



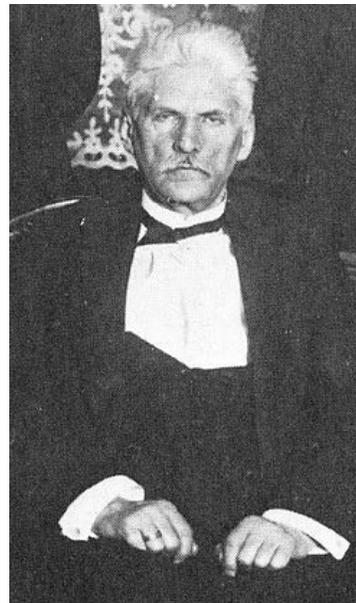
Who is the Victim? The answers of Sociology and Law

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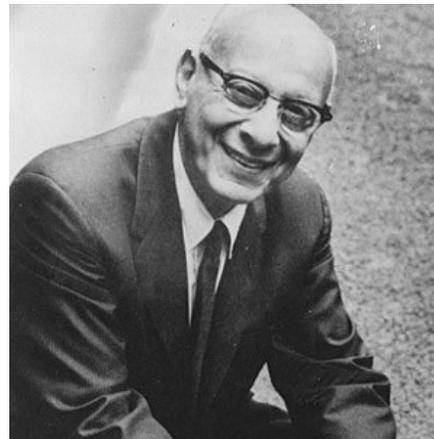
Sociology of Victims

- ▶ **Hans von Henting (1940s):** crime is a product of an interaction between offender and victims. Much of what victims do or who they are, leads to their victimization.



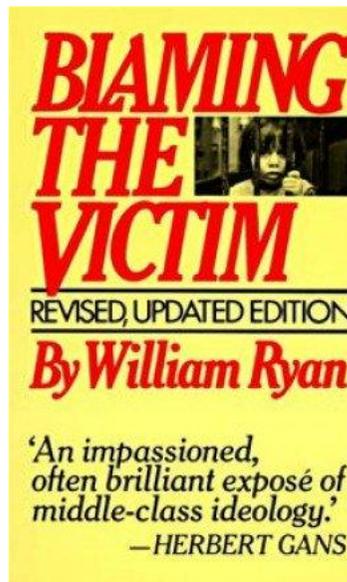
Sociology of Victims

- ▶ **Bruno Bettelheim** (1960): analysis of Holocaust victim, Anne Frank (*The Ignored Lesson of Anna Frank*). In some way victims yearn and are responsible for their victimization (“blaming the victim” – theory rejected, at least for the core crimes).



Sociology of Victims

- ▶ William Ryan (1976) – Erich Goode: differences between blame and cause.
Ex. Young women are more likely to be raped than older women, but they must not be blamed for being raped.



Sociology of Victims

- ▶ **Why must victims be blamed???**
 - **Bettelheim:** for Anne Frank and her family's passivity and naivety for their fate.
 - **Hilberg:** for Jewish's lack of resistance during the Holocaust.
 - **Other scholars:** for Armenians or Native Americans' passivity during the occupation of their territories.



Sociology of Victims

▶ What were you wearing???

Sept. 2017. A University of Kansas art installation, aimed at shattering the myth that a victim of rape must be blamed with reference to their clothes.



Sociology of Victims

- ▶ **What were you wearing???**

It's impossible to deduce the willingness to have sexual intercourse with someone from the victim's clothes (Italian Supreme Court of Cassation., 3rd Section, November 16, 1998).



Sociology of Victims

- ▶ People thinking that rape may be attenuated because of the victims' clothes, refer to the “victim-blaming” theory.



“Blame the victim?
That works for me.”

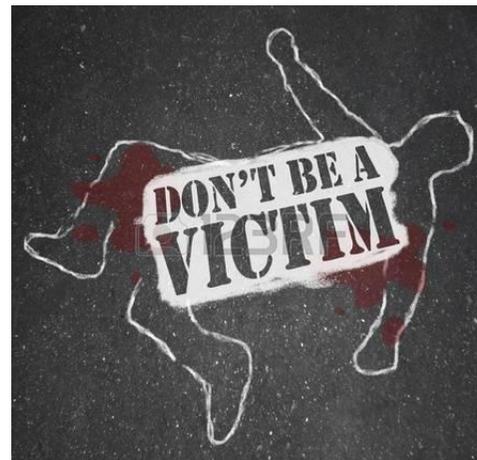
Sociology of Victims

- ▶ Other application of the “victim–blaming” theory
 - The refuse to continue a love affair attenuates the seriousness of rape (Italian Supreme Court does not agree: 3° Sect., December 14, 2011).
 - The victim’s passivity during an undesired sexual intercourse may disprove the existence of rape (Italian Supreme Court does not agree: 3° Sect., May 23, 2013).

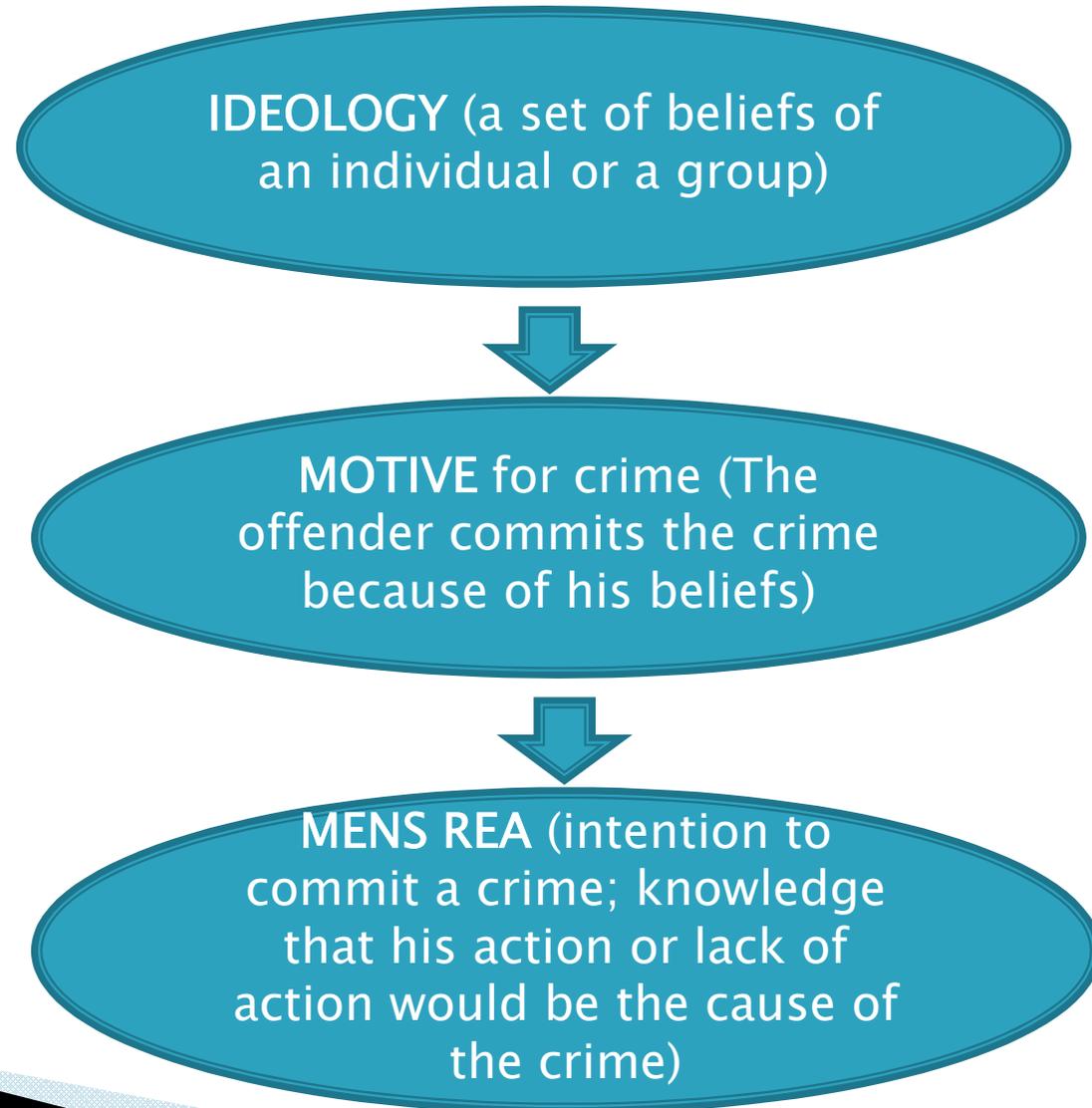


Sociology of Victims

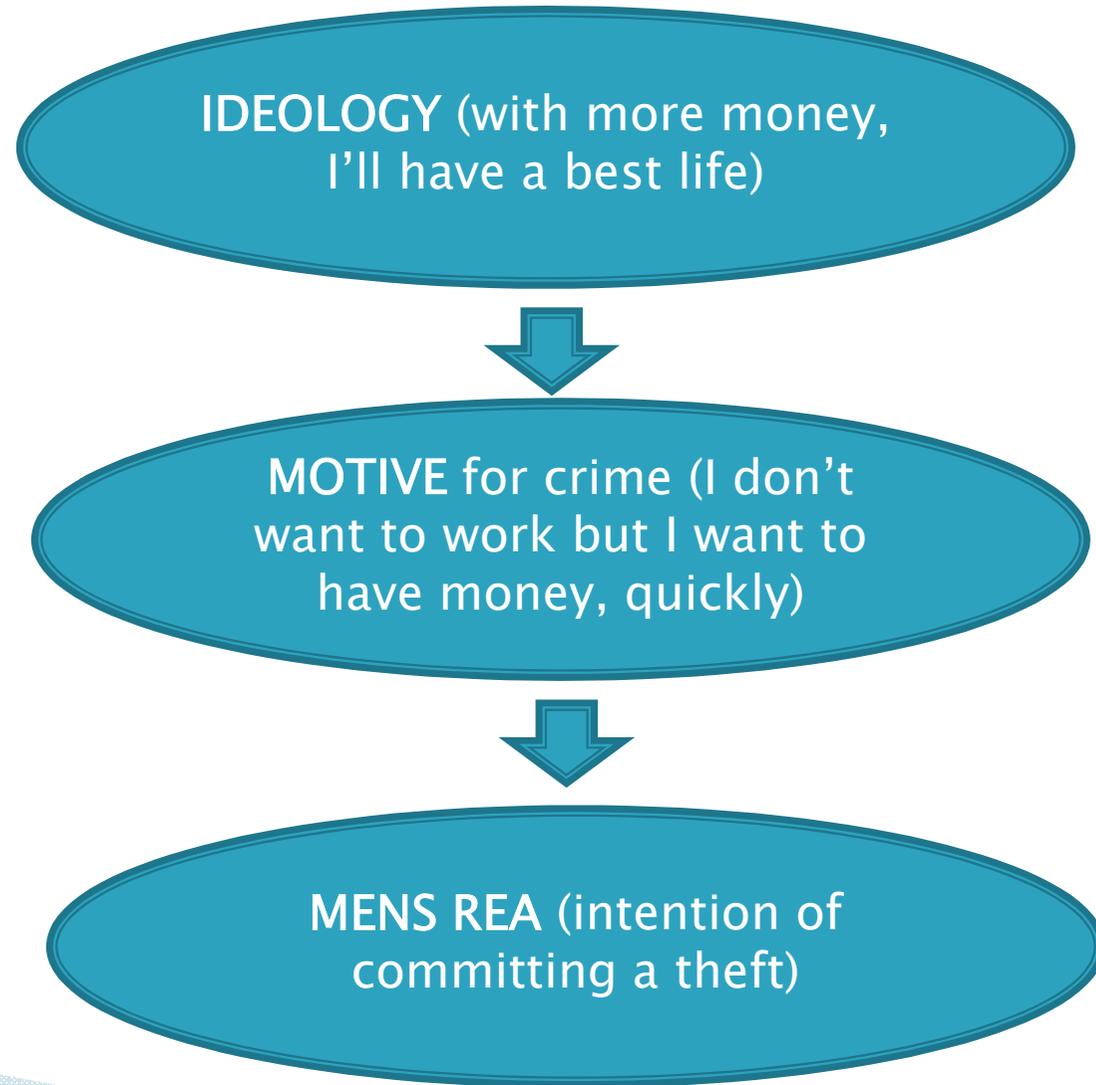
- ▶ Beyond the distinction between *blame* and *cause*... why are people victimized???
- Ideology is the *animus* that triggers crimes.
- Obedience to orders, peer pressure, careerism and conformity added to ideology



Sociology of Victims



Sociology of Victims



Sociology of Victims

- ▶ Side factors ...

E.G. Bullying:

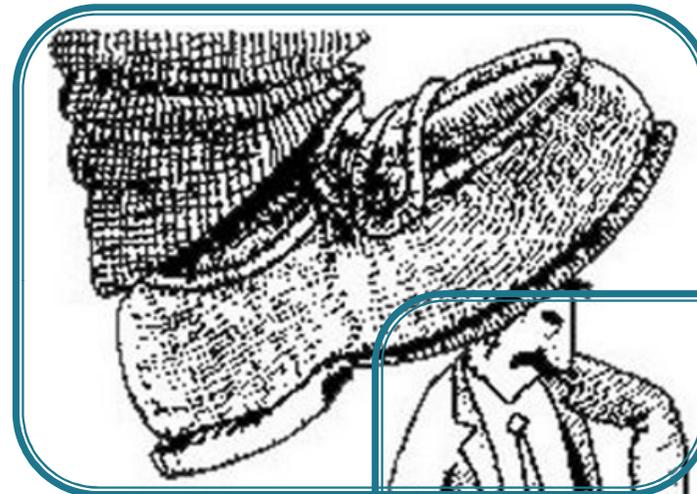
1. Membership of a group;
2. Pressure of other member of group;
3. Compliance with group rules;
4. Group strength and individual weakness;
5. ...



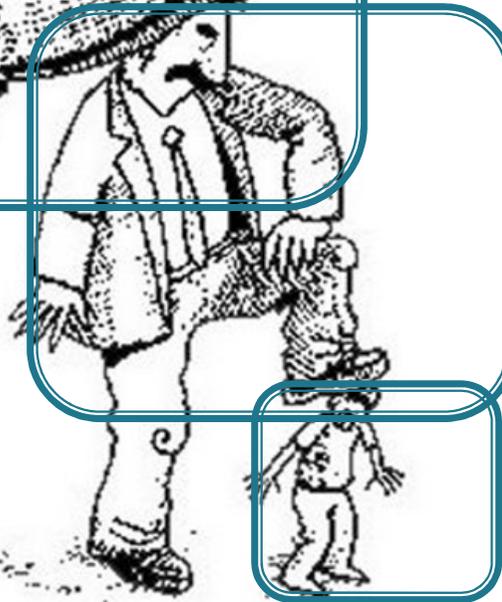
Sociology of Victims

- ▶ All these factors... The law of the strongest.

The offender



Possible intermediate persons (e.g. in a group of teenagers, the leader orders to someone to beat a smaller companion)



The victim

From Sociology to Law

- ▶ **Mediation:** instrument to balance the interaction between the Offender and the Victim.

Offender

Victim

Interaction between the Offender and the Victim during the crime: weakness of the Victim; strength of the Offender.

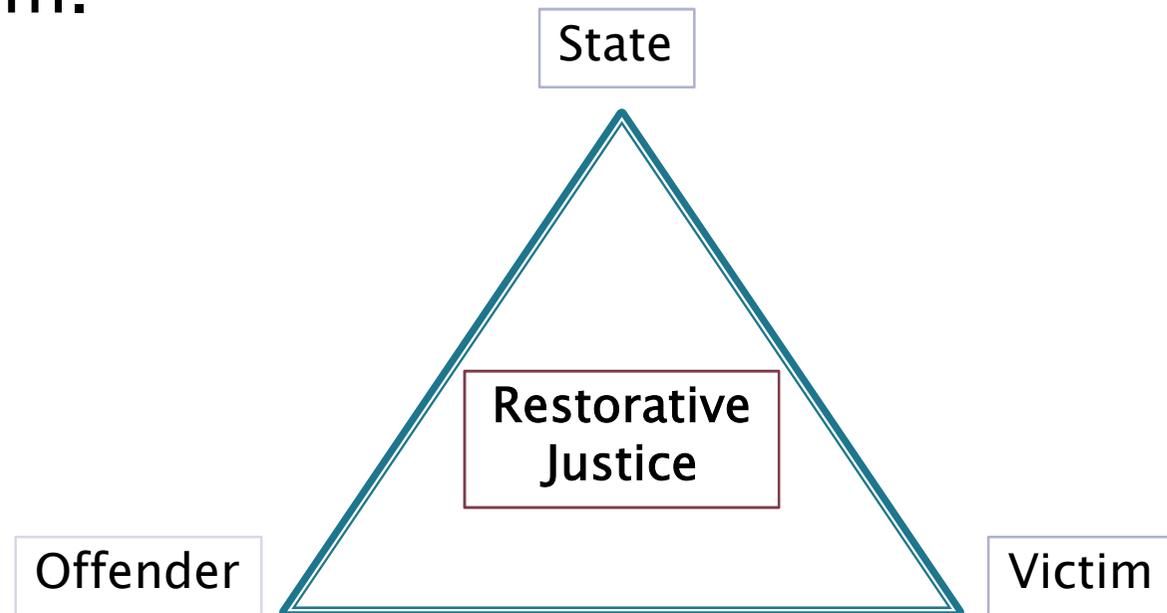
Offender

Victim

Interaction between the Offender and the Victim during the mediation: relationship balanced.

Criminal Mediation

- ▶ Each crime offends: *a)* first of all, the State (i.e., the Community); *b)* and then, the Victim.
- ▶ **Criminal Mediation:** instrument to balance the interaction between the Offender, the State and the Victim.



Criminal Mediation

- ▶ **Restorative Justice:** approach to justice that mediates a resolution agreement between the Offender and the Victim, to satisfy each other, with the involvement of the Community.
- ▶ Restorative Justice \neq **Retributive Justice** (approach to justice that aims at punishing the Offender on the basis the exigence of general prevention).

Criminal Mediation

- ▶ “General prevention may be described as the restraining influences emanating from the criminal law and the legal machinery” (J. Andenaes, *The general preventive effects of punishment, University of Pennsylvania Law Review*, 1996).



Criminal Mediation

▶ Summarizing ...



Retributive Justice

Criminal Law, in a Retributive Justice Systems is an instrument of punishment; according to the Restorative Justice paradigm, it is an instrument useful for mediating between Offender, Community and Victim.

Offender



Victim

Criminal Mediation

- ▶ An Italian Instrument of Criminal Mediation: the *messa alla prova* (procedural probation).



In criminal proceedings for offences punishable with the penalty of imprisonment not exceeding the maximum term of four years, the imprisonment may be replaced by a period of community service. The Offender should repair the damage and remove the consequences of the crime, as far as possible.

Criminal Mediation



▶ Italian “messa alla prova”

At the beginning of the proceeding, the Offender applies for the “messa alla prova” (procedural probation)

While the proceeding is suspended, the Offender should:

- a) Completes the period of Community Service;
- b) Repair the damage and remove the consequences of the crime, as far as possible.

If the Offender satisfies the conditions *sub a)* and *b)*, the Judge should deliver a judgment of dismissal, since the offence has been extinguished.

The procedure is available only once in the lifetime.

Criminal Mediation

- ▶ What is the meaning of “... reparation ... removal ... as far as possible”?????
- Italian Criminal Code and Italian Criminal Procedural Code don't explain the meaning of “as far as possible”.
- There is no rule that compels the Offender to carry out the period of Community Service in the same field which affects the object of the crime committed.
- There is no rule that drafts the criteria useful to quantify the compensation with regard to the economic availability of the Offender.
- There is no rule that explains the role of the Victim in this kind of proceeding.

Criminal Mediation

▶ A case of International Child Abduction.

A German woman carried her daughter to Germany without the consent of the Italian father.

After six months, the woman and the child came back to Italy. The proceeding for the crime of International Child Abduction started before an Italian Criminal Tribunal.

The Offender applied for the "messa alla prova".

In Italy this crime is punishable with the penalty of imprisonment not exceeding a maximum term of 4 years.



Criminal Mediation

- ▶ **Reparation of the damage:** the Victim proved that he had spent €30.000,00 trying to bring her daughter back to Italy.

Although the German mother received from Germany €1.200,00 per month as a a subsidy, the Judge granted the victim just €2.000,00 as an all-inclusive compensation.

(There are No criteria to quantify the compensation)



Criminal Mediation

- ▶ **Community Services:** the Offender proposed to carry out her period of Community Services working in a cleaning company. The Judge ordered her to work in the aforementioned cleaning company for nine hours a week, just for few months. (There is no rule that oblige the Offender to carry out his Community Service in the same field which affects the object of the committed crime)



Criminal Mediation

- ▶ Removal of the consequences of the crime. The Offender asked for money by her *Twitter* Account and a German web-site, in order to pay a lawyer to obtain the exclusive custody of her daughter ... and then travel back to Germany.

In Italian Court's opinion, this behaviour was not enough to prove the Offender's willingness to reiterate the crime.

(No criteria to define what is the "removal of the consequences of the crime")



Criminal Mediation

- ▶ The Italian Judge found the Offender's efforts to be sufficient, and delivered a sentence acquitting her.
- ▶ The Victims appelaed against that judgment.
- ▶ In this case, the “messa alla prova” has not been an efficient instrument of criminal mediation.



Criminal Mediation

- ▶ An Italian instrument of criminal mediation: the extinguishment of the crime thanks to the reparative conducts (Art. 162-ter of Italian Criminal Code).



If the offense is prosecuted only in case of complaint, and the Offender proposes a certain amount of money before the beginning of the debate, if the Offender removed the consequences of the crime, as far as possible, the Judge may declare the extinguishment of the crime.

Criminal Mediation

- ▶ What happens if the **Victim** doesn't accept the offering of the **Offender**???
- ▶ If the **Judge** considers sufficient the offer, he may declare the extinguishment of the crime anyway.



Criminal Mediation

- ▶ A case of Stalking

The stalker offered €1.500,00 to repair the consequences of the crimes.

The Victim didn't accept the offer, but in Judge's opinion this amount was sufficient. He declared the extinguishment of the crime.

(For this reason, law December 4, 2017, n. 172 has excluded the application of Article 162-ter of Italian Criminal Code for the crime of stalking).



Criminal Mediation

- ▶ In this case, the “Article 162-ter” has not been an efficient instrument of criminal mediation.



Criminal Mediation

▶ Criminal Mediation in Family Crimes???

Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 2011)

Article 48 – Prohibition of mandatory alternative dispute resolution processes or sentencing

1 Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention.

2 Parties shall take the necessary legislative or other measures to ensure that if the payment of a fine is ordered, due account shall be taken of the ability of the perpetrator to assume his or her financial obligations towards the victim.

Criminal Mediation

▶ Alternative Dispute Resolution:

- **Conciliation:** A.D.R. process: a conciliator meets the parties both separately and together, attempting to resolve their disagreements.
- **Mediation:** A.D.R. process: instrument useful for balancing the relationship between the parties.
 - **Civil Mediation:** two parties, Plaintiff and Defendant.
 - **Criminal Mediation:** three parties, Offender, Victim and Community.



Criminal Mediation

- ▶ **Messa alla prova** and “**article 162-ter**” are (ineffective) instruments of (criminal) mediation;
- ▶ **Messa alla prova** and “**article 162-ter**” may be applied to cases of domestic violence (E.G. crimes of physical injury, threats or harassment if occurred in the family context);
- ▶ **Istanbul Convention** prohibits mediation (criminal mediation, also) in relation to all forms of domestic violence;

Criminal Mediation

- ▶ If *Messa alla prova* and “article 162-ter” are applied to contexts of domestic violence, they will be in breach of Istanbul Convention (article 48, paragraph 1).

Italy ratified
Istanbul
Convention
(l. June 27, 2013,
n. 77).



Criminal Mediation

- ▶ What happens if *messa alla prova* and “article 162-ter” are in breach of Istanbul Convention?
 - It’s possible to propose a question of constitutionality.

Italy ratifies an International Convention

Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international (Art. 117.1, Italian Const.)

All national rules violating International rules, violate Italian Constitution also (Art. 117)



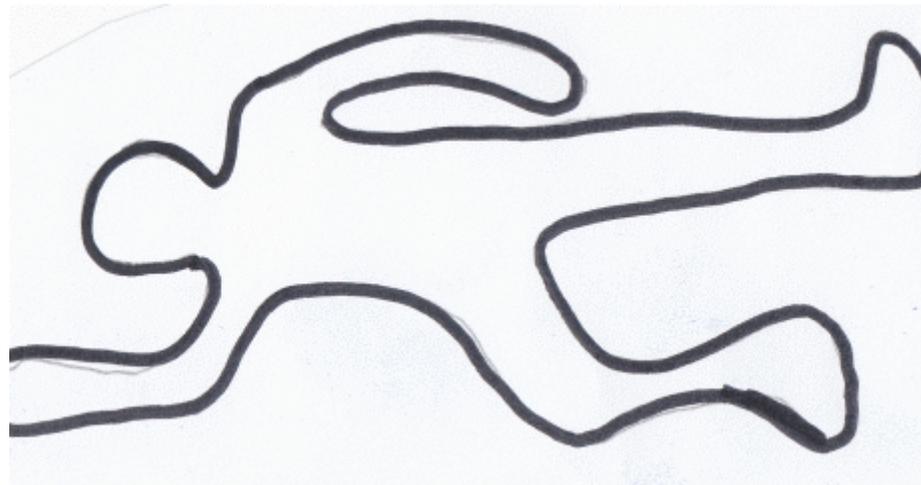
(Possible) question of constitutionality

Who is the Victim?

- ▶ A qualified witness during the proceeding
- ▶ A rights owner

The Judge ...

- ▶ Feeling of empathy for the victims
- ▶ Safeguardes victims' prerogatives



Who is the Victim?

- ▶ What happens if the judge (or, generally, the authority) doesn't safeguard victims' prerogatives???

ECHR, March 2, 2017 – Talpis vs. Italy

Italian authorities failed to protect a mother and her son because they did not take prompt action after a complaint concerning conjugal violence

E.G. Protection measures haven't been applied;

Police didn't investigate;

Victim wasn't been heard

...

Who is the Victim?

▶ Talpis vs. Italy, §141.

141. La Cour rappelle que, selon sa jurisprudence, le manquement – même involontaire – d'un État à son obligation de protéger les femmes contre les violences domestiques s'analyse en une violation du droit de celles-ci à une égale protection de la loi (*Opuz*, précité, § 191). La Cour a en effet déjà conclu que la « passivité généralisée et discriminatoire de la police » créant « un climat propice à cette violence » entraînait une violation de l'article 14 de la Convention (*ibidem*, §§ 191 et suiv.). Elle a par ailleurs constaté qu'un tel traitement discriminatoire avait lieu lorsqu'il était possible d'établir que les actes des autorités s'analysaient non pas en un simple manquement ou retard à traiter les faits de violence en question mais en une tolérance répétée à l'égard de ces faits et qu'ils reflétaient une attitude discriminatoire envers l'intéressée en tant que femme (*Eremia c. République de Moldova*, n° [3564/11](#), § 89, 28 mai 2013).

1. Each State has to protect the victims of the crimes;
2. Authorities' inertia (passivity) increases the violence (against women);
3. Authorities' tolerance to domestic violence violates ECHR

Who is the Victim?

- ▶ May the instruments of criminal mediation (“messa alla prova” and “article 162-ter”) justify the Authorities’ passivity???
- In the aforementioned case of International Child Abduction, the Judge ~~has~~ acquitted the offender because of the extinguishment of the crime without satisfying the Victim’s rights (so that, the Offender may repeat the crime ... she could carry to Germany her daughter once again!)
- According to Article 162-ter of Italian Criminal Code, the Judge will deliver an acquittal if considers that the offered amount was sufficient ... even if the Victim took position against this judgment!

Who is the Victim?

- ▶ Two opposite exigences:
 - To decrease the workload of the Courts
 - To create an authentic system of Victims' rights



Vs.



Who is the Victim?

- ▶ **Which future???** An (im)possible reform ...
 - **“Messa alla prova”**: Creation of rules compelling the Offender to carry out his Community Service in the same fields which affects the object of the crime committed.
 - **“Article 162–ter”**: Extinguishment of the crime only with the consent of the Victim.
 - **Each instrument of Criminal Mediation**: should not be applied to domestic violence cases, according to Article 48 of Istanbul Convention.
 - **In each case ...** Creation of rules compelling the Judge and the Investigative Authority to hear the Victim.

The end

Thanks to all of you!