

## WITNESSES AND TESTIMONIES OF THE PAST

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e-mail: povolo@unive.it**ABSTRACT**

*Each testimony conveys more or less explicitly a specific historical truth and assumes a precise meaning with full significance only in the light of the specific conclusions of the present, which may also not coincide exactly with the historiographical process that had previously selected and recreated those conclusions. The process of review and revision of the past is in fact such as to constantly reposition the relationship between facts, evidence and interpretations. If the former constitute data that are difficult to disregard, the relations between the way that they are represented and their mode of demonstration are necessarily mutable and require constant (re)adjustments. Ultimately, testimonies manifest themselves essentially as narratives that cannot, in any case, be separated from the values assigned to the traces of the past and the paths that these traces suggest. Cultural values and political systems are the most significant factors, which, over the centuries, have assigned a changing meaning to testimony and, above all, the particular emphasis placed on testimony within an increasingly complex framework of interpretation.*

*Key words: testimony, clues, evidence, cultures*

The proceedings on the topic of testimony, considered in its many cultural meanings, reflect the complexity and multiplicity of identifiable approaches in the context of the ineliminable relationship between past and present, as well as what salient details concerning the former are considered important or even essential to be conveyed in order to perform a specific function pertaining to the present.

Each testimony therefore necessitates a process of *historiographical* reconstruction: a portion of the past believed to be of some significance is recorded, processed and interpreted within a complex system of information (of a greater or lesser variety and number) before being proposed in the present as *historical truth*.<sup>1</sup>

However, it also has to be added that any testimony, which conveys a specific historical truth, assumes a precise meaning with full significance only in the light of the specific conclusions of the present, which may also not coincide exactly with the historiographical process that had previously selected and recreated those conclusions. The process of review and revision of the past is in fact such as to constantly reposition the relationship between *facts*, *evidence* and *interpretations*. If the former constitute data that are difficult to disregard, the relations between the way that they are re-presented and their mode of demonstration are necessarily mutable and require constant (re)adjustments. It is through the very multitude of *interpretations* that confirmation and veracity are conferred on the *evidence*.<sup>2</sup> It is a significant topic, which has in recent decades affected the very notion of *historical truth* (in the broadest sense of the term), to the point of compelling more than one author to emphasize the similarities or the contiguity between the profession of the historian and that of the court judge (Ginzburg, 1991; Ginzburg, 2000, 65–66).

It seems clear that these aspects of the problem involve an emphasis on the *cultural* values of any testimony; but they are also a reflection on the modes of organization of conflicts and on the characterization of the typology of evidence provided in the context of different legal systems. Indeed, testimony occupies a key role in the typology of evidence, which invariably contains both cultural and political aspects. Even in the case of so-called *transcendental* evidence (evidence that is based on supernatural powers, as in ordeals and divination), the oath that accompanies the various forms of testimony would seem to encompass eminently *cultural (and religious)* values; but when one considers that, in societies that apply it, familial power is not clearly distinguished from power that is political (such as in the case of early medieval Germanic tribes), it is clear that there is also a close relationship between the aspect of the testimony and the nature of the socio-political organization that produces it. And, to draw from the example that was proposed just above, in the early Middle Ages the person who was called to *say the right* was not actually required to form a

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1 On the more general reference to the collective volume edited by Lackey and Sosa, 2006.

2 This is an aspect addressed in a precise manner in Evans, 2001, 99–101.

judgement, but rather to choose the type of evidence that would settle the conflict.<sup>3</sup> It is therefore the role of a *third party* to determine the type of proof – and, consequently, the specificity of the *truth* that the proof is held to provide (Cooney, 1998, 6–8). As has been noted, judicial evidence tended not to serve so much to prove the truth as to convince the third party who was to settle the conflict (Rouland, 1992, 300). It is no coincidence that transcendental evidence is widespread precisely in those social and political contexts in which a third party, who would be clearly distinguishable from the two parties involved in the conflict, cannot be identified: in such situations bilateral agreements and arbitration tend to prevail.

In so-called semi-complex and complex societies<sup>4</sup> *transcendental evidence* gradually gave way to *material evidence*, in which, as we shall see, investigation takes a leading role. In fact, for many centuries, legal systems (but not only) were characterized by *mixed evidence*, therefore distinguished by both material and symbolic or sacral aspects.<sup>5</sup> And besides, the presence of the oath that to this day characterizes judicial testimony, seems to refer to the strong symbolic dimension assigned to the juridical process, both civil and criminal (Garapon, 2007, 13–16).

These observations allow a better understanding of the value of testimonial evidence, which (including its confessional variant) is characterized by both symbolic and material aspects. For, as we shall see, testimonial evidence was for a long time essentially linked to the social role of the witness (gender, age, status...). And the confession itself actually involved a form of testimony that very often had little to do with a genuine search for material truth (Brooks, 2000, *passim*). Considered as a means of acquiring a truth of which the accused was the depositary, the confession, too, accompanied by the judicial institution of torture, lost over time its characteristic transcendent tone to become a mere constituent – although significant – of a complex reconstruction of reality (Langbein, 1976, 64–69).

In fact, the great transformation would only occur in the seventeenth century, when so-called *moral evidence* – thus evidence being constituted by the free ruling of the judge – became affirmed.<sup>6</sup> It is no coincidence that it was as part of a reconstruction of the *truth*, entrusted to the investigating judge, that testimony would gradually

3 As observed by Van Caenegem, in the early Middle Ages, "when the witnesses of both parties refused to renew their testimony and the judges, therefore, found themselves at a dead end, a duel was the only possible way out. The judges did not in any case carry out a critical comparison of the two parties or witnesses that could reveal a contradiction", Van Caenegem, 1995, 47–48.

4 Distinctions which, as is often pointed out by anthropologists, do not refer to a greater or lesser *simplicity* of the societies, but to the specific nature of their law and the existing relations between parental or family power and political power. For disambiguation of such distinctions, cf. Fabietti, 1991, 173–174.

5 For the distinction between the two types of evidence cf. again Rouland, 1992, 301.

6 This topic is extensively treated in Rosoni, 1995 and Marchetti, 1994, *passim*. The text of Isabella Rosoni focuses specifically on the birth of circumstantial evidence, while that of Paolo Marchetti devotes most attention to the changes that affected the institution of judicial confession.

lose its traditional connotations in order to take on a somewhat relativized significance, the value of which would be more and more determined in the sphere of a more complex *legal truth*. And indeed it is precisely during the seventeenth century that we can locate the enucleation of a *judicial inquiry*, headed by an investigating judge, that will be less willing to rely entirely on the evidence gathered during the investigation (Povolo, 2007, 54–65).

Apart from that, the subtle interplay of any historiographical reconstruction (in the widest sense of the term) is conducted in the significant relationship between *clues* and *evidence*. The former are in fact, in any case and discipline, more or less visible and consistent traces of the past. They are claims of past events. And we could say that the past is essentially filtered through clues. The latter are, conversely, always verifications of already existing clues, implemented in the present. As is well demonstrated by the jurist Luigi Ferrajoli, clues are always proven facts of the past from which we infer another fact; while evidence is constituted from the present as evidential facts, in relation to a fact from the past, inasmuch as the clues are the subject of experimentation (Ferrajoli, 2000, 108–109).

It is clear that the strength and reliability of the evidence (compared to the past) is given by the reliability and effectiveness of the evidence medium (documents, testimonies, reports, etc.). We can therefore have reliable evidence (e.g. an irrefutable document) built on subtle or irrelevant clues (the contents of the document itself being barely significant); or barely relevant / reliable evidence (a report carried out under a non-stringent procedure) based on serious and significant clues (for example: a footprint in the ground or an alleged positive DNA match) (Ferrajoli, 2000, 111).

In this sense, the role of oral evidence assumes a fundamental significance. Not only because its possible relevance as evidence is directly invested, given its reliability, partiality, visual and auditory perception, etc., but also, as already noted, because it is involved in its own cultural and political dimension that reveals its changing position over time and in different social contexts.

No discipline can ignore, in its practical and theoretical formulations, reflections that directly determine the value and significance of testimony. This includes aspects that have become decisive in areas of hard science. Even the most established scientific paradigms have been shown to have a deeply rooted fragility because they are based on conventions that derive their logic from seemingly stainless *testimonies*, whose veracity was not truly tested. Moreover, in practical terms, the creation of new paradigms often avoids a substantial *revision* of the preceding historical truth (Evans, 2001, 167).<sup>7</sup>

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7 The Anglo-Saxon historian refers to the well-known text of Thomas Kuhn, *The Structure of Scientific Revolutions*, which appeared in 1962, and which tended to show how science itself did not necessarily have a progressive route and that the prevailing scientific claims were rarely subject to a proper process of falsification.

The *instrumental* use of testimony seems decisive in determining the subtle and complex links that connect the past to the present; similar to the changing role it plays in every judicial and historiographical reconstruction.

It is interesting to compare and contrast the role of testimony in traditional and community systems with the analogous role played in systems in which written culture predominates. It is found in societies that are profoundly stratified through concepts of status and hierarchical classifications.

In oral and traditional cultural systems, individual testimony seems less distinct and only meaningful to the extent that it is able to represent collective values. The informal processes of its transmission are instrumental in assigning some specific meanings to the events of the past: in particular, in narrow territorial spheres and in the personal identification of the transmitter of information. But the *cultural* aspects of testimony in traditional spheres are also essential for characterizing their specificity: the transmission of information occurs according to interpretative rules that reproduce as much new material as emerges: an inevitable part of perpetuating the existing ideal order (as it has always been ...).<sup>8</sup>

The great social and economic transformations that were recorded in the twelfth century significantly affected the customary value of testimony. It is in this century that continental Europe registered the rediscovery of Justinian's *Corpus*; and written law, as interpreted by judges trained in Roman law, took on a certain importance and political significance that would considerably affect the dominant culture of the following centuries. A comparison with England and its legal system of *common law* relevantly highlights the impact of the transformations that occurred during this period; but also the different value assigned to testimony in considerably varied political contexts. In England, in fact, the emergence of the *jury* replaced the old system of trial by ordeal (Van Caenegem, 1995, 32–38). The collective testimony, centred on community values and customary traditions<sup>9</sup> thus inevitably retained its value as *transcendental evidence* – implicit, evidently, in the political value assigned to the jury in a country that, first of all, had seen the rise of monarchical power and large courts. In contrast, in continental Europe – characterized by more fragmented political systems – the old collective testimony, of customary origin and centred on the oath of the community elders, quickly lost significance and was replaced by individual testimony. As has been argued, "testimonial evidence underwent a profound transformation: the old *coniuratore*, who swore as a group on the reliability of the statements sworn by one party, became witnesses in the modern sense of the word" (Taruffo, 2009, 25–26). The credence given to individual testimony by the judge was clearly intended to recreate a different *truth*, no longer of a mythical and transcendent

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8 Issues widely discussed in Rouland, 1992, 195 ff.

9 The relationship between blood feud, pages and state can be read about in Bossy, 1983.

nature. But above all it reflected, with the affirmation of a learned and written law, the new political realities that were emerging in continental Europe and particularly in Italy (Kelly, 1996, 151–183; Prodi, 2000, 133–137).

It must also be added that, in the context of traditional communities, the testimony of "hearsay" often has a value similar to that of direct testimony (eyewitness); often the former even has a surplus value when reported by a witness who is given a personal dimension (a respectable individual, an elderly member of society, etc.) (Rouland, 1992, 195–200).

These traits can burgeon; adopt unpredictable meanings in the moment in which the (traditional) testimonies betray customary indications in their transmission (among people who know each other and share the same territorial context); and cross community boundaries. An example is a well-studied phenomenon in connection to the *greatest fears*: news that quickly assumes a different meaning as the collective referent jumps around and is manipulated by unforeseen events (Lefebvre, 1973, *passim*).

But the same remarks may apply with regard to the judicial review exercised within them. The testimony whose role is widely acknowledged by all those who share a particular social context will tend to preserve its mainly oral and customary traits. It will be inclined to assume a written form necessarily entrusted to professionals (notaries, lawyers, etc.) in the moment when that same context is subjected to a process of stratification and strong geographical and social mobility. This aspect emerges clearly in the marriage regulations developed by canon law, in particular by the Council of Trent: the two witnesses and the presence of the priest would have to legally establish the validity of a sacramental act that also still consisted in the exchange of consent between the two betrothed (Gaudemet, 1989, 213 ff.). Similarly, the so-called *customary marriage*, that is a simple agreement between a man and a woman to regard each other as husband and wife, was widespread in the United States until the early nineteenth century, especially where the population was less dense and there was a shortage of ecclesiastics (Friedman, 1995, 199–201).

The role of testimony is substantially different in cultural systems in which writing is predominant and appears in social contexts where stratification is focused on status or profession.<sup>10</sup> Writing moves in the first place towards an abstraction of content, assigning a decisive role to those who are the instruments of transmission (this was discussed at the earlier conference on cultural interpreters). Testimony itself, however, seems less manipulable and must subject itself to predetermined criteria. The selection criteria for testimony in writing-based cultures remain interesting to consider; they essentially respond to the need to mirror hierarchical structures or to

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10 An extensive reflection on the motivations and consequences of the assertion of writing was done by Jack Goody, cf. Goody, 1988, *passim*.

ends that are integral to the respective social classes or professional groups. This different type of manipulation (with respect to traditional systems) seems evident in the greater significance given to individual testimony, to its perceptive and visual dimension. On the contrary, precisely because of its different placement in the present, written testimony seems to be free of the purposes that often distance it from the processes of historical reconstruction. Academies, professional groups and institutional entities seem for the most part to assign strongly selective values relative to the original historical truth.<sup>11</sup>

The characteristics of each form of testimony are clearly inseparable not only from the structure of a given community, but also from the forms of social control implemented in that community.<sup>12</sup> In cultures strongly pervaded by the idiom of honour, symbols, gestures and attitudes constitute an inseparable part of the reproduction of the past, with a strong representation of collective values inherent to every individual testimony.<sup>13</sup> It suffices to bring to mind the oldest forms of justice, which generally tended to exercise a social-control function, pursuing the role of the *criminal* rather than the type of *crime* per se (Lenman, Parker, 1980, 13–16).

It is further necessary to thoroughly consider the role played within the context of different cultural forms by a particular type of testimony: the *gossip* or the *rumour*.<sup>14</sup> A testimony of 'hearsay', which apparently takes place according to procedures specific to the cultural contexts, seems to offer itself as an attempt (and this distinguishes it from mere gossip) to recreate a different truth than the official.

As already noted, testimony seems to assume different meanings in institutional contexts that use it more strictly as a means for ascertaining the truth, such as is the case with judicial systems. It is inextricably linked to the system of evidence, but also to the procedural rites applied. It is worth remembering, if only briefly, the long history of testimony: at first under the system of *legal evidence* or learned evidence; and then placed in a cultural context focused on *moral evidence* and on the free ruling of the judge. Even if often understood as a system of direct evidence, in truth it is characterized mainly (in the complex relationships between deduction, induction and ab-

11 As Peter Stein has clearly shown, "the mere existence of a text containing the law gives room for unthinkable of analysis and interpretation, which did not exist when the law was not written, and this promotes the development of a new class of experts ready to advise litigants at the individual level about the meaning of the law", cf. Stein, 1987, 90.

12 As noted by Donald Black, "when a moralistic crime is handled by the police or prosecuted in court, the official definition of the event is drastically different from that of the people involved, particularly from that of the alleged offender", cf. Black, 1983, 38.

13 Referrals to the various essays in the volume *Honour and History in Mediterranean Societies*, particularly that of D'Onofrio, 1989, 65–67 and also Di Bella, 2008, 75–87.

14 As stressed by Coady (2006, 262) "gossip may be true and known or justifiably believed to be such, rumor has by (my) definition no strong justificatory base".

duction) as a present-day research of past events (clues).<sup>15</sup> Or, to an even greater degree, with the value assigned today to scientific evidence that seems to recreate other forms of testimony (from fingerprinting to DNA testing).<sup>16</sup> It is interesting to reflect on the value assigned to oral testimony in various judicial systems over the course of time. As for legal opinions, these are developed as a kind of catalogue involving society in its entirety (women, servants, prostitutes, etc.). In this context, courtroom confession takes on particular importance: a testimony given at a trial certainly permits gathering together social and familial relationships, which are then placed at the forefront during judicial proceedings, both criminal and civil, even if with differing modality and intensity.

The value of testimony is broad: in the literary, artistic and cinematographic spheres it is clear that it is essentially a search for the 'self', but it can also be posited as the expression of a particular historical context. Even though the selection processes are clearly and deliberately 'arbitrary', these types of testimony can assume a significant historical value.

The memoir can certainly be considered as a particular form of testimony: in the sense that it primarily aims to reconstruct the memory of certain events, but also when it becomes an artificial synthesis of an entire life (an obvious example is Carlo Goldoni's *Memoirs*) (Bosisio, 1993). Furthermore, the relationship between film and history, subjected in recent years to a careful examination by scholars, should also be considered (see Guynn, 2006 and especially Rosestone, 1995 and 2006); as should that between literature and history. Both film and the historical novel have an elevated potential to reproduce the past due to the technical specifications entailed in their nature – however, deliberately circumventing the interpretative links that, as has been said, link the past to the present. It is also not simply a matter of defining and distinguishing, as Alessandro Manzoni observed, between *truth* and *likelihood*, between a historical truth; that is, between a somehow *certain* (or, rather, proven) truth and a probable truth, which is lacking of any circumstantial evidence.<sup>17</sup> In fact, as has increasingly been suggested by cinematographic developments (narrative techniques, special effects, etc.), *likelihood* has often become essential for *forcing* a truth

15 These are complex issues that are merely mentioned here. On the relationship between induction, deduction and abduction cf. different interventions in Eco, Sebeok, 2000.

16 Cf. Taruffo, 2009, 213–218, which associates scientific evidence (and its *certainty*) to the type of *inference* adopted: "A piece of real scientific evidence provides guarantees of a high degree of reliability in the information it produces, but nevertheless confers a certain degree of confirmation [...] to the statement which is the subject of evidence." A positive view on the use of scientific evidence in Haack, 2007, 118–119; on the ambiguity of scientific evidence in a trial system based on the *burden of proof* cf. Gaskins, 1992, 164–166. For a history of fingerprints and identification cf. Cole, 2001, *passim*.

17 For the Manzonian text, cf. Viola, 1968.

which, as noted by Mar Ferro, is often unwilling to appear as a sort of expropriation carried out by certain institutional apparatuses (Ferro, 1988, 89–90).

Testimony is therefore a broad concept, which involves relevant aspects of the relationship between past and present: consider (but these are merely examples) the inscriptions and plaques that dot cities and towns, the monuments to the fallen in wars (either national or wars for independence) through which nation states have wished to reproduce the controversial relationship between testimony and collective identity. These are testimonies bearing strong symbolic values, which seemingly attempt to enclose the past in rigid and unbendable interpretive schemes in order to transmit them as they are for posterity. One could say that every tombstone or mediaeval inscription of the commemorative type bears a meaningful political value; a witness, in the first instance, to practices attempting to reproduce the power structures ideologically oriented towards the past. Conversely, the rather widespread practice of the *damnatio memoriae*, denoting any pronounced forms of deviance or dissent, tends to reveal the fragility of the consensus enjoyed by a political system.<sup>18</sup>

Artistic representations open an often-indecipherable field of reference since, as David Freedberg recalls, they operate on a series of complex levels in which the world of emotion plays a major role. For example, the testimony represented by the variegated manifestations of the *ex-voto* reveals the theme of divine grace and the indescribable relationship that exists between the earthly and the divine (Freedberg, 2009, 211).

Testimony, understood as a documentary reproduction of past events, takes on a very important meaning at the historical level. It accounts for the importance of historical fact and reproduces the links between the factuality of events (for example, a document that discusses a popular uprising) and its own capacity to fashion itself as the proof of a theory through the interpretation of the historian (following the same example, the causes and social interconnections of that same uprising). This effort, driven by post-modern historiography, to reduce testimony to mere *literary expression*, before even showing itself to be an approach dominated by scepticism, constitutes a fundamental crisis of the profession of the historian and perhaps ultimately of the very value assigned to the past with respect to a boldly and rashly projected present towards an indefinite future.<sup>19</sup>

Courtroom testimony takes on a particular importance in the study of history as mentioned above: not only when, in a penal context, it becomes part of an inquest that aims at legal truth, but above all in jurisdictional conflicts, where testimony is made explicit as a historiographical instrument for attesting to rights, claims and de-

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18 For some aspects of the relationship between iconography and justice cf. Ortalli, 1979 and Edgerton jr., 1985, 70–73.

19 For these elements I refer again to Evans, 2001, *passim*.

mands. The dialectic between testimonies that pertain to parties in conflict therefore reveals the processes of selecting and excluding sources from the past. Court cross-examination is, for example, taken over by the important issue of the burden of proof, which is inevitably part of the same historical and procedural proof, as it acts directly on the problematic question of ascertaining the truth.<sup>20</sup>

In general, with any kind of testimony (historical, literary, artistic, archaeological...), one can observe that above all it defers to the *cultural* values of a given society and historical period. This means firstly that any testimony conveys a set of meanings that go beyond its own intrinsic properties. And this lack in terms of the specific individual properties of the testimony, in addition to deferring to its own cultural timbre, can often even reveal the political and social dimension of the testimony in which it is located. In a strictly semantic sense the analytical spaces are equally interesting: particularly in courtroom testimonies where the language easily lends itself to duplicity or reticence – semantic fields that trespass, at least theoretically, into false testimony. This last category is extremely interesting in its own right: irrelevant in terms of a pure research into truth, it is contrarily a significant expression of a specific social context. And the reticence, conversely, often refers not only to the individual predisposition to not get involved, but also to a broader cultural space that contains or manipulates the individual him- or her-self.<sup>21</sup>

A specific feature of the testimony is therefore assigned to it; not only by those who transmit it, but also by those who, significantly, as a category or group, are often its object of reference. In this way it not only magnifies or diminishes, but also assumes clearly identifiable political and cultural traits; as is the case, for example, with the testimonies involving individuals from the marginal fringes of society. The persistence through time of their original negative features reveals not only the persistence of certain cultural stereotypes, but also the continuity of forms of control evidently serving to maintain the existing social structure; an order which, by its very nature, is also intended to change or be overturned – or at least to take up a more complex interpretative significance, as in the case of forms of *social banditry* studied by Eric Hobsbawm.<sup>22</sup>

The issue of gender is also of great importance in terms of cultural values that characterize the testimony, especially considering that for centuries the social structures under discussion were highly *patriarchal* (Scott, 1986, 33–35). Within the variegated ancient and mediaeval judicial system, the testimony of women was long undervalued; but paradoxically the conflicts that a woman had as a protagonist, in the

20 This topic was addressed in depth by Taruffo, 2009, *passim*.

21 On these aspects of the testimony I refer to the various interventions appeared in Lackey, Sosa, 2006.

22 Particularly in the final edition, Hobsbawm directly addresses the relationship between social banditry and its political and institutional context, cf. Hobsbawm, 2000, 7–18.

multiplicity of her social roles (mother, wife, daughter, widow), express her importance within a society where the familial dimension was predominant. And not surprisingly, in recent decades, the gender issue has become highly relevant, even as a real question of the historiographical reconstruction process.

Witnesses that speak and silent witnesses: they both permeate our present to remind us of the unbreakable link with the past.<sup>23</sup> The task of the present is to give them a voice and an appropriate significance. Focusing on the interpretive procedures that are implemented in order to achieve these objectives is regarded, in the first place, as showing due recognition to the ineliminable value of the past.

The links between testimony, as understood in its broadest significance of *historiographical* nature, and the deepest values of a society are, as we have seen, the litmus test of the complex and ever-changing interrelationship between past and present. It is no coincidence that today they are found especially in the current judicial systems, which, particularly in the United States, seem to be affected by social pressures aimed at achieving *restorative justice*, a justice that is therefore primarily directed at repairing the damage caused to victims (Cantarella, 2007, 197–191). There has also been talk of a *return of the revenge*, an expression of the silent but emerging voice of the victim (Daems, 2004, *passim*). This aspect seems to assign a different role to the testimony and to its placement within a quest for the truth, whose reconstruction – especially over the course of the last two centuries – reveals itself as a complex and well-articulated procedure entrusted to educated and technically trained experts; and this is an aspect that could not be ignored. This role still seems to move between the transcendent and symbolic values and the *material* aspects of the proof while expressing the background tensions inherent not so much, and not only, in the relationship between *law* and *justice* (Miller, 2000, 183–202); but more generally in the controversial issue of assigning values to the past.

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<sup>23</sup> On the judicial implications of the *silent witness* cf. The observations of Laudan, 2006, 162–164.

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