as both an organizational backbone and a site of mass demonstrations.<sup>56</sup> Other key locations of the movement, such as activists' homes and other churches, had been bombed, but most of those bombings were never reported by the white-owned newspapers.<sup>57</sup> This public and vicious act of terrorism literally exploded the city's posture of racial peace, revealing the hollowness of that carefully constructed image. The Sixteenth Street Baptist Church bombing was not the inevitable result of the atmosphere of racial violence tolerated by the city, but it was the product of it. A defiant gesture by a small group of segregationists, the bombing represented the culmination of that summer's escalating campaign of violent resistance to desegregation.

The residents of Birmingham responded with shock and horror. Editorials

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BIRMINGHAM, ALABAMA POLICE DEPARTMENT SURVEILLANCE FILES 1947-1980, Birmingham Public Library Archives, Birmingham, Ala., (1999).

53. Roger Thames, *Demonstration Called Off After Fatal Bombing*, BIRMINGHAM NEWS, Sept. 16, 1963, at 6; *United Klans Public Speaking, Monday September 2, 1963, Graymont Armory, Birmingham, ALA.*, handbill, Birmingham Civil Rights Institute Archives, Small Collections, Birmingham, Ala.. Originating during Reconstruction but reappearing in the modern era in 1915, the Alabama incarnation of the white supremacist Ku Klux Klan evolved in methodology and ideology throughout the twentieth century. See GLENN FELDMAN, POLITICS, SOCIETY, AND THE KLAN IN ALABAMA 1915-1949 *passim* (1999).

54. ESKEW, *supra* note 49, at 318-19. The Greymont Elementary School was located in a North Smithfield neighborhood known as "Dynamite Hill" for its long history of residential bombings. *Id.*

55. *Id.* at 318.

56. See HAMLIN, *supra* note 42. See WILSON FALLIN, JR., THE AFRICAN AMERICAN CHURCH IN BIRMINGHAM, ALABAMA, 1815-1963, at 31-32, 41, 58-59, 83, 89-90 (1997) (providing the history of the Sixteenth Street Baptist Church and the importance of black churches in Birmingham generally). See LYNNE B. FELDMAN, A SENSE OF PLACE: BIRMINGHAM'S BLACK MIDDLE-CLASS COMMUNITY, 1890-1930 (1999) (detailing the evolution of the black middle class that comprised the church's main membership).

57. By contrast, the *Birmingham World*, an African-American-owned and -operated bi-weekly paper, often featured extensive coverage of such bombings. See 18 *Unsolved Racial Bombings in Six Years*, BIRMINGHAM WORLD, Sept. 7, 1963, at 1.

and city leaders expressed their grief, and the local paper reported that Mayor Boutwell wept.<sup>58</sup> Demanding the death penalty for those responsible, Governor George Wallace called the bombing “the most dastardly crime ever committed in Alabama,” while local white ministers asked every citizen to pray in remembrance.<sup>59</sup> The city council quickly established a reward fund, and Wallace personally pledged \$5,000 to bring the bombers to justice.<sup>60</sup> Although the *Birmingham News* had reported that Reverend John H. Cross, the pastor of the Sixteenth Street Baptist Church, expected the church eventually would be bombed, other articles expressed incredulity that this kind of violence could have happened in Birmingham.<sup>61</sup> While officials promised a relentless search for “what must be a small band of men,” the city was faced with explaining yet another example of violent resistance that made national headlines.<sup>62</sup>

Rather than acknowledging that the city had continued to tolerate violence, politicians and the media tried to portray the bombing as an isolated event perpetrated by outsiders. That night, Mayor Boutwell assured the city, “All of us are victims, and most of us are innocent victims.”<sup>63</sup> With the spring accords, Birmingham strove to remake its national reputation by presenting itself as working peacefully with civil rights leaders to integrate, even as it sought to preserve a segregated system based on white dominance.<sup>64</sup> Boutwell’s comment attempted to exonerate the white power structure that had condoned violence in defense of segregation.

As Birmingham and the nation grieved, local and federal agencies quickly launched investigations. During the days and weeks following the bombing, Birmingham officials pledged to bring the vigilantes to justice. The city council issued a statement calling the investigations “not simply a legal or political question but an issue which must strike at the heart and conscience of every person in this state.”<sup>65</sup> Mayor Boutwell promised that the city police would “put all else aside until we have found and made certain the punishment of those responsible.”<sup>66</sup> But while the FBI took the lead in the investigations, the Alabama State Police, under the command of Colonel Al Lingo, arrested the FBI’s three main suspects, including Robert Chambliss, on an unrelated

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58. *City Leaders Express Grief, Shock Over Church Bombing*, BIRMINGHAM NEWS, Sept. 16, 1963, at 3; *Allgood Asks Indictments in Disorders*, BIRMINGHAM NEWS, Sept. 16, 1963, at 4; Editorial, *The Shock and the Shame*, BIRMINGHAM NEWS, Sept. 16, 1963, at 14.

59. *Wallace, Flowers Vow Aid in Bombing*, BIRMINGHAM NEWS, Sept. 16, 1963, at 6; *Saddened City Prays for Peace, Guidance*, BIRMINGHAM NEWS, Sept. 16, 1963, at 5.

60. Lankford & Beiman, *supra* note 42, at 15.

61. Jules Loh, *Knew Blast Would Come, Pastor Says*, BIRMINGHAM NEWS, Sept. 16, 1963, at 6.

62. *The Shock and the Shame*, *supra* note 58, at 14.

63. *City’s People All Victims, Mostly Innocent, Boutwell Says*, BIRMINGHAM NEWS, Sept. 16, 1963, at 21.

64. ESKEW, *supra* note 49, at 154-55.

65. *City Pledges All-Out Pursuit of Bomber*, BIRMINGHAM NEWS, Sept. 16, 1963, at 5.

66. *City’s People All Victims*, *supra* note 63, at 21.

dynamite possession charge in a surprise move two weeks after the bombing. Fined and given six-months jail time for this misdemeanor, the men appealed and saw their sentences suspended.<sup>67</sup> One source close to one of the defendants speculates that the arrest of these men was engineered to keep their files away from the FBI, frustrating a federal indictment.<sup>68</sup> After five years of investigations, the statute of limitations on civil rights violations expired. The FBI had made no arrests and the Justice Department decided to close the case, convinced that a successful prosecution could not be obtained in Birmingham at that time.<sup>69</sup>

### B. 1977: The First Bombing Trial

Like countless other civil rights-era atrocities, the Sixteenth Street Baptist Church bombing might have lingered unprosecuted and forgotten. Instead it was resurrected in 1977 by a young, politically ambitious attorney general, William J. "Bill" Baxley.<sup>70</sup> When Robert E. Chambliss, one of the original four suspects, faced trial that year for murder in the Sixteenth Street Baptist Church bombing, he was already seventy-three years old.<sup>71</sup> The jury returned a guilty verdict within hours in a trial that lasted less than a week.<sup>72</sup>

"Just wait until after Sunday morning, and they'll beg us to let them segregate." These words, recounted by his niece during the 1977 trial, helped to convict Robert Chambliss of murder in the Sixteenth Street Baptist Church bombing.<sup>73</sup> When the witness hesitated to repeat Chambliss's racist epithets, the judge ordered her to speak, insisting that "the language that was used in regard to the blacks would be, at this point, critical."<sup>74</sup> Birmingham had changed since the 1963 bombing. Racially-charged rhetoric, so common in

67. SIKORA, *supra* note 42, at 31-32; John Herbers, *Alabama Surprises F.B.I. By 2 Arrests In Bombings*, N.Y. TIMES, Oct. 1, 1963.

68. Elizabeth Cobbs reports this incident in her memoir *Long Time Coming: An Insider's Story of the Birmingham Church Bombing That Rocked the World*. ELIZABETH H. COBBS/PETRIC J. SMITH, *LONG TIME COMING* 100-02 (1994). Elizabeth Cobbs, Robert Chambliss's niece, was the key witness for the prosecution in the 1977 bombing trial. She speculates that these arrests were the collusion of the Klan and the Alabama state government to delay or avoid the arrest of these men for the bombing. See also DIANE McWHORTER, *CARRY ME HOME* 548-52 (2001).

69. Interview with William J. Baxley, Attorney, Baxley, Dillard, Dauphin, McKnight & Barclift, in Birmingham, Ala. (Sept. 8, 1999).

70. See Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003) (providing an interesting analysis of prosecutorial discretion and its potentially redemptive role in civil rights-era crimes). Baxley would later attribute his lost 1978 gubernatorial bid, in part, to the Chambliss prosecution. Interview with William J. Baxley, *supra* note 69.

71. Andrew Kilpatrick & Frances Spotswood, *Lawyer: Chambliss to Plead Innocent to Church Slayings*, BIRMINGHAM NEWS, Sept. 27, 1977, at 1.

72. Ron Casey & Frances Spotswood, *In Bomb Death of Girl: Chambliss Guilty, Gets Life*, BIRMINGHAM NEWS, Nov. 18, 1977, at 1. Chambliss received a sentence of life in prison and died there in 1985. He maintained his innocence until the end and never named any possible accomplices. SIKORA, *supra* note 42, at 159-62.

73. Transcript of Record at 275, *Alabama v. Chambliss*, Case No. CC 77-01954 (1977).

74. *Id.* at 260.

Alabama in the early 1960s, was now an ugly and damning reminder of white resistance to integration. “Chambliss represents a part of our past which many people would just as soon not remember,” explained one newspaper editorial, and trial observers and newspaper articles attempted to depict the defendant as a symbol of an obsolete order.<sup>75</sup>

Many white people questioned Bill Baxley’s motives at the time, asking him “Why are you doing this civil rights case? Why are you dragging this up?”<sup>76</sup> Trying to separate the bombing from its civil rights context, he answered, “Look, if four little white girls were picked up and murdered, then you would want that case pursued to the ends of the earth so you could find a murderer that killed those little girls. Now why can’t you feel that way about this murder? What is it about good people like you?”<sup>77</sup> The trial, like Chambliss’s words, carried a heavy symbolic weight for the citizens and city of Birmingham. Beyond the harm to the victims’ families and the horror of the act itself, the bombing’s iconic effect, coupled with the delay in official action, meant that citizens were left in search of a larger and more symbolic meaning in this trial—in essence, a wholly different kind of justice.

This deeply felt need can be seen in the responses to the 1977 trial. When Chambliss was convicted, Mrs. Alpha Robertson, mother of one of the girls killed, rejoiced, concluding that the verdict “kind of renews my faith in people and Birmingham.”<sup>78</sup> Reverend John Cross, minister at the Sixteenth Street Baptist Church in 1963, said “I breathed a sigh of relief that after 14 years, someone has finally been convicted.”<sup>79</sup> Expressing the belief of much of Birmingham’s black community that no one would ever be prosecuted, he continued, “I thought I’d be ready to go on to glory when that happened, but now, I’m just ready for somebody to dig up some more dirt.”<sup>80</sup> Others, however, expressed frustration at the long delay and the fact that only one of four suspects had been convicted. Speaking of the lag between crime and prosecution, Reverend James Crutcher, then minister at Sixteenth Street Baptist, said “[i]t makes us feel afraid when our justice departments don’t follow through quickly.”<sup>81</sup> The most common response to the trial was a questioning of the fourteen-year delay and a hope that the remaining suspects soon would be brought to trial.<sup>82</sup> Yet it was not until the 1990s that preparations to try the final suspects began in earnest.

75. Editorial, *Never Again*, MONTGOMERY ADVERTISER, Nov. 20, 1977.

76. Interview with William J. Baxley, *supra* note 69.

77. *Id.*

78. Jerry Mitchell, *Chambliss Trial*, ASSOCIATED PRESS REP., Nov. 19, 1977.

79. Ron Casey, *Chambliss Jury was Stuck at 11-1 Till Finally: Guilty*, BIRMINGHAM NEWS, Nov. 19, 1977, at 3.

80. *Id.*

81. Wallace Henley, *Since Church Bombing: Change and Forgiveness; but There are Still Scars*, BIRMINGHAM NEWS, Nov. 20, 1977, at 2A.

82. See Editorial, *The Chambliss Verdict*, BIRMINGHAM NEWS, Nov. 19, 1977.

C. 2001 and 2002: The Final Bombing Trials

The final bombing trials resulted from a meeting in 1993 called by Rob Langford, the newly appointed Special Agent in Charge of the FBI office in Birmingham. Agent Langford was determined to address the Birmingham black community's long-standing distrust of the FBI, so when he took over the office he invited a group of local African-American leaders to share their concerns with him. Among that group was Reverend Abraham Woods, Birmingham-area president of the Southern Christian Leadership Conference, who expressed the sense that the federal government had done little to protect the interests of black citizens during the civil rights-era.<sup>83</sup> Woods pointed specifically to the FBI's neglect of the Sixteenth Street Baptist Church bombing.<sup>84</sup> Langford promised to review the Bureau's files on the bombing, and eight years later the trials began.<sup>85</sup>

The new prosecutions relied on newly discovered FBI surveillance tapes recorded in the early 1960s; the cases also hinged on witnesses who had previously been unwilling to testify.<sup>86</sup> Many of these witnesses were friends and acquaintances of the suspects. The defendants, Thomas E. Blanton, 62, and Bobby Frank Cherry, 71, had been among the FBI's initial suspects.<sup>87</sup> A fourth original suspect, Herman Frank Cash, had died in 1994 without standing trial.<sup>88</sup> Each defendant's individual role in the bombing has never been established conclusively. Contradicting Blanton's proffered alibi, an eyewitness placed him by the steps of the church the night before the bombing.<sup>89</sup> Cherry's estranged relatives described his role as alternatively building the bomb, lighting the fuse,

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83. Founded in 1957, the Southern Christian Leadership Conference ("SCLC"), first headed by Dr. Martin Luther King, Jr., played an active role in the Birmingham and in the national movement in the 1950s and 1960s. Eskew, *supra* note 49, at 26. SCLC continues this activism today. See Southern Christian Leadership Conference, <http://www.sclcnational.org> (last visited Mar. 13, 2008).

84. Interview with Reverend Abraham Woods, Former President, Birmingham Chapter, Southern Christian Leadership Conference, in Birmingham, Ala. (Mar. 30, 2007); Jay Reeves, *Meeting in '93 was Prelude to Bombing Investigation*, BIRMINGHAM POST-HERALD, May 19, 2000, at A4; see also SIKORA, *supra* note 42, at 168, regarding the role that the FBI's investigation of Birmingham's first black mayor, Richard Arrington, played in the black community's distrust.

85. Steve Reeves, *Federal-State Cooperation Tight*, BIRMINGHAM POST-HERALD, May 18, 2000, at A6.

86. SIKORA, *supra* note 42, at 185-88; Adam Goldman, *Complex Chain of Events Delayed Blanton's Trial Date Until Today*, BIRMINGHAM NEWS, Apr. 24, 2001, at 7A. FBI Director Louis Freeh subsequently testified before Congress that this case was "a disgrace to the FBI" that should have been prosecuted in 1964. Mary Orndorff & Adam Goldman, *Freeh Says Bombing Case Delay A Disgrace*, BIRMINGHAM NEWS, May 18, 2001.

87. Goldman, *supra* note 86, at 7A; Kevin Sack, *Ex-Klansman Is Found Guilty in '63 Bombing*, N.Y. TIMES, May 2, 2001, at A1.

88. John Archibald & Jeff Hansen, *Death Spares Scrutiny of Cash in Bomb Probe*, BIRMINGHAM NEWS, Sept. 7, 1997.

89. William C. Singleton III, *Witness: Blanton Seen Near Church*, BIRMINGHAM POST-HERALD, Apr. 27, 2001, at A17; Chanda Temple, *Case Tries to Undermine Alibis*, BIRMINGHAM NEWS, Apr. 27, 2001, at 10A.

or placing it inside or outside of the church.<sup>90</sup> A friend of Cherry's son was even more damaging to Cherry's defense, testifying that during his childhood he had overheard Cherry and three other men talking about a "bomb" and "Sixteenth Street."<sup>91</sup> Blanton's trial lasted a week, and the jury deliberated for only two and a half hours before rendering a guilty verdict on all four counts of first-degree murder.<sup>92</sup> Cherry's trial, delayed a year for competency hearings, proceeded similarly quickly and also ended in a conviction.<sup>93</sup>

The response to the guilty verdicts in the 2001-2002 bombing trials was overwhelmingly positive. Both Birmingham residents and the victims' families heralded it as a welcome relief.<sup>94</sup> Yet the sense that justice had been only partially served lingered. One observer commented, "[i]t was too-long delayed . . . Cherry met his judgment day. He did not meet justice."<sup>95</sup> This dissonance arose from the widespread sense that Cherry's guilty verdict did little to address the wider harms of the crime. For example, courtroom testimony left too many questions unanswered: Why did it take so long to prosecute these men? What did this long delay say about Birmingham's law enforcement? Had anything been done to make it more responsive? Prompted by this failure of the trial to bring closure, various groups outside of the courtroom called for and implemented what can readily be labeled restorative justice techniques and practices: demonstrations and vigils focused on community harms, as well as a conference reuniting victims, prosecutors, and other stakeholders. An examination of these responses through a restorative justice framework can help us to discern what many in Birmingham found lacking in the trials and how judicial treatment of civil rights-era crimes could better have served the community's pressing need for closure, healing, and restoration.

### III

#### VIEWING THE BIRMINGHAM TRIALS THROUGH A RESTORATIVE JUSTICE LENS

##### A. "History in the Making"<sup>96</sup>: Interpretation and Critique of the Recent Trials

A sense of incomplete or partial justice runs through the contemporary and current writing on the several stages of Birmingham trials. Many articles

90. Jamie Kizzire, *Damaging Testimony?*, BIRMINGHAM POST-HERALD, May 22, 2002, at A4.

91. *Id.* at A1.

92. Marlon Manuel, *1963 Birmingham Church Bombing; Guilty on All Counts*, ATLANTA J. CONST., May 2, 2001, at A1; *Blanton v. Alabama*, 886 So. 2d 850 (Ala. Crim. App. 2003).

93. See Jamie Kizzire, *Beginning Strategies*, BIRMINGHAM POST-HERALD, May 15, 2002, at A1; Rick Bragg, *38 Years Later, Last of Suspects Is Convicted in Church Bombing*, N.Y. TIMES, May 22, 2002, at A1.

94. See Taylor Bright, *Tears of Joy, Pain Follow Verdict*, BIRMINGHAM POST-HERALD, May 23, 2002 at A1.

95. *Id.* at A3 (internal quotations omitted).

96. William C. Singleton III, *Family Presence Strong in Spirit*, BIRMINGHAM POST-HERALD, Apr. 25, 2001, at A1.

suggest that the prosecutions were designed to “dig up” and correct the past, or somehow rewrite history, thus burnishing the reputations of Southern cities and states.<sup>97</sup> In contrast to this criticism, both prosecutors and politicians proudly proclaimed that these trials demonstrated how far legal systems in the South had come toward the goal of equal justice for all races.<sup>98</sup>

In every respect the trials are laudable accomplishments, reflecting the work of huge numbers of people, including local activists, prosecutors, FBI agents, and investigative journalists.<sup>99</sup> The successful prosecution of any murder case forty years after the fact is praiseworthy in itself. Yet these trials also have led many observers to question whether bringing a criminal to justice and providing a symbol of judicial evolution is an adequate resolution for a crime of this kind.

These “narratives of redemption,” as one scholar has dubbed the news media and prosecutors’ portrayals of the trials, have been criticized for focusing narrowly on white leaders, while neglecting the contributions of black activists.<sup>100</sup> Additionally, some observers worry that the importance placed on current convictions obscured official complicity in the long non-prosecution and may have discouraged white communities and Southern cities from recognizing the continuity of racism in the region.<sup>101</sup> These “redemptions” removed the focus from the race-based system of justice in the 1960s and overlooked the decades in which the crimes remained unsolved. Critics believe that laudatory articles mask the history of racialized power structures and overall majority community indifference in the South, while failing to acknowledge the same problems persist long after the civil rights-era. One

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97. For one recent example, see Lara Jakes Jordan, *FBI Reopens 100 Civil Rights-Era Cases*, ASSOCIATED PRESS, Feb. 27, 2007, available at [www.sfgate.com/cgi-bin/article.cgi?file=/n/a/2007/02/27/national/a123352S99.DTL](http://www.sfgate.com/cgi-bin/article.cgi?file=/n/a/2007/02/27/national/a123352S99.DTL) (last visited Mar. 17, 2008); Dewan, *supra* note 1, at A16.

98. See Interview with Doug Jones, Attorney, Whatley, Drake & Kallas, LLC, in Birmingham, Ala. (Mar. 29, 2007).

99. The most prominent investigative journalist associated with the Sixteenth Street Baptist Church bombing case, as well as many of the other reopened cases, is Jerry Mitchell of the *Jackson Clarion-Ledger*. He has been recognized by the American Bar Association for his work in uncovering facts that have led to multiple convictions, including Bobby Frank Cherry and Byron de la Beckwith (for the murder of Medger Evers). Mitchell’s role in the Beckwith case was dramatized in the movie *Ghosts of Mississippi*. R. Hayes Johnson, Jr., *Jerry Mitchell: Crusading for Justice Long Overdue*, ABA HUM. RTS. MAG. (Fall 2000), available at <http://www.abanet.org/irr/hr/fall00/johnson.html>.

100. See Renee C. Romano, *Narratives of Redemption: The Birmingham Church Bombing Trials and the Construction of Civil Rights Memory*, in *THE CIVIL RIGHTS MOVEMENT IN AMERICAN MEMORY* 96, 96-133 (Renee C. Romano & Leigh Raiford eds., 2006).

101. See *id.*; S. Willoughby Anderson, ‘Against the Peace and Dignity of the State of Alabama’: The Sixteenth Street Baptist Church Bombing Trial and the Remaking of Birmingham (2000) (unpublished A.B. thesis, Harvard College) (on file with author); See also S. Willoughby Anderson, ‘Against the Peace and Dignity of the State of Alabama’: The 1977 Sixteenth Street Baptist Church Bombing Trial and the Remaking of Birmingham (2004) (unpublished MA thesis, University of North Carolina at Chapel Hill) (on file with author).

observer has asserted that the trials actually serve an anti-restorative function: “by holding a handful of individuals responsible, they do nothing to force other whites to come to terms with their own complicity with the racist practices of the past.”<sup>102</sup>

But redemption also can affect those who had little or no complicity in the racial status quo. After the Cherry trial in Birmingham, former and current African-American politicians were optimistic that these trials would rescue the city’s reputation in the eyes of the nation.<sup>103</sup> These leaders hoped the trials would change, for the positive, the city’s image in which a single violent act had overshadowed the momentous civil rights demonstrations of 1963. As Mayor Kincaid stated, “All of us in the city, I hope we can breathe a sigh of relief.”<sup>104</sup> The final Birmingham trials were certainly a process of history making, but the discussions that they sparked also addressed the current state of race relations.

Restorative justice theory questions how much cultural, historical, or restorative work one long-delayed trial can realistically accomplish. Constrained by rules of evidence, a trial necessarily covers a scripted narrative terrain. As journalist Tina Rosenberg succinctly put it, “[t]rials, in the end, are ill suited to deal with the subtleties of facing the past.”<sup>105</sup> In discussing cases of genocide and war-crimes trials like those held at Nuremberg, Professor Martha Minow answers this question by asserting: “[e]ven when marred by problems of retroactive application of norms, political influence, and selective prosecution, however, trials can air issues, create an aura of fairness, establish a public record, and produce some sense of accountability.”<sup>106</sup> Those who analyze large-scale historical atrocities acknowledge that trials are limited in their ability to find the whole truth, punish all perpetrators, or address the full harms of crimes. In many ways, historical truth about individual crimes and collective atrocities can only be found in extra-judicial story telling, not in testimony bounded by the rules of evidence. When evaluating a trial, Minow explains, “[t]he challenge is to combine honest modesty about the promise of trials with a willingness to be inspired—and to combine inspiration with the hard, grubby work of gathering evidence and weaving legal sources into judgments.”<sup>107</sup> However, Minow cautions against asking too much of these

102. See Romano, *supra* note 100, at 124.

103. Ryan Gravatt et al., *Friend Recalls Loss of Denise*, BIRMINGHAM POST-HERALD, May 18, 2000, at D2 (then-Mayor Kincaid explained, “everywhere he traveled, people still link the city’s name to the bombings [and he would] like to get past that”); Chris Scribner & Sherrel Wheeler Stewart, *Mood: Calm Satisfaction*, BIRMINGHAM NEWS, May 2, 2001, at 6A (“Richard Arrington, who won the first of his five terms as mayor in 1979, said the verdict will be good for the city’s image.”).

104. Scribner & Stewart, *supra* note 103, at 6A.

105. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 51 (1998).

106. *Id.* at 50.

107. *Id.* at 51.

kinds of trials: “to find the trial process wanting against the aspiration of truly dealing with the complex past is not to find it worthless as a response to atrocity.”<sup>108</sup>

Minow acknowledges that it is unlikely that legal institutions can ever fully reveal the truth of past events or even bring true closure. Yet she emphasizes the need for legal institutions to speak in the face of violence and to not remain silent.<sup>109</sup> In a forward to a recent *Michigan Law Review* colloquium on civil rights-era trials throughout the South, Professor Minow outlines three main objections to contemporary legal proceedings on past crimes: first, “[w]hy open old wounds;” second, the evidence is old and faulty; and third (although not always expressed explicitly) that “exposing some gross and unremedied racial injustices from the past will reveal the scale of imperfections in the systems of justice and government and thereby undermine the legitimacy of those systems.”<sup>110</sup> As for opening old wounds, Minow suggests that legal action can trigger discussion and debate about the past that may help repair community relationships, even in the absence of formalized structures, such as South Africa’s Truth and Reconciliation Commission.<sup>111</sup> This emphasis on discussion and relationships is a restorative justice-informed concept. Furthermore, trials can serve the evidentiary function of “[d]etermining what happened.”<sup>112</sup> Finally, while some may worry that revelation of historical legal inequities by the trials will undermine confidence in the justice system, Minow maintains that by formally recognizing claims that have been silenced and communities that have been disenfranchised, courts can begin the process of renewing faith in the system.<sup>113</sup>

But restorative justice theory suggests that these concerns address only part of the problem. By using more inclusive notions of “harm” and “victim,” we can arrive at a clearer understanding of what the trials left unresolved, and uncover potential extralegal processes that might better heal the remaining hurts to victims, their families, and the city of Birmingham.

### B. Restorative Justice Forty Years Later

The local media reported that the recent bombing trials left observers with both a sense of relief and a feeling of incompleteness. While the trial process

108. *Id.*

109. *Id.* at 4-5.

110. Martha Minow, *Foreward: Why Retry? Reviving Dormant Racial Justice Claims*, 101 MICH. L. REV. 1133, 1133 (2003).

111. *Id.* at 1136-37. The South African Truth and Reconciliation Commission, founded as part of the transition from Apartheid to a democratic South Africa, served as a forum to collect victims’ and, in exchange for amnesty, perpetrators’ stories of human rights abuses, to promote inter-racial healing, and to expose the truth of violence under the previous regime. Russell, *supra* note 4, at 1263-64.

112. Minow, *supra* note 110, at 1139.

113. *Id.* at 1139-40.

itself served a vital but limited function, the “broad community harms” described by Professor Margaret Russell seem to require additional work if Southern communities can ever truly heal.<sup>114</sup> A restorative justice theoretical approach would first expand the concept of the bombing’s harms to embrace all the foreseen and unforeseen effects of the crime, as well as the damage wrought by the long delay in prosecution.<sup>115</sup> This expansion of the concept of the harm also requires those touched by the bombing to be included as potential stakeholders. For a truth and reconciliation-type event to come to fruition in Birmingham, this would be vitally important in order to convince those resistant to restorative practices that they have a stake in the hard work of racial healing. Finally, we must think creatively about how to expand the remedy to encompass as many stakeholders and reach as many harms as possible.

### 1. *Expanding the Concept of Harm*

The bombing of the Sixteenth Street Baptist Church has been described as a crime against everyone in Birmingham and against the nation as a whole.<sup>116</sup> By contrast, the traditional legal view espoused at the trials presented the bombing as a crime against a limited and abstract state interest. The gulf between these two formulations lies at the heart of the dissatisfaction with legal responses to the long-unprosecuted crime. Accepting an expanded understanding of harm is essential to crafting responses to this and other civil rights-era crimes.

Equating the bombing and other acts of racial violence in the 1960s to hate crimes today, Margaret Russell sees these murders as single pieces of “a larger mosaic of violent acts against blacks, Jews, and others who threatened” white supremacy.<sup>117</sup> The recently revived trials can provide legal accountability for private wrongs and begin to redeem the expanded harm of “government malfeasance” in failing to investigate or prosecute these cases at the time they occurred. These trials can thereby help to restore some legitimacy to the justice system.<sup>118</sup>

Russell also emphasizes that violence like the bombing was *intended* to create wide-reaching harms. She describes the context of civil rights-era racial violence: “the racial climate in which the killings . . . occurred was one in which each murder bore a distinct, contextual message: hatred of black progress and defense of racial hierarchy.”<sup>119</sup> The bombing’s symbolic weight,

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114. Russell, *supra* note 4.

115. See VAN NESS & STRONG, *supra* note 6, at 37-38 (describing the broad definition of “harm” in restorative justice theory).

116. SIKORA, *supra* note 42, at 153; Gravatt et al., *supra* note 103, at D2 (quoting Coretta Scott King).

117. Russell, *supra* note 4, at 1247.

118. *Id.*

119. *Id.* at 1230.

its design to derail school desegregation, must be added to the harm's calculus. The prominence of the Sixteenth Street Baptist Church in the civil rights movement further guaranteed that this message would be heard nationally.

In restorative justice theory, communities as well as individuals can be victimized by crime, and both must seek reconciliation.<sup>120</sup> It was widely believed in Birmingham that state and federal authorities knew who the perpetrators were in the 1960s, and had let them get away with their crimes for almost forty years. This sense of harm to the black community as a whole, encompassing but reaching beyond those injured or killed in the bombing, illustrates the way that official inaction constituted a continuing harm that stretched through all the years separating the crime from its prosecution. This sense of "too little, too late" ran through comments from members of the Sixteenth Street Baptist Church congregation, who suggested that the crime's unsolved status was a direct result of the race of the victims. The Associated Press cited the congregation's assessment that there would not have been such a delay if the victims had been white.<sup>121</sup> Local civil rights leader Reverend Fred Shuttlesworth echoed this sentiment: "Justice in any situation should be done at the time . . . . If you delay justice, you deny justice. Thirty-seven years is too long to talk about justice in a situation like this."<sup>122</sup> Similarly, some of the victims' families and friends found that, in the end, victory was only "bittersweet" because of the long delay.<sup>123</sup> Justice delayed is not full justice because it disregards the victims of the crime, and starkly reveals how racism continued to pervade the justice system in the years after 1963.

Acknowledgment of how widely the bombing's harms were felt, expressed both at the time of the incident and also during the recent trials, links directly to an expanded understanding of responsibility for the bombing, one that extends beyond the individual perpetrators. While the bombing itself may have been an isolated act, inaction and deceptive practice by state and local law enforcement officials were widely interpreted as attempts to maintain the racial status quo.<sup>124</sup> According to one former *Birmingham News* reporter who has written extensively on the trials, this deeper harm manifests itself as guilt felt today by some members the white community.<sup>125</sup> This sense of responsibility

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120. See ZEHR, *supra* note 12, at 194-95.

121. *Large Jury Pool Picked for Church Bombing Trial*, CNN.COM, Apr. 16, 2001, <http://archives.cnn.com/2001/LAW/04/16/church.bombing.trial.03/index.html> (last visited Mar. 17, 2008).

122. Singleton, *supra* note 96, at A3.

123. Carol Robinson, *Justice Prevailed After Long Wait, Says Victims' Kin*, BIRMINGHAM NEWS, May 2, 2001, at 6A (A childhood friend of Denise McNair explained: "My first response was, 'Thank God,' but then I got angry and upset . . . . It's been almost 40 years and they knew all along who did this.").

124. See, e.g., Reverend Fred Shuttlesworth's comment regarding the likely collusion of the local government and the Klan. Gravett et al., *supra* note 103, at D2.

125. See Sara Foss, *Author: 'I Think Blanton Drove the Car and Cherry Put the Bomb Down'*, BIRMINGHAM POST-HERALD, Apr. 17, 2001, at A8.

breeds two kinds of guilt. One is the guilt of omission shared by white moderates who did not speak out at the time or since, and feel shame because of their own position within a racialized justice system. The other is the guilt of commission, ascribed to officials and law enforcement personnel who were responsible for the long delay in the prosecution of the bombing.

This leap to official complicity is not a difficult one. Images of official city resistance to desegregation, beamed across the nation in the form of Bull Connor turning dogs and fire hoses on school children, combined with the bombing and then non-prosecution of the worst act of violence of the civil rights movement, have overshadowed Birmingham's reputation since. During the Blanton trial, Birmingham mayor Bernard Kincaid explained that "everywhere he traveled, people still link the city's name to the bombings [and that he would] like to get past that."<sup>126</sup> While the city should be hailed as a center of local civil rights organizing and mass demonstrations that raised the national consciousness, this understanding of official complicity and sheltering of violence has completely subsumed that image.

The recently reopened trials have forced Birmingham to confront its history. The most striking aspect of the media and citizens' discussion of complicity and reputation is how it anthropomorphizes the city. Ignoring racial differences among residents or distinctions between past and present governments, speakers assume that the city has feelings, responsibilities, and a character to impinge. This understanding of the city springs directly from an unarticulated expanded harm concept. The harm was widespread and its perpetrators were, in the widest sense, everyone who supported, even by omission, the maintenance of segregation. Since our culture relies on storytelling and narrative to make sense of harm and because the bombers remained unapprehended, observers created a locus for the perpetrator of the harm: the city itself. Observers' comments that the city was "haunted" by the unsolved status of the crime echo this anthropomorphized sense of the city-at-large's guilt.<sup>127</sup>

Such anthropomorphosis in the context of criminal justice is ubiquitous, however. In any criminal trial, the government's role as prosecutor transforms an individual harm into a crime against the state. The recent bombing trials were no exceptions to this pattern. But the state's dilatory prosecution of the crime created fresh harms that went unvindicated by the long-delayed trials. In 1963 when Mayor Albert Boutwell said in response to the bombing, "[w]e are all victims, and some of us are innocent victims," he was expressing the classic understanding of crime as perpetrated against the state.<sup>128</sup> Yet this one-dimensional framing of the city as a victim rang false because it failed to reflect

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126. Gravatt et al., *supra* note 103, at D2.

127. Elaine Witt, *Thought of '63 Atrocity Often Awakes Minister*, BIRMINGHAM POST-HERALD, May 18, 2000, at A7.

128. See *City's People All Victims*, *supra* note 63, at 21.

that the city was *both* a victim and a perpetrator of the crime.

This theoretical understanding of crime as a crime against the state, subsuming the individual harm, lies at the heart of our criminal law system. Yet it is not how most individuals conceptualize crime, harm, and victimhood. Individuals understand crime on a personal level, and this response is seen not only among the immediate family of the victims, but also in the continuing effect of the bombing on the lives of all Birminghamians. Frank Sikora, a retired *Birmingham News* reporter who has written extensively on the bombing trials, explains:

It's not something people think about all the time, but it's out there. I don't know that I think about the bombing every day, but I think about it a lot. I remember when it happened. . . . I remember hearing the report that four kids had been killed. It floored me. I think I thought, like a lot of people around the country, about if it had been my own child.<sup>129</sup>

These widespread individual harms make the trial mechanism an unsatisfying and insufficient remedy. Ultimately in the course of a prosecution the personal harms beyond those of the victims are glossed over. Yet even direct victims of the bombing may not have their harms subsumed by the prosecution in a satisfying way. Sarah Collins Rudolph, sister of the murdered Addie Mae Collins, believed that the recent trials would do little to give her personal closure or to bring justice to the victims' families. Physically scarred by the explosion herself, Mrs. Rudolph continues to suffer from trauma, nightmares, and pain. As she told one *New York Times* reporter, "[t]here will never be any closure for me. . . . Every time I go to the bathroom and put my makeup on, it always comes back to me. The scars on . . . my legs and my face will always remind me."<sup>130</sup> By expanding the definition of victim and acknowledging other stakeholders, restorative justice theory expands the definition of harm to include individuals whose injuries did not fit with the priorities or strictures of the state's case.

Restorative justice theory can help to return the focus to all persons involved—victims, offenders, families of each, and the larger community. The movement's theoretical focus places the dignity of individuals at the center of its work. By using restorative justice practices to craft extrajudicial responses to these long-buried crimes, it may be possible to repair the longstanding harms that go unaddressed by traditional legal practices.

## 2. *Expanding the Definition of Victim*

If we expand the concept of harm in analyzing the Birmingham bombing

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129. Foss, *supra* note 125, at 8A.

130. Kevin Sack, *Survivor Expects Little From Trial*, BIRMINGHAM POST-HERALD, Apr. 27, 2001, at A17.

and reactions to it, we must simultaneously enlarge the definition of who was a victim of this crime. While restorative justice theory reserves the concept of “victim” specifically for the individuals most directly affected by the crime, it encompasses this broader idea of victim within the term “stakeholders.” “Stakeholder” includes all individuals “affected significantly by a criminal offense” and contemplates community involvement in restorative processes.<sup>131</sup>

In many ways, the media expanded the community of stakeholders in the Birmingham bombing by the sheer volume of attention it paid to the crime.<sup>132</sup> Its narratives of redemption, memory, and history, although criticized by some as simplistic, appealed to a broad audience and dominated local newspapers during the three years of recent trial proceedings.<sup>133</sup> This media attention likely brought the bombing and trials into the lives of many people in Birmingham who knew little of the crime or had few reasons to feel connected to it. By making the trials a part of the civic narrative—a city issue—the newspapers helped to extend the number of stakeholders in the bombing.

This expanded concept of stakeholder is also illustrated by the sheer number of people who participated in demonstrations and vigils held in conjunction with the trials.<sup>134</sup> Following his indictment, Cherry’s lawyers argued that, due to dementia and advanced age, he was not competent to stand trial. The judge ruled Cherry incompetent to stand trial at that time, but ordered further psychiatric tests.<sup>135</sup> This sparked demonstrations. Approximately fifty people gathered outside of the courthouse when the competency ruling came down and protests continued sporadically for the next two weeks. Eventually over 250 people marched from downtown Birmingham to the Sixteenth Street Baptist Church, where national civil rights leaders joined the crowd in calling for Cherry to be confined until he was found fit to stand trial.<sup>136</sup> Protests were lead by long-time local civil rights leader Reverend Abraham Woods, who told the press: “[t]he world’s spotlight was going to be on Birmingham and Alabama—some of us was hoping we were ready to join the 21st century. . . .

131. *Introduction to A RESTORATIVE JUSTICE READER*, *supra* note 16, at 3.

132. From January 1, 1999 to January 1, 2003, the *Birmingham News* ran over 400 articles about or mentioning the bombing.

133. For example, headlines read: *Improving Tarnished Image*, *supra* note 3; *The End to an Era*, *supra* note 2; Editorial, *Judgment Day: Justice Delayed But Justice Nonetheless*, BIRMINGHAM NEWS, May 2, 2001, at 14A; Jamie Kizzire, *Civil Rights Struggle Not Yet History: City Leaders Say Whites, Blacks Separated*, BIRMINGHAM POST-HERALD, Apr. 23, 2001, at A3.

134. *Vigil at Sixteenth Street*, BIRMINGHAM NEWS, May 3, 2001, at 1A (several hundred people attended candlelight ceremony after Blanton verdict); Chanda Temple, *Protestors Want Cherry’s Bond Revoked*, BIRMINGHAM NEWS, July 25, 2001, at 1C; Chanda Temple, *King Leads Cherry Ruling Protest*, BIRMINGHAM NEWS, Aug. 9, 2001, at 2A (from 50 to 250 demonstrators, including members of SCLC, the NAACP, and the Nation of Islam, converged on the courthouse throughout the week).

135. Val Walton & Chanda Temple, *Cherry Not Competent, Judge Rules*, BIRMINGHAM NEWS, July 17, 2001.

136. Temple, *Protestors Want Cherry’s Bond Revoked*, *supra* note 134, at 1C; Temple, *King Leads Cherry Ruling Protest*, *supra* note 134, at 2A.

But this verdict makes the statement loud and clear that the justice system is not blind, that there isn't always justice for black folks."<sup>137</sup> Additionally, hundreds of people attended vigils and unity ceremonies after each verdict.<sup>138</sup> This spontaneous outpouring of sentiment—driven by initial outrage at the lack of accountability followed by relief at the verdicts—as well as the sheer number of people involved, underscores the need to adopt an expansive definition of “stakeholder.”

Yet active community members, such as those participating in the demonstrations, vigils, and unity ceremonies, were not the only stakeholders involved. The criminal justice context also overlooked the plight of the families of the perpetrators. The effects of the crime on Cherry's family strife illustrate how the bombing's harms were not restricted to one side of the equation. Thomas Cherry, estranged son of the bomber, describing how his childhood was blighted by the crime, forcing his family to relocate to Texas, and providing the subject of conversation at every family reunion.<sup>139</sup> The son was subpoenaed to testify in front of the grand jury, and the newspapers described him as “anguished over his father but . . . also haunted by the bombing.”<sup>140</sup> After the verdict, Thomas Cherry tried to explain how the crime cast a long shadow: “[i]t leaves you an awful empty feeling in you [to] know that your father is going to the penitentiary for the rest of his life.”<sup>141</sup> Cherry's trial also featured conflicting testimony from ex-wives and a loyal grandson as to his character, the meaning of his Klan membership, and his motives for racial violence.<sup>142</sup> After the verdict, the *Birmingham Post-Herald* ran a large picture of Cherry's daughter Karen Suderland sitting on the ground weeping.<sup>143</sup> One wonders what the effect of the competency protests might have been on this wide spectrum of family members, both estranged and otherwise. How could the trial possibly have brought them a sense of closure? In evaluating harms and victims, an inquiry into the effects the crime has on the offenders' families is necessary, no matter how much this complicates otherwise simplistic

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137. Jay Reeves, *Accused Church Bomber Incompetent to Stand Trial*, ASSOCIATED PRESS, July 16, 2001 (internal quotations omitted).

138. *Vigil at Sixteenth Street* at 1A; Charlotte McIntosh, *Relief, Joy Echo Through Church*, BIRMINGHAM POST-HERALD, May 23, 2002, at A4. The unity ceremony held after the Blanton verdict began with a candlelight service on the steps at the Sixteenth Street Baptist Church featuring a prayer and poetry reading, brief words by local ministers, Reverend Shuttlesworth, and Doug Jones. *Unity Ceremony Planned at Church*, BIRMINGHAM NEWS, May 2, 2001, at 6A; *Vigil at Sixteenth Street* at 1A.

139. Christopher John Farley, *The Ghosts of Alabama*, CNN.COM, May 22, 2000, <http://cgi.cnn.com/ALLPOLITICS/time/2000/05/22/ghosts.html> (last visited Mar. 17, 2008).

140. *Id.*; Jill Vejnaska, *Hard-Hitting Film Revisits the 1963 Church Bombing*, ATLANTA J. CONST., Jan. 4, 2002, at 1E.

141. Kizzire, *supra* note 2, at A3.

142. *Id.*; Rick Bragg, *Defense Rests After One Day in '63 Bombing*, N.Y. TIMES, May 21, 2002, at A1.

143. Kizzire, *supra* note 2, at A1.

condemnation of criminal offenders.<sup>144</sup>

But what can address all those harms suffered by such a broad field of stakeholders? Looking beyond judicial remedies—expanding our concept of acceptable outcomes, accountability, and restitution—may begin to satisfy these many stakeholders in ways that trials alone cannot. If Birmingham is ever truly to heal, some means of addressing the harms suffered by a diverse range of stakeholders must be discovered. How can restorative justice theory help leaders, prosecutors, and courts to better serve their citizens and find the justice so many are seeking?

### 3. *Expanding the Justness of the Remedy*

The goal of re-establishing “right relationships” is central to restorative justice. Additionally, perceived fairness is of the utmost importance in restorative justice systems.<sup>145</sup> After evaluating the perception of the judicial remedy among various Birmingham constituencies and examining the limits of such solutions, I will tentatively explore the potential for a restorative justice process in Birmingham.<sup>146</sup>

The need to recognize disparate voices, such as those of the Birmingham protestors and Cherry’s family, is a reminder of the far-reaching impact and powerfully expressive qualities of the criminal law. As restorative justice scholar Lode Walgrave notes,

[i]n principal, penal law is proactive. . . . Penal law holds itself out as the defender of fundamental values of society. The wrongdoing throws into question . . . general, fundamental societal norms . . . . By criminalizing certain acts, organized society as such shows itself to be a concerned party.<sup>147</sup>

But in the case of the Birmingham bombing, the penal law’s inaction showed it to be a defender of the values of white supremacy and segregation rather than equal justice under the law. Although the bombing was an acknowledged criminal act, the lack of meaningful action by both federal and state law enforcement for almost forty years sent a strong message to the very community who, after having been injured by the crime, was most in need of some kind of formal means of restoration.

Restorative justice acknowledges both the symbolic component of crime and the need for healing that follows in its wake.<sup>148</sup> Without prosecution of the

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144. See ELIZABETH BECK ET AL., *IN THE SHADOW OF DEATH* (2007) (providing a thoughtful, personal look at the families of individuals on death row and their sufferings).

145. Walgrave, *supra* note 24, at 261.

146. A recent article by a member of the Cherry prosecution team briefly touches on issues of transition justice: Donald O. Cochran, *Ghosts of Alabama: The Prosecution of Bobby Frank Cherry for the Bombing of the Sixteenth Street Baptist Church*, 12 MICH. J. RACE & L. 1 (2006).

147. Walgrave, *supra* note 24, at 255.

148. *Id.* at 256.

Birmingham bombing, no formal acknowledgment of the victims or other stakeholders was possible. Minow also suggests that some form of official response is necessary to assure citizens that the legal system itself has not been silenced by this crime.<sup>149</sup> Yet the justness of the remedy offered by the long-delayed trials remains the subject of debate.

Many citizens expressed frustration at the Birmingham trials. A frequent complaint was that the offenders never accepted responsibility. At the end of Cherry's trial, questions of competency melted away as he stood to address the court after his sentencing. Pointing at the prosecution, he said, "[t]his whole bunch lied all the way through this thing. . . . I told the truth. I don't know why I am going to jail for nothing."<sup>150</sup> In fact, none of those convicted ever accepted responsibility for the crime—the original suspect Chambliss died defiant to the end and Cherry, before his death in prison in 2004, called himself a political prisoner.<sup>151</sup> Yet this denial of accountability illustrates just one of the limits of the current criminal justice system. While few may really have expected these men to accept responsibility or ask for forgiveness, their defiance helped convince some observers that the defendants were sacrificed to salve the collective conscience, rather than justly punished for a heinous crime.<sup>152</sup> Although the convictions formally allocated blame to each defendant, the current criminal justice system does not encourage individuals to take personal responsibility for their crimes. The not-guilty plea itself is often used, as it was in the Birmingham trials, to gain a favorable outcome, and may not represent a truly felt statement of non-culpability on the part of the defendant.

Yet some in Birmingham's black community believed that only a full trial could offer an adequate remedy, as it would force the same justice system responsible for the earlier non-prosecution to now repair that harm. During the competency demonstrations Reverend Woods called Judge James Garrett, the presiding judge, "a good man who is part of a bad system."<sup>153</sup> His statement captured the hope that although courts continued to perpetrate racial injustice, the system yet could be redeemed with this trial. Even though some observers predicted a furor if either of the men had been acquitted, some members of the church community simply expressed relief that any official proceeding was going forward at all: "[n]o matter what the outcome, at least we can say it is

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149. MINOW, *supra* note 105, at 4-5.

150. Jay Reeves, *Ex-Klansman Convicted in '63 Bombing*, ASSOCIATED PRESS, May 22, 2002.

151. Michelle O'Donnell, *Bobby Frank Cherry, 74, Klansman in Bombing is Dead*, N.Y. TIMES, Nov. 19, 2004, at B9.

152. William C. Singleton III, *Area Residents Divided Over Trial*, BIRMINGHAM POST HERALD, Apr. 23, 2001, at D1 (quoting one citizen: "I don't think he can get a fair trial. . . . Somebody wants to see someone pay the price for that bombing.").

153. Chanda Temple & Val Walton, *Ruling Draws Protesters*, BIRMINGHAM NEWS, July 19, 2001, at 1A.

over. . . . Those were terrible times, but we have overcome.”<sup>154</sup> Reverend Christopher Hamlin, pastor of the Sixteenth Street Baptist Church, reiterated the sense that a fair trial represented the best resolution: “[i]f there’s a conviction, then justice has been served. And if there’s an acquittal, at least an effort has been made.”<sup>155</sup>

Observers saw the trials as remedies with enormous extralegal consequences. Some feared that the trials would dredge up Birmingham’s shameful past in a way that would simply confirm the city’s negative national reputation.<sup>156</sup> Others persisted in anthropomorphizing the city and considered the first guilty verdict to be “conscience-salving” for Birmingham.<sup>157</sup> It was not just the trials, but guilty verdicts, that came to represent the city’s progress in race relations. United States Attorney Doug Jones said after the Blanton verdict, “I was real concerned that people would say, ‘O.K. this is Birmingham and Birmingham hasn’t changed’ . . . . So when the guilty verdict came back, it was such a relief.”<sup>158</sup>

Although they did not use restorative justice terminology, the *Birmingham News* editors hoped that the trials would spark discussion and lead to concrete repair of race relations. The newspapers largely portrayed the Blanton verdict as an “indictment on racism in general” and hoped that the trial would serve as a “building block” to the improvement of race relations in Birmingham.<sup>159</sup> This particular article was followed by a feature on two women, one black and one white, who were individually moved by the verdict to go to the church and pray; upon meeting each other, they decided to pray together.<sup>160</sup> While the main *Birmingham News* editorial after the Blanton verdict rejected the trial as a litmus test for Birmingham’s racial progress, many in the city embraced just this symbolic aspect.<sup>161</sup>

The trials were also heralded as signals that “the civil rights struggle, resolved or not, [was] receding into history.”<sup>162</sup> Some greeted them as a chance to clarify history and reveal new facts. One commentator hoped, “if there is a trial, then some old secrets, at least, might see the light,” while a survivor of the

154. *Church Bombing Trial Down to One Ex-Klansman*, CNN.COM, Apr. 11, 2001; Chanda Temple & Val Walton, *10 Whites, 6 Blacks on Jury*, BIRMINGHAM NEWS, Apr. 24, 2001 at 6A. One local law professor stated, “[i]f they’re convicted, it would be a watershed for Birmingham. . . . But if they’re exonerated—oh brother!” Gravatt et al., *supra* note 103, at D2 (internal quotations omitted).

155. Witt, *supra* note 127, at A7 (internal quotations omitted).

156. See Singleton, *supra* note 152, at D2.

157. Manuel, *supra* note 92, at A1.

158. Kevin Sack, *An Alabama Prosecutor Confronts the Burden of History*, N.Y. TIMES, May 5, 2001, at A8.

159. Scribner & Stewart, *supra* note 103, at 6A.

160. *Id.*

161. Editorial, *Judgment Day*, *supra* note 133, at 14A.

162. Adam Goldman, *Civil Rights Cases Breathing Their Last*, BIRMINGHAM NEWS, Apr. 29, 2001, at 1A.

blast explained, “[i]t was very important to be here [at the Blanton trial] to hear all these things. . . . I really didn’t hear it the first time (in the Chambliss trial).”<sup>163</sup> This sense of the trial as history-in-the-making also weighed heavily on the jury—one juror described coming to the final verdict as “agonizing.”<sup>164</sup>

The discussions, vigils, and demonstrations that sprang up during and in the wake of the Birmingham trials are a kind of grassroots restorative justice, acknowledging the importance of symbolic communal acts of healing. Initiated and led by the victims’ families and members of the church community, these events allowed for the expression of frustration at the constraints of the legal justice system.<sup>165</sup> Yet as Sarah Rudolph points out, there is really nothing that will fully restore the harm caused by this bombing and the forty years of indifferent and inconclusive state response. So how can we begin to fashion a remedy?

Many in the city questioned if the remedy offered by these trials could adequately address the full harm created by both the crime and long-deferred prosecution. One elderly African-American man outside the courthouse during the Blanton trial explained, “[w]e might as well let him go. His best days are over with. There should have been a trial a long time ago—not some 37 years later. Whatever they do now is not going to bring these little girls back.”<sup>166</sup> In a statement to the Associated Press, the congregation of the Sixteenth Street Baptist Church echoed this sentiment, suggesting that a trial would be unlikely to contribute to healing after the crime.<sup>167</sup> Another member of the Birmingham black community expressed the belief that no justice could ever be meted out in this case because despite the punishment of the individual bombers, the intent to maintain segregation had been condoned by the wider white community: “I don’t care what kind of punishment these men get, no justice will be served for those little girls. . . . How can they hold these men responsible when the whole state of Alabama encouraged it?”<sup>168</sup>

Many observers felt that the remedy was neither adequate nor fair. Some expressed the opinion that the prosecutors were just trying to close the case.<sup>169</sup> Others felt that the pressure on the government to finalize the case meant that the suspects were not necessarily guilty, and furthermore that pressure from the black community would make jurors convict regardless of the evidence.<sup>170</sup> This

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163. Witt, *supra* note 127, at A7; Singleton, *supra* note 96, at A3.

164. Tom Gordon, Adam Goldman & Brett J. Blackledge, *Jury Convinced By Secret FBI Tapes*, BIRMINGHAM NEWS, May 2, 2001, at 7A.

165. See Chanda Temple, *McNair Asks Access to Cherry Evaluations*, BIRMINGHAM NEWS, Aug. 4, 2001.

166. Chanda Temple, *Selection Process Begins: 92 Potential Jurors Asked to Complete Questionnaires*, BIRMINGHAM NEWS, Apr. 16, 2001.

167. *Large Jury Pool*, *supra* note 121.

168. Jeb Phillips, *Couple Faced Unique Issues of Segregation*, BIRMINGHAM POST-HERALD, Apr. 27, 2001, at A1.

169. Singleton, *supra* note 152, at D1-D2.

170. *Id.* at D2.

sense of the trials as an inadequate remedy led to fear of unjust procedures: that the prosecutors were just trying to remedy the mistakes of their predecessors or that the jury would disregard reasonable doubt in favor of closing a chapter of history. These suspicions, including that the defendants were innocent scapegoats, underscore the significance of the trials' outcomes for the community, as well as the way that no trial can address all of the lingering harms experienced by even those who are unsympathetic to the specific victims. In essence, these two trials raised difficult questions about Birmingham's past and present that did not find answers within the restricted framework of the trial setting.

While the prosecutors involved championed the essential justness of the trial procedure itself, vocal leaders of one segment of the black community valued the outcome over the process. Prosecutor Doug Jones, repeating themes from the first trial in 1977, often asserted, "justice delayed doesn't have to be justice denied."<sup>171</sup> Yet for others, the chance for a trial was a symbolic event that might partially redeem a justice system that was then and remains now fundamentally flawed in its treatment of African Americans.

The conflicting concept of justice manifested in the Cherry competency protests illustrates this point well. The civil rights demonstrators saw the competency ruling as an affront, a clear denial of justice in a system that historically had disfavored black defendants. Despite their best efforts to bring Cherry to trial, the prosecutors were stymied further by statutory definitions and evidentiary standards that required additional mental health evaluations of the defendant.<sup>172</sup> This reflects a fundamental difference in the way that the two groups approached the competency ruling: civil rights activists saw yet another facially race-neutral way that justice would be denied; while the legal advocates, similarly frustrated with the procedural gamesmanship, accepted the legal ground rules of the trial itself.<sup>173</sup> These two conflicting views pitted the Bar's understanding of justice with the larger community's sense of fairness, and affected the personal relationships between civil rights supporters and the prosecution. Even five years later, the protests and competency controversy evoked an emotional reaction: hurt and betrayal at the response of the other side on what had been presumed to be a common goal. Ultimately the protesters were concerned about something beyond fair trial process. Their expanded vision of harm—embracing government complicity, institutional corruption, the effect on the entire black community, and the city's reputation—demanded more than merely a conviction. The limitations of a trial as a sole remedy became only too clear when the system that finally seemed to be working in their favor suddenly appeared to have once more let them down. Thus the trials and grassroots restorative efforts seem to have left many harms

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171. Kizzire, *supra* note 2, at A3.

172. Interview with Doug Jones, *supra* note 98.

173. *See id.*; Interview with Reverend Abraham Woods, *supra* note 84.

unresolved and many stakeholders untouched. So what restorative practices might be practicable in Birmingham today?

CONCLUSION:  
ENVISIONING RESTORATIVE JUSTICE IN BIRMINGHAM

Birmingham's history of racial injustice is very palpable in its present. The protests, demonstrations, marches, and vigils held in the wake of the Birmingham bombing verdicts suggest that the victims and stakeholders harmed by the crime—the young girls, their families, the black community, and indeed the larger Birmingham community—were calling out for a remedy beyond what a trial alone could provide.<sup>174</sup>

Trials like those in Birmingham are valuable because they help to address hard issues and prompt difficult questions. Margaret Russell pinpoints another goal of these recent trials: “racial healing.”<sup>175</sup> According to Russell's theory, racial healing requires an appreciation that racially motivated murders damage an entire community.<sup>176</sup> Russell suggests, however, that racial healing cannot be achieved through the adversarial process alone. Instead a truth commission in conjunction with current legal processes would best facilitate this process.<sup>177</sup> Looking to the African concept of *ubuntu* or “humane interconnectedness” adopted by the South African Truth and Reconciliation Commission, Russell suggests that trials can begin community and individual healing as a restorative response to mass atrocities.<sup>178</sup> In imagining American or Southern truth commissions, she points to both the narrative, history-writing, and the personal, story-telling aspects of these commissions as restorative processes for individuals and as prerequisites for reconciliation on a large scale.<sup>179</sup>

The idea of a truth and reconciliation-style event in Birmingham is not new. The Birmingham Civil Rights Institute hosted a conference on the topic in 1992 at which Bishop Desmond Tutu spoke.<sup>180</sup> Additionally, many in Birmingham specifically called for some kind of organized effort to expose

174. See *Vigil at Sixteenth Street*, *supra* note 134, at 1A.

175. Russell, *supra* note 4, at 1261.

176. *Id.*

177. *Id.* at 1262.

178. *Id.* at 1266-67.

179. *Id.* at 1265-66. Truth and Reconciliation Commissions specifically, however, can be very contentious. Citizens of Greensboro, North Carolina, created a Truth and Reconciliation Commission to hear testimony on an incident in 1979 now known as the “Greensboro Massacre” in which the Klan fired on a union march, killing five people. Community support for this reconciliation work has been tenuous at best. Despite the fact that town hall meetings attract sizable crowds, the mayor has denounced the Commission as biased and the City Council voted to both officially oppose the Commission and reject its resolution asking for apologies. See Margaret Moffett Banks, *Council Votes Down TRC Resolution*, GREENSBORO NEWS-RECORD, Mar. 7, 2007; Jordan Green, *Truth Report is Discussed Despite Hostility, Disinterest*, YES! WKLY, Mar. 14, 2007.

180. Singleton, *supra* note 96, at A3; Editorial, *Judgment Day*, *supra* note 133, at 14A; Kizzire, *supra* note 133, at A3; Russell, *supra* note 4, at 1263.

past and current racial injustices during the Blanton and Cherry trials.<sup>181</sup> If a truth and reconciliation-type commission were to be established in Birmingham, hard questions about the boundaries of harm, the scope of victims and offenders, and possible or meaningful remedies might finally be addressed.

The continuing need for deeper and more lasting healing continues to haunt the city. Some citizens and family members take comfort in a belief in God's judgment upon the perpetrators after death or from their own consciences during life.<sup>182</sup> Others have called for a full accounting of the violence of the 1960s in Birmingham. Reverend Fred Shuttlesworth, the city's most prominent civil rights leader of that time, expressed the conviction that true healing could not occur until citizens fully comprehended the extent of government complicity with and encouragement of that violence.<sup>183</sup> Others, like Dr. Horace Huntley, director of the Birmingham Civil Rights Institute's Oral History Project, explain: "[i]ts time to simply tell the truth" and to encourage dialogue about race relations past and present to facilitate change.<sup>184</sup>

Each of these suggestions demonstrates how citizens continue to search for new answers to the questions raised by the bombing and the trials. This points to the vacuum that extrajudicial or parajudicial processes could fill. But in light of the vast number of stakeholders suffering many harms and seeking varied types of remedies, is the implementation of some type of restorative justice-informed mechanism practical or possible in Birmingham?<sup>185</sup>

Such a victim-centered attempt at community dialogue has already been organized. In February 2004, Birmingham Southern College hosted a symposium entitled, "The Gathering: Civil Rights Justice Remembered," in which victims' families, journalists, attorneys, and law enforcement agents participated.<sup>186</sup> Attended by over 1,200 people, this conference focused on civil rights-era trials throughout the South, with an emphasis on the Birmingham bombing trials.<sup>187</sup> Participating community stakeholders spanned a broad range and included many of the victims' family members, politicians, and students from Miles College and Birmingham Southern College, as well as enjoying sponsorship from prominent local companies.<sup>188</sup> Prosecutor Doug Jones conceived of and helped to organize the event. Looking back, he remembers it

181. Kizzire, *supra* note 133, at A3 (suggesting the creation of a state-wide human rights agency to monitor civil rights complaints); Gravatt et al., *supra* note 103, at D1-D2 (calling for Freedom of Information Act requests for local government files to prove Klan ties).

182. Singleton, *supra* note 96, at A3; Editorial, *Judgment Day*, *supra* note 133, at 14A.

183. Gravatt et al, *supra* note 103, at D1-D2.

184. Kizzire, *supra* note 133, at A3.

185. Russell, *supra* note 4, at 1265-1267 (for some suggestions on the creation of an American truth and reconciliation commission).

186. Carol Robinson, *Rights Witnesses Listen, Learn Panelists Discuss 1960s Victims Who Gave Their Lives for Freedom*, BIRMINGHAM NEWS, Feb. 14, 2004.

187. *Symposium at Birmingham-Southern Remembers 40 Years of Civil Rights Justice*, 'SOUTHERN 3 (2004), available at <http://www.bsc.edu/communications/southern/spring04/03.pdf>.

188. *Id.*

as “incredibly emotional.”<sup>189</sup> While participants, including Jones, described this conference as helping to create some closure and as serving a healing function, another said that it provided additional information on the crimes, fulfilling a truth-finding purpose as well.<sup>190</sup> Jones also asserted that this conference made a statement in the national media and helped to repair Birmingham’s image:

I think a part of this is a statement to the world. You know, Look folks, Birmingham is changed, do not think of us simply as black and white, of fire hoses and dogs. We are a city of living color in which we do the right thing. And this proves it.<sup>191</sup>

Jones suggested that additional conferences be held to examine other famous civil rights-era atrocities, including the 1964 murder of the three civil rights workers, James Chaney, Michael Schwerner, and Andrew Goodman, in Mississippi.

Yet responses to the event were not unanimously positive. Although he attended the conference, Reverend Abraham Woods felt that the contributions of his organization, including the demonstrations, were not adequately acknowledged. This response points to the difficulty of organizing such an event to please all stakeholders, even those who already consider themselves fully invested in the topic.<sup>192</sup>

In a recent interview, I asked Dr. Huntley if the Civil Rights Institute had ever considered sponsoring a truth and reconciliation, restorative justice-inspired event in Birmingham. He agreed that some sort of dialogue was critical for both Birmingham and the nation as a whole, but reminded me that the Institute is not itself an advocacy organization.<sup>193</sup> When I asked Reverend Woods about the same possibility, he was not optimistic and pointed to most Americans’ resistance to official apologies for slavery and consideration of any kind of reparations. He also noted a lack of leaders to spearhead this kind of project.<sup>194</sup> Yet various groups in Birmingham have promoted dialogue to attempt racial reconciliation throughout the years since the 1960s. In fact, one of the Birmingham Civil Rights Institute’s stated goals is reconciliation and its prominent position within the city—as a tourist attraction and location of cultural events—serves as a symbolic locus for on-going discussions of race relations. One local attorney drafted and publicized “The Birmingham Pledge,” now signed by over 114,000 people who individually pledge to consciously

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189. Interview with Doug Jones, *supra* note 98.

190. Robinson, *supra* note 186 (“‘We are still learning things,’ said Chris McNair, father of Denise.”).

191. Interview with Doug Jones, *supra* note 98.

192. See Interview with Reverend Abraham Woods, *supra* note 84.

193. Interview with Dr. Horace Huntley, Director, Oral History Project, Birmingham Civil Rights Institute Archives, in Birmingham, Ala. (Mar. 30, 2007).

194. Interview with Reverend Abraham Woods, *supra* note 84.

avoid racism in their lives.<sup>195</sup> Additionally, long-standing community groups such as Operation New Birmingham work to foster dialogue and eliminate racial disparities in the city.<sup>196</sup>

Some might argue that rather than discussing historic racial injustice, a better path to re-establishing community relationships would be to forget the past. Restorative justice processes, whether day-long symposia or commissions sponsored by municipal governments, are costly and require the kind of time and energy that many cities, including Birmingham, may need to channel toward other needs. Additionally, as Reverend Wood highlights, dialogue on race relations may have little benefit for stakeholders unwilling to participate or who do not envision themselves as stakeholders at all. And what of the offenders and offenders' families: can they be reincorporated into the community through processes such as these, particularly if they never accept responsibility for their past actions?

In truth, even among citizens who feel themselves to be very far removed from these trials or Birmingham's past and present race relations, the city's reputation for racial violence lingers. Odessa Woolfolk, president *emerita* of the Civil Rights Institute, often encounters visitors who arrive with a mental picture of the city as "Bombingham": "So I tell people, Birmingham [today] is like the rest of America. Forty years ago we were an anomaly, but we are like the rest of America. We're progressive, we're struggling."<sup>197</sup> Despite efforts among some to ignore it, the effect of historical injustice on current race relations is to create an on-going mediation in which we are all stakeholders. Because Birmingham citizens must live with the city's past in the form of the city's present reputation, they may feel some greater stake in the process of resolution.

Looking beyond this bombing, Birmingham activists and civic organizations could consider a restorative justice process centered on other unsolved crimes of the 1950s and 1960s. This would facilitate the exploration of individual harms while addressing the larger harm of institutionalized racism within the government and law enforcement at the time. This process could shed light on largely forgotten events by drawing on personal, story-telling, and history-writing narratives to offer recognition of individual suffering. The community reaction to the bombing trials also reminds us that official city sponsorship of any large-scale restorative process must address governmental involvement and complicity in the violence. An event organized around

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195. For more information on "The Birmingham Pledge," see [www.birminghampledge.org](http://www.birminghampledge.org).

196. Stephanie Aaron, *Group Works to End Racial Problems*, BIRMINGHAM POST-HERALD, July 18, 2001 (announcing the establishment of a Human Rights Commission affiliated with the Community Affairs Committee of Operation New Birmingham designed to hear citizens' complaints of discrimination).

197. Interview with Odessa Woolfolk, President Emerita, Birmingham Civil Rights Institute, in Birmingham, Ala. (June 4, 2003).

individual testimony about these less well-known crimes could bring us closer to a full accounting and may lead to renewed faith in current systems of justice by frankly acknowledging the failings of the past.

Similarly, as discussed above, the key to public acceptance of a restorative process would be expanding the understanding of harm to involve stakeholders who would ordinarily consider themselves unaffected by historical racial injustice. The efficient mobilization of the media might be the best way to generate this critical public engagement. While it may prove difficult to overcome the resistance of large sectors of the community to involvement, media coverage of the events at least could help to educate such individuals. An event of this sort would attract national media attention, replacing images of police dogs and fire hoses and with the picture of a city striving to improve race relations, and highlight citizens concerned more by today's Birmingham than the Birmingham of the past.

Defining the scope of the remedy would be the most important part of designing a restorative justice process to address unsolved crimes against the black community during the 1950s and 1960s in Birmingham. Any event, whether a one day conference organized by an academic institution or a multiyear commission developed in league with the municipal authorities, must emphasize that its overarching goal is the restoration of relationships among all parts of the community. Some specific remedies may need to wait on further developments. While some during the bombing trials called for further punitive measures, as Reverend Woods explained, any discussion of compensation or reparations is likely to alienate many potential stakeholders before any real work of racial reconciliation can be achieved.<sup>198</sup> As most of the fifty or more residential and church bombings during that time period were never investigated, the likelihood of bringing specific offenders to trial is also slim.<sup>199</sup> But there is a host of collective remedies short of such measures that could help restore relationships among Birmingham's citizens, communities, law enforcement, and local government.

Ultimately, any alternative process would have to create a means for achieving both "truth" and "justice" through the involvement of a wide swath of stakeholders in discussions about the past. Restorative justice provides the best hope of achieving these lofty and pressing goals, through a victim-centered approach that seeks to restore relationships rather than to assign retributive punishments. It offers Birmingham, at long last, the opportunity to follow Dr. Huntley's advice and "simply tell the truth."<sup>200</sup>

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198. See ERIC YAMAMOTO, *INTERRACIAL JUSTICE* 203-09 (1999) (providing an excellent introduction to reparations theory).

199. See *Bombings or Attempt Bombings in Birmingham*, *supra* note 52.

200. See Kizzire, *supra* note 133, at A3.