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The Expressive Dimension of EU Criminal Law

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THE EXPRESSIVE DIMENSION OF EU CRIMINAL LAW

By Jenia Iontcheva Turner*

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Abstract

Over the last decade, the European Union has begun actively legislating in the area of criminal justice. The 2009 Treaty of Lisbon expressly acknowledged the EU's authority to pass criminal laws with respect to certain serious offenses with a cross-border dimension. This explicit grant of powers is one element of a remarkable evolution in the European Union's identity—from an organization devoted primarily to economic integration to a political union that increasingly resembles a federal state.

This Article argues that the European Union has used its powers to criminalize not only to address practical needs, but also to reaffirm its core values and strengthen its political identity. An example of this phenomenon is the decision to harmonize definitions of racist and xenophobic crime across the Union. A review of the text and the drafting history of EU measures against racist and xenophobic crime suggests that they are best understood as a tool to express the Union's commitment to human rights and equal treatment, rather than as a response to pressing practical needs.

The Union's use of the criminal law for such purposes, while symbolically powerful, raises some questions about the limits to EU intervention in criminal justice. The Article discusses the difficulties with establishing a legal basis for EU intervention in criminal justice when no demonstrable transnational dimension is present. Policy considerations—respect for state sovereignty, deference to democratic decision-making, and a concern for the

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effective implementation of EU laws—also recommend a cautious approach to legislating in this field. Above all, the European Union should actively engage national parliaments in decisions to expand its reach over criminal law. While this approach might reduce the frequency of EU legislation, it could strengthen the legitimacy and effectiveness of EU criminal law and better serve the political goals to which Europe and its peoples aspire.

I. Introduction

Just three decades ago, most observers of the European Union (and its predecessor, the European Community) would have dismissed the notion of EU criminal law as fanciful.¹ The original understanding of the European Community was that it was an organization of limited powers, devoted primarily to economic integration. Criminal law was firmly considered the exclusive province of member states.² One would look in vain in textbooks and treatises on EC or EU law for entries on criminal law or procedure.

In the 1990s, however, the picture began to change. The 1992 Maastricht Treaty first endowed the European Union with limited competence to adopt measures related to cooperation in criminal matters. In the late 1990s, the European Council (comprised of the heads of EU member states) encouraged EU institutions to use their newfound authority in the field of criminal law. The Union did so and defended its new role on the ground that criminal networks increasingly crossed national borders.³

Although not always specifically mentioned in the EU treaties, the cross-border dimension of crime was long seen as a key justification for EU action.⁴ The recent Treaty of Lisbon codified this understanding.⁵ Article 83(1) of the Treaty on the Functioning of the European Union (TFEU) gives the Union authority “to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with

¹ The European Union did not come into existence until 1992. But since most readers today are familiar with the term “European Union,” I use it here to include both the Union and its predecessor, the European Community.

² ANDRÉ KLIP, *EUROPEAN CRIMINAL LAW* 14 (2009); STEVE PEERS, *EU JUSTICE AND HOME AFFAIRS LAW* 381-88 (2006); Mireille Delmas-Marty, *The European Union and Penal Law*, 4 *EUR. L.J.* 87, 87 (1998). For a discussion of the indirect ways in which EC law influenced national criminal law even in these early days, see Delmas-Marty, *supra*, at 88-89; Hanna G. Sevenster, *Criminal Law and EC Law*, 29 *COMMON MKT. L. REV.* 29 (1992).

³ For an overview of the development of EU criminal law, see MARIA FLETCHER ET AL., *EU CRIMINAL LAW AND JUSTICE* 20-42 (2008); KLIP, *supra* note 2, at 13-28; VALSAMIS MITSILEGAS, *EU CRIMINAL LAW* 5-36 (2009); PEERS, *supra* note 2, at 381-88.

⁴ See, e.g., DAMIEN CHALMERS ET AL., *EUROPEAN UNION LAW* 611 (2010); Steve Peers, *The European Union and Substantive Criminal Law: Reinventing the Wheel?*, 33 *NETHERLANDS YEARBOOK INT'L L.* 47, 55 (2002).

⁵ An exception is Article 83(2) of the TFEU, which does not require a cross-border dimension and instead allows the EU to harmonize criminal laws when this is essential to ensuring the effectiveness of existing EU rules. See *infra* note 105 and accompanying text.

a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.”⁶

A closer look at the offenses which the European Union has chosen to address, however, shows that the Union is not interested merely in transnational crimes. The European Union has at times taken a stand against certain conduct even if it has no significant cross-border dimension and may be adequately addressed at the national level. The EU’s action in such cases is better explained by a different motivation—to reaffirm the Union’s core values and to strengthen its political identity. This is the expressive dimension of EU criminal law.

An example of this phenomenon is the decision to harmonize definitions of racist and xenophobic crime across the Union. In 1994 and again in 2008, the European Union passed measures to ensure that member states’ laws on racist and xenophobic crimes followed a common standard.⁷ Neither the drafting history nor the ultimate text of the measures provides a persuasive case that these crimes have a significant cross-border element⁸ or that the European Union was better positioned to address them than national authorities. Instead, the decision to act in this area is best understood as a tool to express the Union’s commitment to human rights and equal treatment. EU legislators chose the criminal label to send a message—that the entire community believes racist and xenophobic conduct is reprehensible and that the Union cares for the well-being of groups who are likely to be victims of such crimes. The Union was not aiming merely, or even primarily, to strengthen law enforcement measures in these areas; instead, it was focused

⁶ Treaty on the Functioning of the European Union, art. 83(1), May 9, 2008, 2008 O.J. (C 115) [hereinafter TFEU].

⁷ Joint Action 96/443/JHA of 15 July 1996 Concerning Action to Combat Racism and Xenophobia, 1996 O.J. (L 185) [hereinafter 1996 Joint Action to Combat Racism and Xenophobia]; Framework Decision 2008/913 On Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, 2008 O.J. (L 328) [hereinafter 2008 Racism and Xenophobia Framework Decision].

⁸ See *infra* Sections III.A and III.B. The treaty then in force did not specifically require a cross-border element, but the offenses it listed as worthy of harmonization—organized crime, terrorism and drug trafficking—were seen as grave and typically transnational, and these elements were seen to underlie EU competence to act. *E.g.*, CHALMERS ET AL., *supra* note 4, at 611.

on organizing community values behind the condemnation of racist conduct and thus strengthening the Union's political identity.⁹

The use of the criminal law for expressive purposes is not uncommon at the national level. Indeed, some theorists have argued that criminal law inherently serves expressive purposes.¹⁰ But at the supranational level, the emphasis on expressive purposes, without regard to the practical need for criminalization, has different implications. The European Union's desire to take advantage of the expressive value of criminal law may come into conflict with the wishes of member states to do the same. Accordingly, when the European Union begins to legislate for such purposes, questions about its authority are likely to arise.

The text of the current treaties provides no clear authorization for harmonizing criminal law on expressive grounds, particularly in the absence of a cross-border dimension.¹¹ There is a possible argument that Article 352, the implied powers provision, can serve as a foundation for such legislation, but the claim is contestable. Such a broad interpretation of the treaties is likely to give rise to objections that the Union is overreaching and that member states and their citizens have not authorized such sweeping EU powers in criminal law.¹²

Other considerations also suggest caution in asserting broad EU powers to pass criminal laws. Criminal law is still regarded as an essential feature of state sovereignty. It represents a community's fundamental choice to use coercive measures in order to protect core values.¹³ This is a choice that states believe is their prerogative to make for themselves, through a

⁹ See *infra* Section III.C. Fletcher et al. have previously made the point that the EU has used its criminal law powers to make value statements or for "moral posturing." They list the Framework Decision on racist and xenophobic crime as an example of this phenomenon. FLETCHER ET AL., *supra* note 3, at 194-202. For a valuable discussion of the expressive dimension of hate crimes legislation in the United States, see Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U.L. REV. 1227, 1254 (2000).

¹⁰ See JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 98-118 (1970); Beale, *supra* note 9, at 1255; Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

¹¹ See *infra* Part IV.

¹² See *infra* notes 107-109 and accompanying text.

¹³ See, e.g., Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 402-06 (1958); Mireille Hildebrandt, *European Criminal Law and European Identity*, 1 CRIM. L. & PHIL. 57, 65 (2007); Thomas Weigend, *Strafrecht durch internationale Vereinbarungen—Verlust an nationaler Strafrechtskultur?*, ZSTW 105, 774, 789 (1993).

democratic process, unless special features of the crimes make it impossible to respond effectively at the national level.¹⁴ Given that decision-making at the EU level (despite recent improvements) is still less democratic than at the national level, the invocation of state sovereignty also helps protect the democratic legitimacy of criminal law.¹⁵ Treaty provisions on subsidiarity, proportionality, and respect for national identities reflect these concerns.

In response to these considerations, the European Union should actively involve national parliaments in decisions to expand the reach of EU criminal law.¹⁶ Participation by national parliaments might slow down and frustrate the passage of some criminal justice legislation—especially measures that are perceived to encroach on state prerogatives. But the involvement of national parliaments would strengthen the democratic legitimacy of EU criminal law and would lessen concerns that the Union is overstepping its authority to act under the Treaties. It would help ensure that EU decisions in criminal law respect national political identities and follow the EU’s bedrock principles of subsidiarity and proportionality. Finally, because national parliaments are critical to the implementation of EU criminal laws, involving them in the process would also increase the effectiveness of these laws, while reducing perceptions that such laws are curtailing national autonomy.

II. The Evolution of EU Competence over Criminal Matters

For a long period of its existence, the European Community was viewed and operated as a primarily economic organization. It was committed to creating a common market, with the idea that economic integration would help guarantee peace among European states.¹⁷ As the European Community evolved and became the European Union, the goal of economic integration brought with it an extension of competences—“a spillover,” as it is sometimes called—to certain non-economic areas, such as environmental protection or

¹⁴ See, e.g., BVerfG, 2BvE 2/08 vom 30.6.2009, paras. 355, 358-59.

¹⁵ *Id.* para. 358; see also Stephen C. Sieberson, *The Treaty of Lisbon and Its Impact on the European Union’s Democratic Deficit*, 14 COLUM. J. EUR. L. 445, 463-65 (2008); Weigend, *supra* note 13, at 789.

¹⁶ See *infra* Part V.

¹⁷ E.g., Robert Schuman, Declaration of 9 May, 1950, at http://europa.eu/abc/symbols/9-may/decl_en.htm.

safety standards. Increasingly, non-economic regulation was seen as necessary to ensure the functioning of the internal market.¹⁸

The theory of spillover gradually made its way to criminal justice. Policymakers proffered the argument that as people, goods, capital, and services moved freely throughout the Community, organized crime also gained the ability to operate more easily across borders.¹⁹ In response to these concerns, the 1992 Maastricht Treaty introduced member state cooperation in “justice and home affairs.”²⁰ The Treaty provided the European Union with limited powers to promote cooperation and coordination in criminal matters, including the power to harmonize rules in the areas of organized crime, terrorism and drug-trafficking.

Recognizing the extent to which criminal law measures affected national sovereignty, the drafters provided for a separate institutional arrangement for decision-making in this area—the so-called “third-pillar” method of lawmaking. Under it, the Council of Ministers, the main legislative body of the Union, had to vote unanimously to approve any measure, meaning that each member state had veto power. This type of lawmaking departed from the standard “first-pillar” method, which applied to economic integration measures and under which legislation could be passed by qualified majority.²¹

¹⁸ LEON N. LINDBERG, *THE POLITICAL DYNAMICS OF EUROPEAN ECONOMIC INTEGRATION* 10-12 (1963).

¹⁹ *E.g.*, European Commission, Prosecuting Criminals and Guaranteeing Individuals’ Rights More Effectively in Free Movement Europe, at http://ec.europa.eu/justice/policies/criminal/policies_criminal_intro_en.htm; see also MITSILEGAS, *supra* note 3, at 6-7; Margherita Cerizza & Giuseppe Martinico, *Supranationalism in EU Criminal Justice: Another Incoming Tide?* 8 (2010), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1645804; Caroline Morgan & Jonathan Faull, *The Role of Criminal Law in the EU*, 1 J. EUR. CRIM. L. REP. 17, 21 (2006); Joachim Vogel, *The European Integrated Criminal Justice System and Its Constitutional Framework*, 12 MAASTRICHT J. EUR. & COMP. L. 125, 128 (2005); Anne Weyembergh, *The Functions of Approximation of Penal Legislation Within the European Union*, 12 MAASTRICHT J. EUR. & COMP. L. 149, 164 (2005).

²⁰ *E.g.*, MITSILEGAS, *supra* note 3, at 10.

²¹ The three-pillar structure aimed to accommodate the expansion of EU competences into more politically sensitive areas. The more established competences (those most related to economic integration) were placed in the “first pillar” and were subject to the “Community” method. Under it, the Council, alone or with the European Parliament, could pass binding legislation by qualified majority voting. Foreign policy and common defense were placed in the “second pillar,” subject to inter-governmental cooperation. Immigration and criminal law were placed in the “third pillar.” Under it, the Council acted by unanimity and only had to consult the Parliament. The European Court of Justice also had only minimal authority to

Once the idea of cooperation in justice and home affairs was introduced, it quickly gained popularity. The 1997 Treaty of Amsterdam strengthened the EU's ability to pass criminal law measures.²² Beginning in 1999, the European Council²³ began setting a more activist agenda in this regard, leading to numerous efforts to standardize definitions of offenses at the EU level.²⁴ The terrorist attacks on the United States on September 11, 2001, and later on Spain in 2004 and Britain in 2005, strengthened the position of the advocates for joint EU action on criminal matters. In 2004, the European Council set out the Hague Programme, which focused on strengthening the protection of fundamental rights, fighting terrorism, and developing a common strategy to tackle organized crime.²⁵

Following the lead of the EU Council, EU legislators passed a number of measures intended to strengthen the EU's internal security. Some of these measures focused on police and judicial cooperation. A prominent example was the European Arrest Warrant, which facilitated extradition among EU member states. Legislators also harmonized the definitions of certain cross-border criminal offenses, such as drug trafficking, money laundering, and organized crime.²⁶ These standardization measures were not efforts to create an EU "criminal code." Rather, they required member states to align national criminal codes with definitions agreed upon at the EU level. Enforcement remained the prerogative and responsibility of national governments.

In 2009, the Treaty of Lisbon formally recognized the EU's authority to legislate in criminal law. It gave the European Union the authority to establish minimum rules on offense definitions "in the areas of particularly serious

review third-pillar legislation. PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* 14-18 (4th ed. 2008).

²² Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340).

²³ The European Council comprises the heads of state of EU member states. It provides general policy guidelines for the development of the Union, but does not have concrete legislative powers.

²⁴ At its 1999 meeting, the European Council defined "freedom, security and justice" as a priority area for EU policies over the next five years. Tampere European Council, Presidency Conclusions (Oct. 15-16, 1999).

²⁵ European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the EU, Mar. 3, 2005, 2005 O.J. (C 53/1).

²⁶ The EU also harmonized definitions of corruption, counterfeiting currency, and fraud against the Union's financial interests. These crimes do not necessarily have a transborder element, but are seen to directly affect core EU financial interests, as well as economic integration more broadly. *See* Peers, *supra* note 4, at 55.

crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.”²⁷ The Treaty lists several areas of crime that meet these criteria: “terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.”²⁸ It also provides the possibility of expanding the list in the future, but only by unanimous decision of the Council and only if the crimes meet the criteria of gravity and a transnational dimension.²⁹ Another provision of the Treaty allows the Union to enact criminal laws when this is essential to ensuring the effectiveness of EU harmonization measures in other contexts.³⁰ In other words, the European Union can use criminal law measures to enforce rules in areas already subject to EU regulation, such as environmental and intellectual property law.³¹

The Treaty of Lisbon also arguably makes it procedurally easier for the European Union to pass criminal law measures. Council members no longer need to be unanimous. They can act by qualified majority, although the European Parliament will also have to give its approval. The result is that such legislation can now be adopted despite objections by one or more states.

Recognizing that criminal law concerns sensitive national interests, however, the Treaty also includes an “emergency brake” procedure, under which a state can refuse to participate in a particular measure where it “would affect fundamental aspects” of the state’s criminal justice system.³² When a state invokes the “emergency brake,” the proposal goes back to the European Council, which will attempt to reach consensus. If it does so within four months, it will refer the draft directive back to the EU legislators, who may adopt the directive under the ordinary legislative process. If the European

²⁷ TFEU art. 83(1).

²⁸ *Id.*

²⁹ *Id.* The Council must also first obtain the consent of the European Parliament. *Id.*

³⁰ *Id.* art. 83(2).

³¹ A few years before the Treaty of Lisbon entered into force, the European Court of Justice had already recognized the EU’s authority to act in this field. *Commission v. Council*, Case C-176/03, [2005] ECR I-7879. The Court held that the European Community may pass certain criminal measures under the “first pillar” method, whereby the Council may act by qualified majority, and the European Parliament must approve the measure. This competence was limited to situations when criminalization was essential to ensuring the effectiveness of preexisting regulations (such as the environmental regulations at issue in the case).

³² TFEU art. 82(3).

Council does not reach consensus, but at least nine member states wish to proceed with the directive, they may do so on their own. If they adopt the directive, the state that had invoked the emergency brake would not be bound by it; the law would apply only in states that approved it.

Two other important principles that limit EU competence in criminal law are subsidiarity and proportionality, and the Treaty of Lisbon emphasizes their importance. Under the principle of subsidiarity—which applies in areas where the European Union shares competence with member states—EU action is valid only when national efforts have proven inadequate and EU action would be more effective.³³ The principle helps ensure that decisions are taken as closely to the people as possible and are therefore more democratically legitimate.³⁴ The Treaty of Lisbon includes a new procedure to safeguard subsidiarity, under which national parliaments can object to proposed EU legislation on the grounds that it violates subsidiarity.³⁵ The idea is that national parliaments are in a good position to assess whether legislation infringes on state sovereignty and should therefore have a greater say in the process. The Treaty itself recognizes that this subsidiarity review is especially valuable in matters of criminal law.³⁶

The principle of proportionality further confines the Union’s ability to harmonize criminal laws. Proportionality means that EU action must not

³³ Treaty on European Union, art. 5(3), Mar. 30, 2010, 2010 O.J. (C 83/13) [hereinafter TEU] (“[T]he Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”); *see also* Protocol to the Treaty of Amsterdam on the Application of the Principles of Subsidiarity and Proportionality, 1997 O.J. 1997 (C 340/105).

³⁴ Subsidiarity may be relevant to criminal law in another way as well. Some have argued that it embodies the *ultima ratio* principle, widely adopted by European criminal law scholars, under which criminalization should be “reserved for the most serious invasion of interests since less serious misconduct is more appropriately dealt with by civil law or by administrative regulation.” Ester Herlin-Karnell, *What Principles Drive (or Should Drive) European Criminal Law?*, 11 GERMAN L.J. 1115, 1124 (2010).

³⁵ National parliaments receive legislative plans and draft legislative proposals from the Commission at the same time that these documents are sent to the EU legislators. Protocol on the Role of National Parliaments in the European Union, 2010 O.J. (C 83/203), arts. 1-2. If one-fourth of national legislative chambers object to a criminal law directive, the Commission must review the draft legislation; if the Commission wishes to maintain the proposal, it must provide a reasoned response. If a majority of national legislative chambers object, the Treaty enables the Council and the European Parliament to more easily reject the proposed legislation. Protocol on the Application of the Principles of Subsidiarity and Proportionality, 2010 O.J. (C 83/206), art.7 [hereinafter Lisbon Subsidiarity Protocol].

³⁶ In criminal law matters, only one-fourth of national legislative chambers must object to trigger the subsidiarity review; in other areas, one-third of parliaments must object. Lisbon Subsidiarity Protocol, *supra* note 35, art.7(2).

“exceed what is necessary to achieve the objectives of the Treaties.”³⁷ EU legislators must show that any proposed measure actually contributes to achieving its stated goals, goes no further than is necessary to achieve these goals, and does not have an excessive effect on the interests of the concerned state or person.³⁸ In other words, the measures should “not be a sledgehammer falling on a nut.”³⁹ For criminal law measures, a robust proportionality analysis might consider whether the costs in terms of reduced national autonomy are disproportionate to the stated objective of combating a particular crime at the EU level.⁴⁰ Such an interpretation would be consistent with the emphasis in the Treaty of Lisbon on respect for national identity, particularly in the field of criminal law.⁴¹

Despite the limits imposed by proportionality and subsidiarity, Union legislators have vigorously asserted their powers to enact criminal justice measures. They have maintained that such measures are essential to combating increasingly transnational criminal networks and ensuring that criminals do not escape prosecution by moving freely across the Union.⁴²

III. The Expressive Dimension of EU Criminal Law: Measures Against Racism and Xenophobia

While most arguments for EU competence in criminal law have focused on the practical need for supranational intervention, this alone does not explain EU action in the field. Instead, one must look to the expressive value of criminal law to fully understand the EU’s motivation to act. The Union’s measures against racist and xenophobic crime provide an instructive example.

³⁷ TEU art. 5(4).

³⁸ CHALMERS ET AL., *supra* note 4, at 367; Gareth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, 43 COMMON MKT L.REV. 63, 71 (2006); Germany v. Parliament and Council (Tobacco Advertising), Case C-376/98, [2000] ECR I-8419.

³⁹ Davies, *supra* note 38, at 71.

⁴⁰ See *id.* at 71, 83. Some read the ECJ’s case law on proportionality as setting a less demanding standard, particularly when it comes to reviewing the actions of EU institutions rather than of member states. See, e.g., CHALMERS ET AL., *supra* note 4, at 368-69; Stephen Weatherill, *Competence Creep and Competence Control*, 23 Y.B. EUR. L. 1, 13-17 (2004).

⁴¹ TEU art. 4(2).

⁴² E.g., European Commission, Justice: Criminal Law Policy, at http://ec.europa.eu/justice/criminal/criminal-law-policy/index_en.htm; see also HOUSE OF COMMONS JUSTICE COMMITTEE, JUSTICE ISSUES IN EUROPE, SEVENTH REPORT OF SESSION 2009-10, H.C. 162-I, at 6 (Mar. 23, 2010); Anne Weyembergh, *Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme*, 42 COMMON MKT. L. REV. 1567, 1579 (2005).

A. Legislative History

In the 1990s, the European Union began adopting a series of measures to combat racism and xenophobia. Some of these were largely symbolic. They included declarations condemning racism and xenophobia and calling for a “vigorous and effective” response; setting up bodies to gather information on racism and xenophobia; and designating 1997 as a European Year Against Racism.⁴³ Others, however, imposed concrete obligations on member states to criminalize racist and xenophobic conduct.

In 1994, the European Council called for “a global strategy at the Union level aimed at combating acts of racist and xenophobic violence.”⁴⁴ Two years later, at Spain’s initiative, the European Union passed a Joint Action to Combat Racism and Xenophobia.⁴⁵ A joint action is a tool introduced by the Treaty of Maastricht to allow for the harmonization of criminal law. Joint actions identify specific objectives to be attained by member states, but they are not binding and have been called “little more than aspirational.”⁴⁶ As part of the 1996 Joint Action, member states committed to ensure that their domestic laws criminalize racist and xenophobic behavior or at least do not subject such offenses to the double criminality requirement for extradition.⁴⁷

The Joint Action was passed against the background of increased national efforts to criminalize racist and xenophobic speech. In the mid-1990s, Germany, France, Belgium, and Spain all passed legislation criminalizing Holocaust denial.⁴⁸ This domestic legislation was in large part a reaction to the resurgence of extreme-right nationalist parties and to ethnic

⁴³ European Commission, Commission Communication of 13 December 1995 on Racism, Xenophobia and Anti-Semitism 4-6, COM (1995) 653 [hereinafter 1995 Commission Communication]; Press Release, Europa, European Year against Racism Is Launched in The Hague (Jan. 30, 1997), *at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/97/72&format=HTML&aged=1&language=EN&guiLanguage=en>.

⁴⁴ Corfu European Council of 24 to 25 June 1994, Conclusions of the Presidency, at 18.

⁴⁵ 1996 Joint Action to Combat Racism and Xenophobia, *supra* note 7.

⁴⁶ FLETCHER ET AL., *supra* note 3, at 174.

⁴⁷ Double criminality is typically a requirement for extradition. Under it, a person would be extradited from one country to another only if the crime is punishable in both. In other words, the country holding the person to be extradited (Country A) may refuse to proceed with extradition to Country B if the offense with which the person is charged in Country B is not a crime in Country A.

⁴⁸ Laurent Pech, *The Law of Holocaust Denial in Europe: Towards a (Qualified) EU-wide Criminal Prohibition* 7, 9 (2009), *available at* <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

tensions resulting from growing immigration.⁴⁹ The European Union began to legislate in the area of immigration around the same time, and it concluded that it should also address the related increase in racist and xenophobic crime.⁵⁰ As the European Commission acknowledged, however, the Treaties contained no “specific reference to action in this area.”⁵¹

The next major step came in 1999, when the Treaty of Amsterdam entered into force. The Treaty strengthened the EU’s ability to harmonize criminal laws. It also provided a legal basis “to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability or sexual orientation.”⁵² With respect to criminal measures, the Treaty stated that the Union would aim to “provide citizens with high levels of safety within an area of freedom, security, and justice by developing common action among Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.”⁵³ To achieve this objective, the European Union would act to prevent and combat “crime, organized or otherwise, in particular terrorism, trafficking in persons and offenses against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through . . . approximation, where necessary, of rules on criminal matters in the Member States”⁵⁴ Article 31(e), which specifically allowed for harmonization of criminal law, narrowed the list of offenses to be addressed to organized crime, terrorism and drug trafficking.⁵⁵ Neither list included racist and xenophobic crime. This arguably weakened the legal basis for EU measures in this regard.⁵⁶

⁴⁹ See *id.*; Jörg Monar, *The EU’s Role in the Fight Against Racism and Xenophobia: Evaluation and Prospects After Amsterdam and Tampere*, 22 LIVERPOOL L.REV. 7, 8 (2000).

⁵⁰ Monar, *supra* note 49, at 8.

⁵¹ 1995 Commission Communication, *supra* note 43, at 18.

⁵² Treaty Establishing the European Community, art. 13, as amended by Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 340) 1.

⁵³ Treaty on European Union, art. 29, as amended by Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 340) 145.

⁵⁴ *Id.*

⁵⁵ *Id.* art. 31(e).

⁵⁶ It would be difficult to argue that the European Union could instead rely on Article 29, which stated as an EU goal “combating racism and xenophobia.” This provision merely stated a broad objective, and it can be used only in conjunction with a more specific provision, or the implied powers provision, in order to provide competence. Yet the then-existing implied provision could only be used if the European Union was pursuing an objective that was related to the operation of the common market. Neither the drafting history nor the text of the

Nonetheless, the European Union had high-level political support for such measures. The heads of EU member states, meeting at the 1999 Tampere European Council, called on the European Union to take strong steps against these problems.⁵⁷ As the European Commission began considering what action would be most appropriate, the European Parliament adopted a resolution requesting that the European Union pass a “framework decision”—a binding instrument—to replace the non-binding Joint Action on racist and xenophobic crimes.⁵⁸ The Commission began to draft a framework decision, and in 2002, it presented a proposal to the Council.⁵⁹

The proposal included a greater range of offenses than did the 1996 Joint Action, and it also mandated that all states criminalize these offenses at the national level.⁶⁰ Because the proposal criminalized both speech and conduct, it proved controversial. Several states worried that the proposed Framework Decision conflicted with their own laws protecting freedom of expression.⁶¹ A minority opinion attached to the European Parliament report on the proposed Framework Decision also expressed concern that the legislation was “an attack on freedom of expression” and would extend to

Framework Decision makes any suggestion that the criminalization of racist conduct and speech is related to the operation of the common market.

⁵⁷ Tampere European Council, Presidency Conclusions (Oct. 15-16, 1999).

⁵⁸ European Parliament Resolution on the European Union’s Position at the World Conference Against Racism and the Current Situation in the Union, Sept. 21, 2000, 2001 O.J. (C 146/110).

⁵⁹ The European Commission is the institution which proposes and drafts legislation in the European Union.

⁶⁰ In other words, states no longer had the choice to either abolish dual criminality or criminalize; they had to criminalize specified conduct. European Commission, Proposal for a Council Framework Decision on Combating Racism and Xenophobia, COM (2001) 664 final (Mar. 26, 2002) [hereinafter 2002 Commission Proposal for a Framework Decision on Racism and Xenophobia]. The proposal and the final text of the Framework Decision had other provisions that went beyond the 1996 Joint Action. For example, they mandated that states take necessary measures to ensure that investigations and prosecutions of racist crimes are not dependent on complaints by victims, “at least in the most serious cases where the conduct has been committed in [the state’s] territory.” 2008 Racism and Xenophobia Framework Decision, *supra* note 7, art. 8. They also required states to ensure that corporations can be held liable for racist and xenophobic conduct under certain circumstances. *Id.* arts. 5, 6.

⁶¹ At the time, domestic laws in several countries, including Italy, Greece, Denmark and Hungary, protected free speech from criminalization, unless it poses a “clear and present danger” of violence. Pech, *supra* note 48, at 6-7. In the United Kingdom, speech was protected unless it was “threatening, abusive, or insulting” and intended or likely to stir up racial hatred. *Id.* at 6; The Crown Prosecution Service, Racist and Religious Crime - CPS Guidance (June 23, 2010), at http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime. Not surprisingly, many of these countries expressed reservations about the Framework Decision. *E.g.*, *EU Criminalises Racial Hatred*, EURACTIV, Apr. 23, 2007, at <http://www.euractiv.com/en/security/eu-criminalises-racial-hatred/article-163291>.

“legitimate public discourse, for example opposition to mass immigration or to Islamisation, or defence of national identity.”⁶² As a result, the law would “render[] any debate on immigration and Islam impossible and . . . result in arbitrary complaints and prosecutions of leading politicians in this debate.”⁶³

Because of concerns about the potential conflict with free speech protections, it was not until 2008 that the Council adopted the final text of the Framework Decision.⁶⁴ In the end, the legislation expanded the list of punishable offenses beyond those included in the 1996 Joint Action. For example, it includes “publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity, and war crimes . . . directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin”⁶⁵ It also prohibits the denial, condoning, and gross trivialization of the Holocaust.⁶⁶

But to accommodate concerns about freedom of expression, the Framework Decision provides a number of qualifications. First, the punishable conduct must be “likely to incite violence or hatred against a group defined by reference to race, color, religion, descent, or national or ethnic origin.”⁶⁷ Second, states “may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive, or insulting.”⁶⁸ Third, they may choose to criminalize denial and trivialization offenses only if these have been established by a final decision of a national or international court.⁶⁹ Fourth, the legislation affirms that it will not modify “the obligation to respect fundamental rights and fundamental legal principles, including freedom of expression and association, as

⁶² European Parliament, Report on the Proposal for a Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, at 15, A6-0444/2007 (Nov. 14, 2005) (Minority opinion pursuant to Rule 48(3) of the Rules of Procedure by Koenraad Dillen) [hereinafter EP Report on Proposal for Framework Decision].

⁶³ *Id.*; see also Eva Brems, *Belgium: The Vlaams Blok Political Party Convicted Indirectly of Racism*, 4 INT’L J. CONST’L L. 702, 705 (2006) (noting the prosecution of Dillen’s own Flemish Block party for racist speech).

⁶⁴ 2008 Racism and Xenophobia Framework Decision, *supra* note 7.

⁶⁵ *Id.* art. 1(c); see also 1996 Joint Action to Combat Racism and Xenophobia, *supra* note 7, at A(b) & (c).

⁶⁶ 2008 Racism and Xenophobia Framework Decision, *supra* note 7, art. 1(d).

⁶⁷ *Id.* art. 1(c) & (d).

⁶⁸ *Id.* art. 2.

⁶⁹ *Id.* art. 1(d)(4).

enshrined in Article 6 of the Treaty on European Union.”⁷⁰ Finally, it will not require states “to take measures in contradiction to . . . freedom of the press and the freedom of expression in other media.”⁷¹

B. The Official Justification of the Measures

In justifying the need for action in 1995 and again in 2001, the Commission pointed to the increased prevalence of public racism and discrimination in all member states.⁷² The Commission concluded that “the existence of racist incidents in all Member States makes it a European problem that requires . . . a global strategy to combat acts of racist and xenophobic violence at [sic] Union level”⁷³ The 1996 Joint Action also expressly referred to the prevalence of racist and xenophobic crime as a motivating concern.⁷⁴ The European Parliament, in its 2007 report on the Commission’s proposal, similarly referred to statistics showing that “racist crimes are on the rise in at least eight EU Member States” and that “racist violence and crime remains a serious social ill across the EU.”⁷⁵

Yet none of these documents pointed to evidence that racist and xenophobic crimes have a significant transnational dimension. The Commission does note the “worrying issue” of the spread of racist propaganda on the Internet, suggesting a cross-border element.⁷⁶ But it points only to data about racist websites outside the EU.⁷⁷ Moreover, it recognizes that the problem is already being addressed under the auspices of a Council of Europe Cyber-Crime Convention.⁷⁸ A Protocol to that Convention, signed in 2003, criminalizes the dissemination of racist and xenophobic contents online. Given that the Protocol was open for signature to EU member states, the practical need for a parallel commitment by the European Union appears

⁷⁰ *Id.* art. 7(1).

⁷¹ *Id.* art. 7(2). The clause states further that it refers to such principles “as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.”

⁷² 1995 Commission Communication, *supra* note 43, at 3, 16; 2002 Commission Proposal for a Framework Decision on Racism and Xenophobia, *supra* note 60, at 2.

⁷³ 1995 Commission Communication, *supra* note 43, at 16.

⁷⁴ 1996 Joint Action to Combat Racism and Xenophobia, *supra* note 7.

⁷⁵ EP Report on Proposal for Framework Decision, *supra* note 62, at 13.

⁷⁶ 2002 Commission Proposal for a Framework Decision on Racism and Xenophobia, *supra* note 60, at 5.

⁷⁷ *Id.*

⁷⁸ *Id.* at 6.

diminished. Finally, nothing in the text or drafting history of the Decision suggests that its focus is online racist crime. The Decision sweeps much more broadly, covering conduct and speech both online and off.

Given the lack of an obvious cross-border component, the Commission had to provide other reasons why racist crime should not remain a matter of national law.⁷⁹ To defend the need for a supranational response, it noted the diversity of approaches to racist conduct and speech in member states.⁸⁰ This diversity appears to exist primarily in the regulation of hate speech and genocide denial. In 2001, only ten out of twenty-seven EU member states had laws criminalizing the denial of the Holocaust or other genocides and crimes against humanity.⁸¹ The Commission and the European Parliament concluded that this divergence in domestic criminal laws, combined with the prevalence of racist violence across the Union, called for harmonization at the EU level.

EU legislators expressed concern that different approaches to the punishment of racist and xenophobic crime “constitute barriers to international judicial cooperation.”⁸² The Commission stressed the need to prevent perpetrators of racist and xenophobic offenses from escaping prosecution by moving between states.⁸³ The Framework Decision itself justified harmonization by pointing to a study showing that “some difficulties have still been experienced regarding judicial cooperation.”⁸⁴ The Decision did not, however, refer to concrete data on the source or seriousness of the problem with judicial cooperation in this area.

The Commission did note that victims underreport racist and xenophobic crimes because of fears of retaliation or concerns that their complaints would not be taken seriously. It concluded that EU legislation ensuring that investigation and prosecution do not depend on a victim’s

⁷⁹ The Commission admitted that under the principle of subsidiarity, primary responsibility for combating racist conduct lies with national authorities unless the Union is better equipped to achieve the objective of combating racist and xenophobic crime effectively. 2002 Commission Proposal for a Framework Decision on Racism and Xenophobia, *supra* note 60, at 15.

⁸⁰ *Id.* at 3, 16.

⁸¹ Pech, *supra* note 48, at 3.

⁸² 1996 Joint Action to Combat Racism and Xenophobia, *supra* note 7; *see also* 2002 Commission Proposal for a Framework Decision on Racism and Xenophobia, *supra* note 60, at 5.

⁸³ 2002 Commission Proposal for a Framework Decision on Racism and Xenophobia, *supra* note 60, at 5.

⁸⁴ 2008 Racism and Xenophobia Framework Decision, *supra* note 7, pmb. (4).

complaint would help improve the situation.⁸⁵ The Commission did not clarify, however, how prevalent the underreporting problem was and which countries lacked provisions allowing investigation and prosecution in the absence of complaint by the victim.

In summary, EU institutions based the argument for harmonization on the prevalence of racist crime, the diverse national laws addressing the issue, difficulties with mutual legal assistance, and the problems of combating racist crime in countries where prosecution depends on complaint by the victim. These factors, however, do not provide a clear limit to the EU's authority to legislate in the area of criminal law. The same factors are likely to be present in the investigation and prosecution of many offenses occurring across the EU. Burglary, theft, and rape (to name just a few) are undoubtedly also prevalent in all member states, and states surely differ in their approaches to such crimes, which would pose similar difficulties in mutual legal assistance. To the extent that national systems rely on victim complaints for prosecution, some of these crimes are also likely to remain unpunished because of victims' reluctance to come forward (for example, in cases of sexual abuse). But these difficulties do not necessarily call for an EU-wide response.

None of the EU institutions pointed to evidence establishing a clear cross-border dimension of racist and xenophobic crime. Although such a dimension was said to exist because defendants cross borders to escape prosecution, the Commission's proposal failed to refer to concrete data on this point. The proposal also failed to provide empirical support regarding subsidiarity. It pointed to no source showing that national authorities were unwilling or unable to address racist and xenophobic crimes, or that the European Union would perform better in confronting these problems. The minority opinion to the European Parliament report on the Framework Decision criticized the proposed decision on these grounds, noting that "[i]t is perfectly possible for the Member States to provide protection against racist acts by means of their laws."⁸⁶ Indeed, if the European Union could legislate on criminal matters any time an offense is prevalent and national authorities

⁸⁵ 2002 Commission Proposal for a Framework Decision on Racism and Xenophobia, *supra* note 60, at 6.

⁸⁶ EP Report on Proposal for Framework Decision, *supra* note 62, at 15 (Minority opinion pursuant to Rule 48(3) of the Rules of Procedure by Koenraad Dillen).

address it differently, it is difficult to see the endpoint of EU powers in this field.

C. The Expressive Dimension of the Measures

While statements about the practical need for EU laws on racist crime were not entirely persuasive, EU institutions did point to other factors that could better explain the legislation.⁸⁷ One reason prominently mentioned as a justification for EU-wide action is the symbolic value of such legislation:

The need to build the foundations of a wider and deeper community between peoples who had too often opposed each other in violent conflict was central to the ideals that inspired the founders of the Community. The defence of human rights and fundamental freedoms, core values of the European integration project, cannot be separated from the rejection of racism. Indeed, the struggle against racism is a constituent element of the European identity.⁸⁸

In other words, the Commission regarded the elimination of racism and xenophobia as part of a broader project to reaffirm the EU's commitment to human rights and non-discrimination. By using the criminal law to defend these principles, the Commission was reaffirming their importance to the political identity of the Union.

The European Parliament report also referred to the symbolic function of the legislation. It emphasized that the promotion of human rights and the fight against racism and xenophobia, were two of the EU's main priorities.⁸⁹ The Parliament noted that by adopting the Framework Decision, the Union would "send out a firm political message on behalf of fundamental rights."⁹⁰ Other important players in the drafting process expressed similar sentiments.

⁸⁷ One factor was political demand for EU action in the field. *See* 1995 Commission Communication, *supra* note 43, at 3 (noting "calls from many quarters for a clear European-level response to complement and support national action"). Human rights groups and some national governments were increasingly concerned "that the growing EU activities in the area of asylum and immigration were almost exclusively on the restrictive and repressive side and did largely fail to respond to the need of combating intolerance in the receiving societies" Monar, *supra* note 49, at 9.

⁸⁸ 1995 Commission Communication, *supra* note 43, at 4.

⁸⁹ EP Report on Proposal for Framework Decision, *supra* note 62, at 14.

⁹⁰ *Id.*; *see also* European Parliament Recommendation to the Council of 21 June 2007 Concerning the Progress of the Negotiations on the Framework Decision on Action to Combat Racism and Xenophobia, [2008] O.J. C 146 E/361 (urging the Council to finalize the text of the Framework Decision so as to "send out a strong political message in support of a citizens' Europe").

The German government, a key supporter of the legislation, issued a press release after its adoption, noting that the Framework Decision helped Europe “to forcefully defend its common values and to rigorously punish those who treat these values with contempt for humanity.”⁹¹

Other evidence also suggests that the symbolic value of the Framework Decision, rather than any pressing practical need, was the main reason for its adoption. The final text of the Decision accommodated divergent national approaches to combating racism and xenophobia. States which did not criminalize hate speech, unless it was threatening, abusive, or insulting, could continue to take this more tolerant approach. In the end, the Framework Decision did not demand harmonization in the areas where the greatest divergence among states existed—hate speech and Holocaust denial. Therefore, one of the key rationales for the Framework Decision, that harmonization was necessary to ensure judicial cooperation in multi-jurisdictional cases, appears unfulfilled. This tends to confirm the notion that the legislation was passed primarily for symbolic, rather than practical reasons.

Also worth noting is that, by the time the Framework Decision was adopted, the European Union had abolished the requirement of dual criminality in cases of racist and xenophobic crimes. Under the 2002 Framework Decision on the European Arrest Warrant (EAW), even if a person has fully complied with the law in one EU member state, he may be extradited to another member state if he has committed a racist or xenophobic offense under the laws of that second state. To a great degree, the EAW Framework Decision solves problems with mutual legal assistance that may plague national prosecutions of racist and xenophobic crimes. This diminishes the

⁹¹ Press Release, [German] Federal Ministry of Justice, *EU: Common Criminal Provisions Against Racism and Xenophobia* (Apr. 19, 2007), at http://www.eu2007.de/en/News/Press_Releases/April/0420BMJRassismus.html. Germany played a central role in reviving the stalled Framework Decision, and the Decision was ultimately signed during the French presidency of the Union, which also provided key support. Other major supporters were Luxembourg and Spain. *German Holocaust Denial Case Proceeds as EU Moves on a Ban*, Deutsche Welle, Jan. 26, 2007, at <http://www.dw-world.de/dw/article/0,,2328344,00.html>; Nathalie Vandystadt, *Justice Council: Ministers Agree to Make Racism a Criminal Offense*, EUROPOLITICS, Dec. 8, 2008, at <http://www.europolitics.info/ministers-agree-to-make-racism-a-criminal-offence-artr146808-10.html>.

practical need for an EU instrument harmonizing the definitions of racist offenses.⁹²

Finally, given that the duty to enforce the law remains with national authorities, the practical impact of the Framework Decision is likely to be limited. The Framework Decision imposes few requirements pertaining to the investigation and prosecution of racist and xenophobic crimes. The only clear requirement is that states ensure that prosecutions can occur even in the absence of a victim complaint. It does not appear that the Framework Decision contributes in other ways to enforcement efforts at the national level. This, again, points to a conclusion that the expressive value of the Framework Decision is greater than its practical impact.

In short, the European Union is using the Framework Decision primarily to make a statement about the values for which it stands. It is sending a message that racist crime breaches core norms of the Union—protecting human rights regardless of race or ethnicity.⁹³ It is also showing its solidarity with minority groups who may be targeted by criminals. By criminalizing certain instances of racist and xenophobic speech, the European Union is more broadly making a statement about the balance it wishes to strike between individual rights (such as freedom of expression) and social interests (such as public safety and equal treatment).⁹⁴

The European Union is thus using criminal law measures such as the Framework Decision as a means of expressing and defining its own political identity.⁹⁵ This expressive use of criminal law is best understood as part of a larger project to help construct an identity for the Union that goes beyond

⁹² There are, however, some exceptions to the duty of EU member states to surrender a person pursuant to an EAW request. For example, if the offense was committed at least in part on the territory of the executing state, that state may refuse to surrender a person if its laws do not criminalize the offense. Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States [2002] O.J. L 190/1, art. 4(7).

⁹³ BVerfG, 2BvE 2/08 vom 30.6.2009, para. 355 (“By criminal law, a legal community gives itself a code of conduct that is anchored in its values, and whose violation, according to the shared convictions on law, is regarded as so grievous and unacceptable for social co-existence in the community that it requires punishment.”); Hildebrandt, *supra* note 13, at 65; Weigend, *supra* note 13, at 774, 789; Hart, Jr., *supra* note 13, at 402-06.

⁹⁴ See Joseph H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space*, in AN IDENTITY FOR EUROPE: THE RELEVANCE OF MULTICULTURALISM IN EU CONSTRUCTION 73, 77 (Riva Kastoryano ed., 2009).

⁹⁵ Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 835 (2006).

economic issues and can therefore claim deeper bonds of allegiance over time.⁹⁶ By reinforcing common moral norms, the European Union can help build the supranational demos which it is repeatedly said to lack and which is seen by many as a prerequisite to genuine legitimacy.

Through the conduct that it chooses to criminalize, the European Union can also distinguish itself from other polities around the world who do not penalize the same conduct or perhaps treat it more leniently.⁹⁷ This is another way of cementing the EU's identity by reference to what it is not. Finally, the European Union can use the expressive function of criminal law to bolster its efforts to lead globally on certain moral and legal issues, such as equal treatment and human rights.⁹⁸

To send such messages, EU criminal law does not need to be more effective than existing national efforts to combat crime. Indeed, even if it is not particularly practically useful, it can still be successful on expressive grounds. As Cass Sunstein has commented:

A society might identify the kind of valuation to which it is committed and insist on that kind, even if the consequences of the insistence are obscure or unknown. A society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups.⁹⁹

⁹⁶ As Jörg Monar has commented, the “emphasis on the fight against racism and xenophobia must be regarded as part of the efforts made to assert the value based political identity which the Union—coming of age as a political community—is in need of.” Monar, *supra* note 49, at 9.

⁹⁷ Turkey, for example, expressed concern about the Framework Decision, on the grounds that it would criminalize denial of the alleged genocide against Armenians and undermine Turkey's candidacy for EU membership. *E.g.*, *German Anti-Racism Initiative Creates Concern in Ankara*, TURKISH DAILY NEWS, Mar. 30, 2007, 2007 WLNR 6010632. Eastern European countries, during accession negotiations and the early days of EU membership, also saw the Decision as a way to exclude their concerns and to shame them for their treatment of the Roma and other minorities. European Parliament Resolution, *supra* note 58, ¶26; *Racism and Xenophobia, MEPs Pass Motion Against Rising Racist and Homophobic Violence*, EUR. SOC. POL'Y, July 13, 2006, 2006 WLNR 24793187.

⁹⁸ See, e.g., Ian Manners, *The EU's International Promotion of the Rights of the Child*, in *THE EUROPEAN UNION AND THE SOCIAL DIMENSION OF GLOBALIZATION* 228 (Jan Orbie & Lisa Tortell eds., 2008).

⁹⁹ Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 823 (1994).

Apart from its practical consequences, the value of a criminal law adopted for expressive purposes lies in its ability to “make the best sense of [a community’s] self-understanding.”¹⁰⁰

In nation-states, law, and especially criminal law, is only one of many tools that shape national identity. Geography, culture, religion, history, and language, among other factors, all play a role in the process. But in a supranational polity such as the EU, law assumes a relatively more dominant role. As Mireille Hildebrandt has noted, “there is no ‘inherently European identity’” that can easily be defined by reference to geography, history, culture, or language.¹⁰¹ For that reason, it is likely that law plays a more central part in constructing identity at the EU level than it does nationally.¹⁰²

IV. The Scope of EU Criminal Law After the Treaty of Lisbon: Legal Basis, Limits, and Reservations

While the Framework Decision is the clearest example of an EU criminal law measure adopted for expressive purposes, it is not the only one. Measures on environmental crimes, child sexual abuse, and child pornography, for example, have also exhibited expressive elements.¹⁰³ In the future, as unanimity is no longer required for criminal law measures, the European Union may be even more tempted to adopt such measures on expressive grounds. On the heels of the Framework Decision on racist and xenophobic crime, for example, the Council called on the Commission to consider whether a new framework decision may be needed to address the public denial or trivialization of crimes committed by totalitarian regimes.¹⁰⁴

¹⁰⁰ *Id.*

¹⁰¹ Hildebrandt, *supra* note 13, at 59.

¹⁰² *See id.*

¹⁰³ *See, e.g.,* Michael Faure, *European Environmental Criminal Law: Do We Really Need It?*, EUR. ENVTL L. REV. 18, 24 (Jan. 2004); FLETCHER ET AL., *supra* note 3, at 197-98.

¹⁰⁴ Report from the Commission to the European Parliament and to the Council, The Memory of the Crimes Committed by Totalitarian Regimes in Europe, COM(2010) 783 final at 2 (Dec. 22, 2010). The Commission ultimately concluded that a new framework decision on this subject is not warranted at this time, for two reasons: 1) These crimes are not specifically listed in the Treaty as falling within the competence of the Union (although according to the Commission, the Council could act unanimously to extend the EU’s competence; the Commission does not discuss whether the Council may do so only upon finding that the crime has a cross-border element); 2) National legal approaches to this question are too disparate to allow for harmonization. *Id.* at 9-10. For a discussion of the link between the proposed legislation and identity politics within the European Union, see Carlos Closa, Dealing with the

As the Union contemplates the scope of its newly acquired powers, it is important to consider the legal basis for intervention in criminal law matters under the current treaty framework.

Even after the Treaty of Lisbon expanded the European Union's authority to legislate on criminal matters, there is no clear and solid legal basis for adopting a measure such as the Framework Decision on racist and xenophobic crime. EU legislators could enact such a measure under Article 83(1) of the TFEU, but this would require showing that the offense has a cross-border dimension. The cross-border dimension may result from the "nature or impact" of the offenses or from "a special need to combat them on a common basis." Under an expansive reading, "special need to combat them on a common basis" might include expressive needs (i.e., protecting core values of the Union). But because virtually any EU criminal law can be said to protect core values of the Union, such an interpretation would obliterate the limits placed on EU competence in this field. It would also render the cross-border dimension requirement irrelevant. Finally, even if one were to conclude that racist and xenophobic crimes do have a cross-border dimension, they are not among the offenses enumerated in Article 83(1). To act under this provision, then, the Council would have to decide unanimously, after obtaining the European Parliament's consent, to identify racist crime as a subject worthy of harmonization.

In support of a legal basis, one might also point to Article 67(3) of the TFEU, which provides that the "EU shall endeavor to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia . . . if necessary, through the approximation of criminal laws." But Article 67(3) is largely hortatory, setting out broad objectives. Unlike the much more specific Article 83, it does not explain who would have to adopt the approximating measures and under what procedures. Moreover, if Article 67(3) on its own provided for EU competence to harmonize criminal laws, Article 83 would be superfluous.

Another possibility might be Article 83(2), which allows the European Union to pass criminal laws to "ensure the effective implementation of a

Past: Memory and European Integration (Jean Monnet Working Paper No. 1/11, 2011), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972355.

Union policy in an area which has been subject to harmonisation measures.” But the type of conduct criminalized by the Framework Decision—racist speech and conduct, as well as genocide denial and trivialization—has not been previously subject to EU harmonization measures. The criminal measures envisioned under Article 83(2) are those pertaining to violations of environmental, intellectual property law and other administrative offenses.¹⁰⁵ A creative interpretation of Article 83(2) might point to the EU directive banning racial discrimination in employment and social benefits¹⁰⁶ and argue that a measure criminalizing racist crime helps implement it. But this would be an overly expansive reading, since the Framework Decision focused on the public incitement of racist violence and on the denial of genocide, and neither of these offenses is closely related to discrimination in employment or social benefits.

In the end, the best argument for the European Union’s authority to act in this field might arise from an interpretation of its implied powers. Article 352 of the TFEU—known as the implied powers provision—allows the Union to legislate to achieve one of the Treaty’s objectives, when no other provision furnishes the basis for action. It has been compared to the Necessary and Proper Clause of the U.S. Constitution.¹⁰⁷ In the past, it could be used to advance only goals related to the common market, but the Treaty of Lisbon expanded its scope to include virtually any objectives of the Treaty.¹⁰⁸

To prevent abuse of this expanded competence, Article 352 sets stringent procedural requirements. The Council must be unanimous, and the European Parliament must consent before any legislation can be adopted under the provision. Unanimity helps safeguard state sovereignty, and European Parliament consent adds greater democratic legitimacy to the legislation. To use Article 352, the European Union must also conclude that

¹⁰⁵ See *Commission v. Council*, Case C-176/03, [2005] ECR I-7879.

¹⁰⁶ Directive 2000/43 on equal treatment irrespective of racial or ethnic origin, O.J. L 180/22 (July 19, 2000).

¹⁰⁷ GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 106 (3d ed. 2011).

¹⁰⁸ Two Declarations appended to the Treaty limit Article 352 somewhat, but even so, the provision is significantly broader than it was before the Treaty of Lisbon. See *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, Declarations 41 and 42, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Declaration 41, Declaration 42].

no other Treaty article applies.¹⁰⁹ As noted above, no other provision of the Treaty appears to offer a solid legal basis for EU criminal law measures against racism and xenophobia. Legislation passed under Article 352 must furthermore advance an EU objective that is expressly stated in the Treaty. In the case of racism and xenophobia, this should not be particularly difficult.¹¹⁰ EU legislators may point to Article 3(2), which lists as key goals of the Union the prevention and combating of crime and the combating of social exclusion and discrimination.¹¹¹ The European Union has also committed to act to “to combat discrimination based on . . . racial or ethnic origin”¹¹² and “to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia.”¹¹³ In short, combating racial and ethnic discrimination is undoubtedly an important objective of the Union, and it could therefore serve as the basis for action under Article 352.

But the EU’s implied powers clause has always been controversial, and it is likely to be even more so now that its scope is broader. Because of concerns that the clause can be abused to effectively amend the Treaty without a proper ratification process, Declarations to the Lisbon Treaty attempt to limit its use. Restating settled ECJ case law, one Declaration provides that Article 352 “cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole.”¹¹⁴ Furthermore, the Article “cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose.”¹¹⁵

The limits set by this Declaration are not obvious, and some, including the German Constitutional Court, have dismissed them as insufficient.¹¹⁶ The uncertain scope of Article 352 becomes evident when we consider the EU’s

¹⁰⁹ TFEU art. 352.

¹¹⁰ Note, however, that a Declaration to the Treaty of Lisbon limits the extent to which the EU may use Article 352 broadly to “promote . . . its values.” Declaration 41, *supra* note 108; *see also* TEU art. 3(1); ALLAN ROSAS & LORNA ARMATI, EU CONSTITUTIONAL LAW: AN INTRODUCTION 22 (2010); CHALMERS ET AL., *supra* note 4, at 216-17.

¹¹¹ TEU art. 3(2).

¹¹² TFEU art. 10.

¹¹³ TFEU art. 67(3).

¹¹⁴ Declaration 42, *supra* note 108. For the relevant ECJ case law, see Opinion 2/94 Re Accession of the Community to the ECHR [1996] ECR I-1759; Kadi and Al Barakaat International Foundation v. Council, Joined Cases C-402/05 P and C-415/05 P [2008] ECR I-6351, paras. 224-29.

¹¹⁵ Declaration 42, *supra* note 108.

¹¹⁶ *See* BVerfG, 2BvE 2/08 vom 30.6.2009, para. 328.

authority to pass criminal law measures on racism and xenophobia. The Treaty could be read to allow the Union to act in this area, since Article 67(3) provides that the European Union should strive to “ensure a high level of security through measures to prevent and combat crime, racism and xenophobia.”¹¹⁷ Under this view, one could argue that the implied provision allows the Union to act even when a crime has no significant cross-border elements, as long as it meets the goals of Article 67(3). Yet one could also reasonably point out, that, to the contrary, the Treaty only provides for Union authority to harmonize criminal law with respect to cross-border offenses, as stated in Article 83(1). Under this view, any other interpretation of the Treaty would be the equivalent of amending it.¹¹⁸

In addition to the potential difficulties with the Treaty basis for expressive criminal law measures such as the Framework Decision, other legal, political, and theoretical objections present themselves. Broadly speaking, when contemplating action to unify national criminal laws, the Union must take into account the competing assertions of state sovereignty and the value of keeping criminal lawmaking close to the citizens.¹¹⁹ Criminal law continues to be regarded as an essential state function and a central feature of state sovereignty.¹²⁰ By authorizing the state to use force against its citizens, criminal law represents one of the most important instruments of social control.¹²¹ The decision to use criminal prohibitions, as opposed to other sanctions to ensure compliance, is a fundamental political decision that defines a community; for that reason, it is a decision that any sovereign community should be able to make for itself.¹²² These theoretical considerations are embodied in the legal principles of subsidiarity, proportionality, and respect for member states’ national identities, all of which are reinforced by the Treaty of Lisbon.

¹¹⁷ TFEU art. 67(3).

¹¹⁸ BVerfG, 2BvE 2/08 vom 30.6.2009, para. 327.

¹¹⁹ As the Treaty itself recognizes, the move toward a closer Union is at the same time a move that recognizes the importance of taking decisions as closely as possible to the citizens. TEU art. 1.

¹²⁰ *See, e.g.*, BVerfG, 2BvE 2/08 vom 30.6.2009, para. 355.

¹²¹ *See* Weigend, *supra* note 13, at 789.

¹²² *Id.* (arguing that “it is the prerogative and the duty of the community’s democratically legitimated government to make decisions in this field”).

Because criminal law continues to be legitimated primarily through democratic action at the national level, national constitutional courts are likely to resist expansive interpretations of the European Union's authority to act in this area. As the German Constitutional Court underscored in its recent decision on the Lisbon Treaty, because "democratic self-determination is affected in an especially sensitive manner by provisions of criminal law and criminal procedure, the corresponding basic powers in the treaties must be interpreted strictly . . . and their use requires particular justification."¹²³ The resort to criminal law by the European Union cannot be justified simply on the grounds that EU member states have come to a political consensus.¹²⁴ Instead, there needs to be an open debate about why the nature and impact of the crime is such that it deserves to be addressed at the supranational level.¹²⁵ The Union's interest in using the criminal law to promote its core values must be carefully balanced against states' rights to make these decisions.

V. Respecting the Limits to EU Criminal Law Powers: Three Responses

How should the European Union respond to these reservations about its competence to enact criminal law measures, particularly when there is no clear evidence that a crime has a cross-border dimension? Are there special procedures that the European Union can adopt in such circumstances in order to allay state concerns about overreaching? Three possible responses present themselves.

First, the European Union could adopt a conservative approach and refrain from harmonizing criminal laws in the absence of a real practical need and firm legal basis for supranational intervention. The European Union could limit itself to adopting criminal laws only in the areas specifically mentioned in the Treaty and in the limited instances when criminalization is

¹²³ BVerfG, 2BvE 2/08 vom 30.6.2009, para. 358.

¹²⁴ *Id.* para. 359.

¹²⁵ For example, the UK House of Lords and the UK government have expressed the view that the EU must base criminal law harmonization on statistical evidence showing that such harmonization adds real value to national efforts. HOUSE OF COMMONS JUSTICE COMMITTEE, *supra* note 42, at 15-16.

essential to implementing preexisting EU regulations.¹²⁶ The European Union would not interpret expansively its criminal law powers and would refrain from acting when national authorities are already addressing the problem.

Second, the European Union could seek a Treaty amendment to give it broader authority in criminal law. The amendment could specifically authorize the European Union to pass criminal laws that uphold enumerated core values of the Union, such as equal treatment, even when no cross-border element is present. The amendment would require ratification at the domestic level and this process would ensure that national concerns are heeded.

Yet because the amendment process is slow, cumbersome, and unpredictable, the EU institutions are unlikely to invoke it. Especially given the recent comprehensive overhaul of the EU's legal framework through the Treaty of Lisbon, the Union is likely to be reluctant to introduce new Treaty amendments in the near future. Instead, EU institutions would most probably prefer to find a plausible (albeit broad) interpretation of the Treaties that would authorize them to act.

As noted earlier, the implied powers provision, Article 352, can be interpreted to give them such authority. Yet this would be an expansive reading of the clause and may be seen to go beyond the scope of what member states authorized when ratifying the Treaty. Because such use of Article 352 is likely to affect sensitive national interests in the field of criminal law, it is important for the European Union to take additional steps to ensure that national concerns are considered.

The third possible response, therefore, would be to strengthen the procedural safeguards protecting national sovereignty and promoting subsidiarity in this area. The European Union could actively involve the democratically elected national legislatures before taking any decision to expand the reach of EU criminal law, and it could allow their reasoned reservations to carry decisive weight.¹²⁷ Such an approach would not only

¹²⁶ *Id.* art. 83(2).

¹²⁷ See BVerfG, 2BvE 2/08 vom 30.6.2009, paras. 358, 366.

address concerns about subsidiarity, but would also reduce the likelihood that the European Union would enact legislation on a less than certain legal basis.

The Treaty of Lisbon already recognizes the importance of involving national parliaments in the EU legislative process. It requires the Commission to consult national parliaments and draw their attention to proposals under the implied powers provision.¹²⁸ It also gives national parliaments the opportunity to review proposed EU legislation and to object to it on grounds of subsidiarity. In criminal law, objections by one-fourth of the legislative chambers trigger reconsideration by the Commission.¹²⁹ After reviewing the objections, the Commission must provide reasons for its decision to maintain, amend, or withdraw the legislative proposal.¹³⁰ If a majority of national legislative chambers object, the Commission must again review the legislative proposal. To maintain it, the Commission must explain why it complies with subsidiarity.¹³¹ The Commission must then forward its reasoned opinion to the Council and European Parliament, either of which could vote down the proposed legislation.¹³²

The Lisbon Treaty's introduction of subsidiarity review by national parliaments is a welcome innovation, and the recognition that this review should be given more weight in the field of criminal law is encouraging. But given the important interests of democratic legitimacy and state sovereignty that inhere in the passage of criminal laws, even stronger safeguards should apply when the European Union legislates on crimes lacking a demonstrable cross-border dimension. In such circumstances, even when parliamentary concerns fail to reach the one-fourth threshold necessary to trigger review—indeed, even when just one national parliament offers a reasoned objection on the grounds of subsidiarity—the Commission should voluntarily reconsider the legislation. Given the difficulty of coordinating action across different

¹²⁸ Lisbon Subsidiarity Protocol, *supra* note 35, art. 2; TFEU art. 352(2).

¹²⁹ Lisbon Subsidiarity Protocol, *supra* note 35, art.7(2).

¹³⁰ *Id.*

¹³¹ *Id.* art. 7(3).

¹³² “[I]f, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration.” *Id.*

national parliaments,¹³³ a lower threshold would be important for allowing national concerns to be adequately presented at the EU level. Since the Treaty does not provide for such a lower threshold, the procedure would depend on the Commission's voluntary cooperation in this arrangement.

As explained earlier, the Treaty already provides a procedure by which even one member state can pull an "emergency brake" on a criminal law measure proposed under Article 83, when it believes that the measure would affect fundamental aspects of its criminal justice system. Invocation of the "emergency brake" suspends the ordinary legislative process and refers the matter for further discussion to the European Council. Should no consensus about the legislation arise, nine or more states can proceed with the legislation, but the objecting state would not be bound by it. In short, states concerned about the effect of a criminal law on their national autonomy already have the ability to object and exempt themselves from the proposed measure.

The procedure I am proposing is in some respects similar to the emergency brake, in that it recognizes that just one member state might force the reconsideration of a criminal law. But there are several important differences. First, the procedure proposed here would be triggered by national parliaments, not government ministers, which would add to its democratic legitimacy.¹³⁴ Second, it would apply not only when a measure would fundamentally affect a national criminal justice system, but also when it fails the subsidiarity test (i.e., whenever the European Union fails to show that it is better positioned than national authorities to combat the crimes in question). Finally, unlike the emergency brake, the procedure I propose would lead to the reconsideration and possible defeat of the measure for all members, rather than merely exempting the objecting state.

The proposed procedure would not require a Treaty amendment, yet it would fulfill the goal of involving national legislatures in decisions to expand the reach of EU criminal law. It would reinforce active and respectful dialogue

¹³³ A recent study confirms that, under the current threshold and deadlines, parliaments have difficulty coordinating actions to trigger reconsideration of the legislation by the Commission. Piotr Maciej Kaczyński, Paper Tigers or Sleeping Beauties? National Parliaments in the Post-Lisbon European Political System 10-13, CEPS Special Report (Feb. 1, 2011), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1756817.

¹³⁴ *E.g.*, CHALMERS ET AL., *supra* note 4, at 126.

between the European Union and national legislatures, and it would be consistent with subsidiarity, proportionality, and the Union's commitment to respect national identities and essential state functions.¹³⁵ Such a dialogue is a prerequisite to politically legitimate EU criminal laws, especially when these laws are passed primarily for expressive reasons. The claim of the European Union to define its political identity is no stronger than national claims to do the same. When these two claims come into conflict, active deliberation between the EU institutions and their national counterparts is critical to defusing the tension.

In the end, a dialogue with national legislatures is also pragmatically justified. National parliaments are ultimately responsible for implementing EU criminal laws through domestic legislation, and national police and prosecutors are tasked with enforcing these laws. Without democratic deliberation at the national level about the need for new EU criminal laws, a commitment to robust enforcement of these laws is more likely to be lacking.

VI. Conclusion

Over the last two decades, the European Union has taken decisive steps in transforming itself from a purely economic organization to a political and social union. EU intervention in criminal law matters has played a part in this transformation. The Union has used the criminal law to express a set of core common values and to strengthen its political identity. The EU's action on racist and xenophobic crime is an example. Both the drafting history and the text of the legislation suggest that there was no significant cross-border effect of racist crime and no clear evidence of a practical need for harmonizing law on this question across the EU. The symbolic nature of the legislation is further evident in the escape clauses included in the final version, which severely weakened the legislation's claim to harmonize national laws. Finally, other instruments—the European Arrest Warrant and the Additional Protocol to the Convention on Cyber-Crime—already addressed the main problems

¹³⁵ TEU art. 4(2) (“The Union shall respect [Member States’] . . . national identities, inherent in their fundamental structures, political and constitutional It shall respect their essential State functions, including . . . maintaining law and order.”).

with which the European Union was concerned, further undermining the argument that EU action was necessary.

Discussion of the Framework Decision on racist and xenophobic crime also raises broader questions about the legitimacy of using EU criminal law for expressive purposes, particularly in light of the Union's expanded powers in the field after the Treaty of Lisbon. The new Treaty does not provide a clear and undisputed basis for such action. The European Union may rely on its implied powers, but the use of such powers risks the objection that the Union is encroaching on legitimate national interests.

These national interests should not be discounted. Precisely because of its expressive function, criminal law is a critical element of state sovereignty. The decision to use it should be made in a democratic fashion, and, in the spirit of subsidiarity, close to the citizen. To the extent that national communities remain sovereign, they must be able to harness the expressive value of criminal law in defining their own political identities.

The EU's claim to define its political identity is not superior to the national claim to do the same. Before choosing to use the criminal law to communicate core values, the European Union should engage in a dialogue with national legislatures. A supranational criminal law can coexist with national criminal law, even if both are used primarily for expressive purposes. But national communities should have the opportunity to take part in the process of creating EU criminal law, even if that means that they will sometimes derail the process. Active participation by national legislatures would help to ensure that supranational criminal law and the political identity it supports do not entirely supplant national identities and values.

The process advanced in this Article is likely to be more cumbersome and to produce fewer EU criminal laws. Yet if these laws are passed after broad consultation and deliberation at the national and supranational levels about their purpose and usefulness, they are ultimately more likely to be legitimate and effective and to lessen perceived encroachments on national sovereignty. A more modest and incremental view of the EU's role in the legislation of criminal justice may better serve the political goals to which Europe and its peoples aspire.