

Chapter Three: Accusing and burden of proof.

1

Accusations arise, as Aristotle pointed out, about things that happened in the past. Why should we care about what happened in the past? What can we do about it? There are several points of view that could be adopted in considering this question.

To start off, take the point of view of the Victim. Say you left your skateboard on your back porch yesterday evening, and this morning it's gone. You think your neighbor's kid took it.

Question 1(a): How do you feel about this? How would you feel if you knew a tornado had lifted it, rather than the kid? Why does it make a difference, whether a human or natural force injured you?

Question 1(b): Facing this situation, what are your goals?--as Aristotle would say, what "ends" do you want to achieve? Be thorough: it should turn out that your goals are many and conflicting.

Question 1(c): What can you do to achieve your goals? What strategies can you pursue? (In other words, what are your choices? What can you *do*?) Which of your goals might each strategy achieve, which not achieve?

For example: You might beat the kid up; take something of his; forget about it....

Question 1(d): For each main strategy: What difficulties would you encounter if you tried to carry it out? What would be the advantages and disadvantages of each?

Question 1(e): How could you modify the strategy to overcome these difficulties?

One main strategy people adopt when injured is the strategy of accusing the person thought to be responsible. To accuse your neighbor's kid, you would go next door, find him and say something like "You took my skateboard!" And we have a strong, common-sense feeling that when you say that you'd be undertaking a burden of proof--that you'd be under an obligation to show him (or others) why you think he did it.

How does this strategy (finding a person, uttering some words in front of him) work? Well, one explanation could be in terms of some social rules--that's just what society tells you to do when injured, and it tells him how to respond to what you say. But will this explanation in terms of social rules work? After all, he's already violated a big social rule against theft (you think), so

why should he follow these littler ones? And as for you, does going and saying these words in front of him feel like it is just a conventional or ritualistic activity? Is it like saying "I do" to get married, or like putting the fork on the left side when you set the table?

No. Instead, here and throughout this course we will assume that the strategy of accusing is a rational strategy, that you are doing something with words which is carefully calculated to achieve the effect(s) you desire. When you accuse, you aren't reading off of society's script; you are designing your own action.

Question 2: What end(s) are you trying to achieve in accusing? What difficulties are you likely to encounter in achieving those ends? How does merely saying some words and undertaking a burden of proof help you achieve your goals and overcome your difficulties?

2

So far, we have considered what you can do after you are injured. But what should you do--that is a different question.

Ethical question: What is the proper response when you have been wronged? Consider the following two excerpts. In one, the Russian novelist Dostoevsky has a character proclaim that one should not respond judgmentally to others. In the other, the Chinese writer Lu Shun tells a story that suggests that a person who doesn't fight back lacks self-respect. Who is right?

Feodor Dostoevsky, "From talks and homilies of the Elder Zosima," in *The Brothers Karamazov*

Remember especially that you cannot be the judge of anyone. For there can be no judge of a criminal on earth until the judge knows that he, too, is a criminal, exactly the same as the one who stands before him, and that he is perhaps most guilty of all for the crime of the one standing before him. When he understands this, then he will be able to be a judge. However mad that may seem, it is true. For if I myself were righteous, perhaps there would be no criminal standing before me know. If you are able to take upon yourself the crime of the criminal who stands before you and whom you are judging in your heart, do so at once, and suffer for him yourself, and let him go without reproach. And even if the law sets you up as a judge, then, too, act in this spirit as far as you can, for he will go away and condemn himself more harshly than you would condemn him. And if, having received your kiss, he goes away unmoved and laughing at you, do not be tempted by that either: it means that his time has not yet come, but it will come in due course; and if it does not come, no matter: if not he, then another will know, and suffer, and judge, and accuse himself, and the truth will be made full. . . .

If the wickedness of people arouses indignation and insurmountable grief in you, to the point that you desire to revenge yourself upon the wicked, fear that feeling most of all; go at once and seek torments for yourself, as if you yourself were guilty of their wickedness. Take these torments upon yourself and suffer them, and your heart will be eased, and you will understand that you, too, are guilty, for you might have shone to the wicked, even like the only sinless One, but you did not. If you had shone, your light would have lighted the way for others, and the one who did wickedness would perhaps not have done so in your light.

Lu Xun--from the Preface to *Call to Arms*

[Lu Xun was born in China in the late nineteenth century. His homeland was effectively under foreign control: large parts of the more prosperous areas of China had been divided up among the various European nations. Recognizing the backwardness of China, he decided to study modern medicine:]

These inklings took me to a medical college in the Japanese countryside. It was my fine dream that on my return to China I would cure patients like my father who had suffered from the wrong treatment, while if war broke out I would serve as an army doctor, at the same time promoting my countrymen's faith in reform.

[While he was studying in Japan in 1904, the Russo-Japanese war broke out. The two countries were essentially fighting over which would get to dominate the northeasterly parts of China.]

I have no idea what improved methods are now used to teach microbiology, but in those days were shown lantern slides of microbes; and if the lecture ended early, the instructor might show slides of natural scenery or news to fill up the time. Since this was during the Russo-Japanese War, there were many war slides, and I had to join in the clapping and cheering in the lecture hall along with the other students. It was a long time since I had seen any compatriots, but one day I saw a news-reel slide of a number of Chinese, one of them bound and the rest standing around him. They were all sturdy fellows but appeared completely apathetic. According to the commentary, the one with his hands bound was a spy working for the Russians who was to be beheaded by the Japanese military as a warning to others, while the Chinese beside him had come to enjoy the spectacle.

[In telling this story elsewhere Lu Xun adds: "And there was I, too, in the classroom"--he too was made to be an apathetic Chinese spectator, "enjoying the spectacle."]

Before the term was over I had left for Tokyo, because this slide convinced me that medical science was not so important after all. The people of a weak and backward country, however strong and healthy they might be, could only serve to be made examples of or as witnesses of such futile spectacles; and it was not necessarily deplorable if many of them died of illness. The most important thing, therefore, was to change their spirit; and since at that time I felt that literature was the best means to this end, I decided to promote a literary movement.

Now shift perspectives. Instead of taking the point of view of the victim, take the point of view of the Benevolent Dictator, a/k/a the Philosopher King. It's your job to make society as a whole better. Clearly you want to prevent your subjects from doing harm to each other in the future, so you set up schools and a police force.

Question: But why should you care to step in after something has happened—after the skateboard is gone? What institutions can you set up to handle the problem(s)?

This is not a made up problem. Consider the case of South Africa, for example. After the end of the apartheid (legal segregation) system in the early 1990's, the new constitution set up a Truth and Reconciliation Commission (TRC). The TRC's duty was to investigate and do something about the gross abuses of human rights that had been perpetrated by all sides during the liberation struggle—the state-sponsored kidnappings, torture and killings, and the terrorist violence of the anti-apartheid groups. According to the TRC, the only way to achieve real democracy was through *reconciliation* among the past enemies. And the only way to achieve reconciliation was to reveal the *truth*. In the following excerpt from the TRC's final report, they describe the four different kinds of truth they were looking for.

Question: How do the different truths relate to each other? Can we do without one or more?

Question: Is the TRC right? Is truth necessary for reconciliation?

Question: How can each of the truths be established? What formal procedures would you recommend the TRC adopt to find each? In particular, what kinds of *speech* would be required?

Question: How would you find the truth(s) about what happened in York, PA—the case from the first day? Would truth help or hinder reconciliation there?

South Africa Truth and Reconciliation Commission, FINAL REPORT
Presented to President Nelson Mandela on 29 October 1998
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* TRUTH

But what about truth – and whose truth? The complexity of this concept also emerged in the debates that took place before and during the life of the Commission, resulting in four notions of truth: factual or forensic truth; personal or narrative truth; social or 'dialogue' truth (see below) and healing and restorative truth.

Factual or forensic truth

The familiar legal or scientific notion of bringing to light factual, corroborated evidence, of obtaining accurate information through reliable (impartial, objective) procedures, featured prominently in the Commission's findings process. . . .

The Act required that the Commission "prepare a comprehensive report which sets out its activities and findings, based on factual and objective information and evidence collected or received by it or placed at its disposal" (emphasis added). In pursuing this factual truth, the Act required the examination of two essential areas.

The first of these related to findings on an individual level. The Commission was required to make findings on particular incidents and in respect of specific people. In other words, what happened to whom, where, when and how, and who was involved? In order to fulfil this aspect of its mandate, it adopted an extensive verification and corroboration policy to make sure that findings were based on accurate and factual information. . . .

However, all truth commissions have their limitations. In the words of Michael Ignatieff:

"All that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse. In Argentina, its work has made it impossible to claim, for example, that the military did not throw half-dead victims in the sea from helicopters. In Chile, it is no longer permissible to assert in public that the Pinochet regime did not dispatch thousands of entirely innocent people..."

Applying Ignatieff's notion of reducing the number of lies, one can say that the information in the hands of the Commission made it impossible to claim, for example, that: the practice of torture by state security forces was not systematic and widespread; that only a few 'rotten eggs' or 'bad apples' committed gross violations of human rights; that the state was not directly and indirectly involved in 'black-on-black violence'; that the chemical and biological warfare programme was only of a defensive nature; that slogans by sections of the liberation movement did not contribute to killings of 'settlers' or farmers; and that the accounts of gross human rights violations in the African National Congress (ANC) camps were the consequence of state disinformation. Thus, disinformation about the past that had been accepted as truth by some members of society lost much of its credibility.

Personal and narrative truth

At a hearing of the Commission in Port Elizabeth on 21 May 1996, Archbishop Tutu said:

"This Commission is said to listen to everyone. It is therefore important that everyone should be given a chance to say his or her truth as he or she sees it..."

By telling their stories, both victims and perpetrators gave meaning to the multi-layered experiences of the South African story. These personal truths were communicated to the broader public by the media. In the (South) African context,

where value continues to be attached to oral tradition, the process of story telling was particularly important. Indeed, this aspect is a distinctive and unique feature of the legislation governing the Commission, setting it apart from the mandates of truth commissions elsewhere. The Act explicitly recognised the healing potential of telling stories. The stories told to the Commission were not presented as arguments or claims in a court of law. Rather, they provided unique insights into the pain of South Africa's past, often touching the hearts of all that heard them.

By providing the environment in which victims could tell their own stories in their own languages, the Commission not only helped to uncover existing facts about past abuses, but also assisted in the creation of a 'narrative truth'. In so doing, it also sought to contribute to the process of reconciliation by ensuring that the truth about the past included the validation of the individual subjective experiences of people who had previously been silenced or voiceless. The Commission sought, too, to capture the widest possible record of people's perceptions, stories, myths and experiences. It chose, in the words of Antjie Krog, a South African writer and poet, "the road of... restoring memory and humanity". It is what Oxford University historian, Timothy Garton Ash, sees as "the most promising" way – a way that offers "history lessons" as an alternative to political trials, uncovering what happened and identifying lessons for the future. As such, the Commission sought to recover parts of the national memory that had hitherto been officially ignored. . . .

Social truth

While narrative truth was central to the work of the Commission, . . . it was in its search for social truth that the closest connection between the Commission's process and its goal was to be found.

Judge Albie Sachs, a prominent participant in the debates preceding the establishment of the Commission and now a Constitutional Court judge, made a useful distinction between what he called 'microscope truth' and 'dialogue truth'. "The first", he said, "is factual, verifiable and can be documented and proved. 'Dialogue truth', on the other hand, is social truth, the truth of experience that is established through interaction, discussion and debate" (emphasis added).

In recognising the importance of social or 'dialogue' truth, the Commission acknowledged the importance of participation and transparency. Its goal was to transcend the divisions of the past by listening carefully to the complex motives and perspectives of all those involved. It made a conscious effort to provide an environment in which all possible views could be considered and weighed, one against the other. . . .

It is particularly important to emphasise that establishing the truth could not be divorced from the affirmation of the dignity of human beings. Thus, not only the actual outcome or findings of an investigation counted. The process whereby the truth was reached was itself important because it was through this process that the essential norms of social relations between people were reflected. It was, furthermore, through dialogue and respect that a means of promoting transparency,

democracy and participation in society was suggested as a basis for affirming human dignity and integrity.

Healing and restorative truth

The preceding discussion rejects the popular assumption that there are only two options to be considered when talking about truth - namely factual, objective information or subjective opinions. There is also 'healing' truth, the kind of truth that places facts and what they mean within the context of human relationships - both amongst citizens and between the state and its citizens. This kind of truth was central to the Commission.

The Act required that the Commission look back to the past and forward to the future. In this sense, it was required to help establish a truth that would contribute to the reparation of the damage inflicted in the past and to the prevention of the recurrence of serious abuses in the future. It was not enough simply to determine what had happened. Truth as factual, objective information cannot be divorced from the way in which this information is acquired; nor can such information be separated from the purposes it is required to serve.

It is in this context that the role of 'acknowledgement' must be emphasised. Acknowledgement refers to placing information that is (or becomes) known on public, national record. It is not merely the actual knowledge about past human rights violations that counts; often the basic facts about what happened are already known, at least by those who were affected. What is critical is that these facts be fully and publicly acknowledged. Acknowledgement is an affirmation that a person's pain is real and worthy of attention. It is thus central to the restoration of the dignity of victims.

*** THE RELATIONSHIP BETWEEN TRUTH AND RECONCILIATION**

It was frequently suggested that the Commission's quest for more truth and less falsehood would result in deepened divisions rather than in the promotion of national unity and reconciliation. This concern must be taken seriously, although some of the mistaken assumptions underlying (much of) this criticism must be noted.

There can be little doubt that gross violations of human rights and other similar abuses during the past few decades left indelible scars on the collective South African consciousness. These scars often concealed festering wounds that needed to be opened up to allow for the cleansing and eventual healing of the body politic. This does not mean, however, that it was sufficient simply to open old wounds and then sit back and wait for the light of exposure to do the cleansing. Nor could the Commission be expected to accomplish all the healing that was required. . . .

The Commission sought to uncover the truth about past abuses. This was part of "the struggle of memory against forgetting" referred to by Milan Kundera. But it was, at the same time, part of the struggle to overcome the temptation to remember in a partisan, selective way. . . . An inclusive remembering of painful truths about the past is crucial to the creation of national unity and transcending the divisions of the past.