

# EUROPE CAN SUCCEED WHERE AMERICA FAILED: A COMPARATIVE APPROACH TO GENDER-BASED VIOLENCE

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## INTRODUCTION

Gender-based violence (GBV) is a worldwide problem. According to UN Women, one in three women worldwide experience physical or sexual violence, mostly from intimate partners.<sup>1</sup> GBV has many forms, ranging from sexual assault to female genital mutilation (FGM) to domestic violence. Oftentimes, GBV accompanies broader societal crises. UN Women refers to the 2020 spike in GBV as a “shadow pandemic.”<sup>2</sup> In France, reports of domestic violence increased by 30% after the March 17 lockdown,<sup>3</sup> and in Germany, domestic violence rose by nearly 5% in 2020.<sup>4</sup> The German Federal Criminal Police

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The author recognizes that persons of all genders can experience economic abuse by an intimate partner and will use the gender-neutral term ‘survivors’ wherever possible. However, much of the literature on economic abuse focuses solely on economic abuse of women, so complete gender neutrality is not possible.

<sup>1</sup> TAMIL KENDALL, A SYNTHESIS OF EVIDENCE ON THE COLLECTION AND USE OF ADMINISTRATIVE DATA ON VIOLENCE AGAINST WOMEN 9 (2020).

<sup>2</sup> *The Shadow Pandemic: Violence Against Women During COVID-19*, UN WOMEN, <https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19> [<https://perma.cc/3QBZ-6YQV>].

<sup>3</sup> Marie Campistron, *France Fears Fresh Wave of Domestic Violence Amid Second COVID-19 Lockdown*, FRANCE24 (Nov. 2, 2020), <https://www.france24.com/en/france/20201102-france-fears-fresh-wave-of-domestic-violence-amid-second-covid-19-lockdown> [<https://perma.cc/TG79-SJ4X>].

<sup>4</sup> BUNDESKRIMINALAMT, PARTNERSCHAFTSGEWALT – KRIMINALSTATISTISCHE AUSWERTUNG 2020 [VIOLENCE IN PARTNERSHIP – CRIMINAL STATISTICAL EVALUATION – REPORTING YEAR 2020] 3 (2021).

Office expressed concerns that domestic violence was likely under-reported during the March 2020 lockdown.<sup>5</sup>

However, while instances of GBV in Europe may have increased since 2020, it has been an extensive problem for the European Union (EU) for a much longer time. A study by the EU Agency for Fundamental Rights (FRA) in 2014 showed that 10% of women in the EU had experienced some form of sexual assault by the age of fifteen, and 43% of those surveyed had experienced some form of psychologically abusive and/or controlling behavior in a relationship at some point in their lives.<sup>6</sup>

On an individual level, GBV causes intense physical, emotional, and psychological trauma. However, these aggregated negative effects culminate in broader societal harm. This harm manifests itself in multiple ways: diminished participation by women in the overall economy, loss of productivity, increased healthcare costs, and negative effects on commutes and travel.<sup>7</sup> In the EU, the annual economic impact of GBV is estimated to be over €220 billion, amounting to almost 2% of the EU's annual GDP.<sup>8</sup> Due to reporting problems, likely caused by a lack of dependable data collection, this expense could be even greater.<sup>9</sup> Therefore, GBV represents a significant challenge, not only for individual Member States, but for the EU as a whole.<sup>10</sup>

Despite this, the EU currently lacks a specific, binding instrument designed to protect women from violence.<sup>11</sup> Instead, the Bloc relies on a complex patchwork of directives and regulations, which individually regulate common issues related to GBV, such as human trafficking, victim's rights, mutual

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<sup>5</sup> See Ralf Bosen, *A Daily Nightmare: Violence Against Women*, DEUTSCHE WELLE (Nov. 25, 2021), <https://www.dw.com/en/violence-against-women-when-daily-life-becomes-a-nightmare/a-59917129> [<https://perma.cc/S8XZ-HUHT>].

<sup>6</sup> ROSAMUND SHREEVES & MARTINA PRPIC, *VIOLENCE AGAINST WOMEN IN THE EU: STATE OF PLAY 2* (2020).

<sup>7</sup> Antonyia Parvanova (Rapporteur), *Comm. on Women's Rts. & Gender Equal., Report with Recommendations to the Commission on Combatting Violence Against Women*, at 7, A7-0075/2014 (Jan. 31, 2014), [https://www.europarl.europa.eu/doceo/document/A-7-2014-0075\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-7-2014-0075_EN.html) [<https://perma.cc/47SW-M9RK>].

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 8. See also SHREEVES & PRPIC, *supra* note 6, at 2; ANNE BONEWIT & EMMANUELLA DE SANTIS, *THE ISSUE OF VIOLENCE AGAINST WOMEN IN THE EUROPEAN UNION 24* (2016).

<sup>10</sup> BONEWIT & DE SANTIS, *supra* note 9, at 21.

<sup>11</sup> SHREEVES & PRPIC, *supra* note 6, at 7.

recognition of civil judgments, and equal treatment between men and women.<sup>12</sup> Taken separately, some of these directives are quite effective,<sup>13</sup> but together, they do not effectively address the totality of GBV.<sup>14</sup> This lack of a comprehensive and specific instrument has been criticized by activists<sup>15</sup>, academics<sup>16</sup>, and policy makers<sup>17</sup> alike, with even the European Parliament calling for a legally-binding instrument.<sup>18</sup>

Member States often have different laws regarding gender-based violence, as well as different reporting standards and definitions of crimes.<sup>19</sup> Consequently, in some Member States, GBV-adjacent measures are ineffective because they lack domestic implementation.

While the EU has a limited power to harmonize divergent national standards,<sup>20</sup> existing literature suggests that a major challenge regarding a specific harmonizing instrument on GBV is the lack of a legal basis for such action.<sup>21</sup> Because the EU is limited to exercising those powers that have been

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<sup>12</sup> *Id.* at 7–8.

<sup>13</sup> See, e.g., Meng-Hsuan Chou, *The Politics of Human Trafficking*, 4 ST. ANTONY'S INT'L REV. 76, 77 (2008) (discussing the efficacy of the EU human trafficking directive). *But see Commission Report on the Implementation of Directive 2012/29/EU* (2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0188> [<https://perma.cc/7YL3-GK2A>] (discussing the lack of implementation of the Victim's Right's Directive by member states and the resulting efficacy problems).

<sup>14</sup> SHREEVES & PRPIC, *supra* note 6, at 7.

<sup>15</sup> EWL CENTRE ON VIOLENCE AGAINST WOMEN, TOWARDS A EUROPE FREE FROM ALL FORMS OF MALE VIOLENCE AGAINST WOMEN 4 (2010), <https://www.womenlobby.org/Towards-a-Europe-Free-from-All-Forms-of-Male-Violence-against-Women-December> [<https://perma.cc/W4SU-9P3S>].

<sup>16</sup> Joanna Goodey, *Violence Against Women: Placing Evidence From a European-Union Wide Survey in a Policy Context*, 32 J. OF INTERPERSONAL VIOLENCE 1760, 1762 (2017).

<sup>17</sup> Parvanova, *supra* note 7, at 15.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., Consolidated Version of the Treaty on the Functioning of the European Union art. 114, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

<sup>21</sup> EUR. COMM'N, FEASIBILITY STUDY TO ASSESS THE POSSIBILITIES, OPPORTUNITIES AND NEEDS TO STANDARDISE NATIONAL LEGISLATION ON VIOLENCE AGAINST WOMEN, VIOLENCE AGAINST CHILDREN AND SEXUAL ORIENTATION VIOLENCE 148 (2010) [hereinafter FEASIBILITY STUDY].

expressly delegated to it,<sup>22</sup> and because the power to harmonize laws relating to gender-based violence is not thought to derive from the current European Treaties, commentators suggest that the EU lacks the competence to act with binding legislation on this issue, favoring a soft law approach instead.<sup>23</sup>

This Note challenges that view. Drawing upon parallels in American constitutional jurisprudence, this Note argues that the aggregate effects of differing national laws regarding domestic violence are an impediment to the proper “functioning of the internal market” of the EU. As such, the European Council and Parliament have the authority under Article 114 of the Treaty on the Functioning of the European Union (TFEU) to harmonize laws relating to gender-based violence. Such harmonization would have wide-ranging effects on the status of GBV in the European Union. For example, legislation could create minimum definitions for intimate partner violence, marital rape, and affirmative consent, thereby targeting those nations where these definitions are lacking. Harmonization could create harsher penalties for these and other crimes, as well as standardized investigative procedures and sentencing guidelines, all of which would prevent certain member states from minimizing GBV in their own domestic legal systems. Through harmonization, the European Union could improve cross-border law enforcement cooperation in these areas, as well as support other directives that focus on gender-equality issues, such as the Victim’s Rights Directive and the directive on human trafficking. Furthermore, harmonization under Article 114 would allow the EU to touch upon ancillary civil issues related to GBV, such as community support, prevention and education programs, and even possible civil remedies. These are all issues that the American Violence Against Women Act (VAWA) addressed, which is why such a comparison is of additional value.

Part I discusses the existing status quo regarding GBV within the EU, both analyzing the shortcomings of the existing directives and establishing the need for a binding, comprehensive instrument. Part I concludes by assessing various legal bases for action on this issue, focusing in particular on the European Parliament’s recent proposed legislation to combat GBV. Part II analyzes the jurisprudence of Article 114 of the TFEU, regarding its limitations and its applicability towards combating GBV. Part II looks both towards the European Court of Justice’s guidance and American constitutional law, particularly the case of *United States v. Morrison*, in assessing the possible applicability of

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<sup>22</sup> Consolidated Version of the Treaty on European Union, art. 5, Oct. 26, 2012, 2012 O.J. (C 326) 18 [hereinafter TEU].

<sup>23</sup> *Id.* See also BONEWIT & DE SANTIS, *supra* note 9, at 38; FEASIBILITY STUDY, *supra* note 21, at 149–51. For further views, see *infra* Part III.A.

Article 114 of the TFEU to GBV. Finally, Part III discusses possible issues related to federalism, sovereignty, and subsidiarity arising out of using Article 114 TFEU to harmonize GBV laws in the EU.

## I. The EU's Current GBV Approach

Much like in the United States, debates over GBV in the EU highlight tensions between the Member States and the federal government.<sup>24</sup> The federal government in the United States and the European government in the EU consistently call for more effective legislation and legal efforts in the realm of GBV. However, inaction by select Member States prevents true, comprehensive action against GBV due to widely divergent standards.

This Part seeks to explain the current status quo regarding those divergent GBV standards within the EU, introduce and critique the unsuccessful efforts the EU has made thus far in this area, and assess both the political and legal barriers to more effective action. In doing so, this Part will also draw conclusions from the successes of the American VAWA to articulate how the EU might replicate that success with a similar binding instrument. Finally, the Part ends with a summary of the EU's actions thus far, concluding that successful regulation of GBV requires a wider approach.

### A. Initial Background

The EU has long been active in fighting GBV. The adoption of the Maastricht and Amsterdam treaties in 1993 and 1997 brought a new social dimension within European integration, including a new focus on gender issues.<sup>25</sup> This appeared to be a marked departure from the then-European Community's traditional concentration on economic issues, but even before that shift, the European Parliament had tasked the Commission and Council<sup>26</sup> with researching and acting on GBV in a 1986 resolution.<sup>27</sup>

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<sup>24</sup> For an overview of the EU's governance model, see *infra* text accompanying note 26.

<sup>25</sup> BONEWIT & DE SANTIS, *supra* note 9, at 32.

<sup>26</sup> The EU is a pseudo-federal state, with a government comprised of Member States' representatives, directly elected legislators, and a technocratic executive. The Parliament is directly elected by European citizens and can be likened to the House of Representatives. The Council consists of government ministers from each of the 27 Member States, broadly similar to the Senate or a similarly situated upper house of parliament. The Commission is the executive branch of the Union, consisting of commissioners nominated by the Council and confirmed by Parliament. The Commission has the sole power to propose EU legislation, which is then voted upon by both the Council and the Parliament.

<sup>27</sup> Resolution on Violence Against Women, 1989 O.J. (C 176) 73, 74.

Owing to this new focus on social equality and gender rights, the Maastricht Treaty on European Union (TEU) eschewed discrimination of all forms and made equality a core foundation of the Union in Article 2.<sup>28</sup> The Charter of Fundamental Rights of the EU, signed in 2000, and which nominally possesses the same binding power as the Treaties, also speaks to issues dedicated to gender equality and freedom from violence.<sup>29</sup> In 2009, upon recommendation of Parliament, the Commission funded the “Campaign for Zero Tolerance for Violence Against Women,” which raised awareness of the issue.<sup>30</sup>

The European Parliament has continuously called on the Council and Commission for more action<sup>31</sup> but has ultimately been unsuccessful in achieving its goal: a comprehensive instrument on GBV. Instead, the Union repeatedly utilizes targeted measures that collectively seek to cover a broad spectrum of women’s issues. These include human trafficking, victim’s rights, protection orders that extend uniformly throughout the Union, and mutual recognition of civil judgments.<sup>32</sup> The EU has also called upon the Member States to sign and ratify the Istanbul Convention, a Council of Europe human rights treaty

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<sup>28</sup> TEU art. 2. The Maastricht Treaty is the predecessor to the current-day Treaty on the European Union of 2007, which outlines the basic principles of European cooperation. The other foundational treaty, the Treaty on the Functioning of the European Union, was signed in 2009 in Lisbon and provides the detailed competences of the European Union vis-à-vis its Member States.

<sup>29</sup> Charter of Fundamental Rights of the European Union, Titles 3, 4, Dec. 12, 2007, 2007 O.J. (C 303) 1. However, the Charter does not necessarily create a legal basis for the EU to intervene in order to protect the fundamental rights. In fact, it is explicitly stated that the Charter “may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties.” Explanations, O.J. (2007/C 303/02), 303/32. While the Union does have the competency to implement CFR “principles,” the treaty does not outline which rights contain “principles.” 2007. O.J. (C303) 51. The result is that the Charter, while an effective human rights document, does not create an adequate basis for the implementation of a comprehensive VAW instrument.

<sup>30</sup> Celeste Montoya, *International Initiative and Domestic Reforms: European Union Efforts to Combat Violence Against Women*, 5 POL. & GENDER 325, 333 (2009).

<sup>31</sup> BONEWIT & DE SANTIS, *supra* note 9, at 34.

<sup>32</sup> Directive 2011/36/EU, of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA, 2011 O.J. (L 101) 1; Directive 2012/29/EU, of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA, 2012 O.J. (L 315) 57; Regulation EU/606/2013, of the European Parliament and of the Council of 12 June 2013 on Mutual Recognition of Protection Measures in Civil Matters, 2013 O.J. (L 181) 4; Directive 2011/99/EU, of the European Parliament and of the Council of 13 December 2011 on the European Protection Order, 2011 O.J. (L 338) 2.

dedicated specifically to combating GBV.<sup>33</sup> These are all important steps in the right direction but cannot cover GBV in its entirety.<sup>34</sup>

The largest obstacle in effectively fighting GBV within the EU is the lack of uniform definitions and frameworks, which results in different outcomes among Member States.<sup>35</sup> For example, the Council of Europe's Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) recently criticized Poland for its lack of adequate protection for women. The criticism levied against Poland relates to both selective enforcement and claims of misogyny as well as Poland's substantive criminal law, where GREVIO found "improvement is warranted in order to reach higher levels of compliance with the requirements of the Istanbul Convention."<sup>36</sup> Amnesty International more directly condemned Poland's lack of protections for victims of domestic violence:

Lack of adequate protections for victims of violence combined with antiquated laws and a culture of victim blaming and impunity form a combustible mixture. Rather than tackling these urgent problems through actions such as adopting a consent-based definition of rape, Polish law makers are threatening to make the country less safe for women and girls.<sup>37</sup>

Other Member States present equally disturbing records on GBV. Spain and France do not legally define sex without consent as rape, requiring that survivors prove their perpetrators subjected them to violence or threats of violence.<sup>38</sup> Bulgaria neither includes marital rape in its legal definition of rape

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<sup>33</sup> Parvanova, *supra* note 7, at 10.

<sup>34</sup> Goodey, *supra* note 16, at 1762.

<sup>35</sup> Parvanova, *supra* note 7, at 8.

<sup>36</sup> GREVIO, BASELINE EVALUATION REPORT POLAND 7 (2021), <https://rm.coe.int/grevio-baseline-report-on-poland/1680a3d20b> [<https://perma.cc/4QAW-EWHB>].

<sup>37</sup> Press Release, Amnesty International, Poland: Government's 'Deeply Misogynistic' Attitude Condemned (Sep. 16, 2021), [www.amnesty.org.uk/press-releases/poland-governments-deeply-misogynistic-attitude-condemned](http://www.amnesty.org.uk/press-releases/poland-governments-deeply-misogynistic-attitude-condemned) [<https://perma.cc/3QLF-32LL>].

<sup>38</sup> Lauren Chadwick, *'There Is Huge Resistance': Europe's Problem with Violence Against Women*, EURONEWS, (Nov 20, 2019), <https://www.euronews.com/2019/11/19/there-is-huge-resistance-europe-s-problem-with-violence-against-women> [<https://perma.cc/9SY5-V32Y>]. As of January 1, 2023, Finland switched to a consent-based law. See Press Release, Ministry of Justice Finland, Revised Legislation on Sexual Offences Enters into Force at the Beginning of Next Year (Dec. 12, 2022), <https://oikeusministerio.fi/en/-/revised-legislation-on-sexual-offences-enters-into-force-at-the-beginning-of-next-year> [<https://perma.cc/3NKE-WLPH>].

nor provides shelters for victims of domestic violence.<sup>39</sup> These are just isolated examples, but the trend is clear: there is a lack of uniform definitions, standards, and frameworks when dealing with GBV.

### B. Previous and Current Unsuccessful Efforts

These issues have not gone unnoticed by the EU's governance. The EU is engaged in ongoing efforts to create uniform definitions, align investigations and victim support to a high common standard, and improve GBV legislation. Harmonization of laws, a power vested in several EU articles,<sup>40</sup> can alleviate this problem by ensuring a common floor for GBV legislation across all EU Member States. Furthermore, through targeted measures, the EU can ensure that harmonization is effective in areas that existing measures cannot reach, such as domestic violence or ensuring enthusiastic consent for sexual activity. Harmonization, beyond minimum definitions, can also ensure uniform penalties, civil remedies, support systems, and investigatory guidelines.<sup>41</sup> With a common European standard, prosecutors, social services, caseworkers, and other actors combatting GBV would have cross-border tools to more effectively combat GBV, protect victims and victims' families, and enforce a high standard of legislation. These instruments are beyond the scope of the EU's less targeted measures on human trafficking or gender equality and leave other important issues unaddressed.<sup>42</sup>

Unsurprisingly, this possible solution of creating uniform standards and definitions has not gone unnoticed. The Parliament has repeatedly called for greater harmonization and more minimum standards in the realm of criminal law regarding GBV, first in 2013, then again in 2014, 2015, and 2021.<sup>43</sup> Each time the Parliament based its proposals around Articles 82, 83, and 84,<sup>44</sup> which

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<sup>39</sup> Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Eighth Periodic Report of Bulgaria*, ¶¶ 22(c) & 23(b), CEDAW/C/BGR/CO/8 (Mar. 10, 2020).

<sup>40</sup> See, e.g., TFEU art. 113; TFEU art. 114; TFEU art. 151; TFEU art. 191.

<sup>41</sup> See Directive 2012/29/EU, *supra* note 32 (for uniform penalties, support systems, and investigatory guidelines); Directive 2014/57/EU, of the European Parliament and of the Council of 16 April 2015 on Criminal Sanctions for Market Abuse (Market Abuse Directive), 2014 O.J. (L 173) 179 (for civil remedies, penalties, and investigatory guidelines); Directive 2011/36/EU, *supra* note 32 (for investigatory guidelines and support systems).

<sup>42</sup> Paranova, *supra* note 7, at 8.

<sup>43</sup> BONEWIT & DE SANTIS, *supra* note 9, at 34–35.

<sup>44</sup> *Id.*



collectively exist within the “Area of Freedom, Security, and Justice” (AFSJ).<sup>45</sup> These articles are concerned with cooperation between Member States regarding criminal law. At the outset, it seems sensible that regulations targeting GBV, which generally consists of criminal acts, would stem from articles in the Treaties dealing with the streamlining of criminal procedure and substantive criminal law. However, using these articles to fight GBV presents unique constitutional challenges, which helps explain why, despite repeated efforts spanning over half a decade, the EU has failed to issue a comprehensive directive against GBV based on Articles 82, 83, and 84.<sup>46</sup>

To illustrate some of these issues, consider the most recent proposal by the European Parliament to combat GBV using Article 83.<sup>47</sup> Article 83(1) TFEU grants the European Union the power to establish “minimum rules” regarding the definition of crimes within the area of “particularly serious crimes with a cross-border dimension.”<sup>48</sup> “Definitions,” as used in this context, is more expansive than it might appear at first and can include both a description of the criminal behavior as well as details such as the level of guilt necessary, ancillary conduct, and operational questions.<sup>49</sup> The Article then proceeds to list these ten “particularly serious crimes”: terrorism, human trafficking, sexual exploitation of women and children, drug and arms smuggling, corruption, money laundering, counterfeiting, organized crime, and cybercrime.<sup>50</sup> Article 83 is clearly a powerful tool, providing the basis for some of the Union’s existing directives on these issues.<sup>51</sup>

This Article is particularly attractive as a basis to establish a directive on GBV due to the possibility of establishing minimum definitions for crimes, since non-uniform definitions are one of the obstacles to effective action. However, Article 83(1) does not enumerate GBV itself as a particularly serious

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<sup>45</sup> TEU art. 3(2); TFEU tit. V.

<sup>46</sup> BONEWIT & DE SANTIS, *supra* note 9, at 32.

<sup>47</sup> Report with Recommendations to the Commission on Identifying Gender-Based Violence as a New Area of Crime Listed in Article 83(1) TFEU, EUR. PARL. DOC. A9-0249/2021 (2021).

<sup>48</sup> TFEU art. 83(1).

<sup>49</sup> Wolfgang Bogensberger, *Article 83 TFEU*, in *THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY* 896, 898 (Manuel Kellerbauer et al. eds., 2019).

<sup>50</sup> TFEU art. 83(1).

<sup>51</sup> Bogensberger, *supra* note 49, at 897.

crime with a cross-border dimension.<sup>52</sup> The Parliament's proposal, therefore, necessitates adding GBV to that list.<sup>53</sup>

Article 83(1) allows for this, requiring consent from the Parliament and unanimous action by the Council.<sup>54</sup> Parliament's September 2021 vote with 427 votes in favor established consent, and the proposal to change the treaties has now been submitted to the Council for action.<sup>55</sup> In a seminal report by the Minister of European Parliament (MEP), Antonia Parvanova, to the European Commission in 2014, she expressed particular support for this course of action.<sup>56</sup> Article 83, in essence, would represent an affirmative grant of power by the European Member States allowing the Union to legislate and establish minimum rules and competencies regarding GBV.

### C. Issues with the Existing Proposal

Article 83(1) is promising; the establishment of minimum rules and definitions in this space would allow the EU to remove legislative gaps like those mentioned above in France, Spain, and Bulgaria. However, one of the largest obstacles to a successful application of Article 83(1) remains political. Upon the consent of the European Parliament, a unanimous Council must still agree to adopt any change to Article 83(1)'s list of crimes.<sup>57</sup> Given the Council's current makeup, this is unlikely to happen. For example, Poland's current representation in the Council is Prime Minister Morawiecki, a member of Poland's Law and Order (PiS) party.<sup>58</sup> The PiS party is a member of the European Conservatives and Reformists (ECR) group in the EU Parliament,<sup>59</sup> and the ECR almost unanimously voted against sending the recommendation to

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<sup>52</sup> TFEU art. 83(1).

<sup>53</sup> European Parliament Resolution, 2022 O.J. (C 117) 88.

<sup>54</sup> TFEU art. 83(1).

<sup>55</sup> *Infra* note 60.

<sup>56</sup> Paranova, *supra* note 7, at 16–17. The Parvanova report continues to be cited as a leading authority on the lack of proper EU action regarding GBV. Although this is not the first report on GBV in the European Union, it is the most recent and the most important to date.

<sup>57</sup> TFEU art. 83(1).

<sup>58</sup> *Members of the European Council*, EUROPEAN COUNCIL & COUNCIL OF THE EUROPEAN UNION (Mar. 17, 2023), <https://www.consilium.europa.eu/en/european-council/members/> [<https://perma.cc/2C2U-B5YE>].

<sup>59</sup> *Member Parties*, ECR GROUP (2022), <https://ecrgroup.eu/ecr/parties> [<https://perma.cc/S9UR-RT92>].

the Council in the first place.<sup>60</sup> Generally, their reservations regarding the use of Article 83 revolve around ideological issues with the proposal, claiming that it “violates the presumption of innocence, obliging the accused man to prove that he is not guilty.”<sup>61</sup> However, the ECR also stated that, in its opinion, national legislation on behalf of Member States suffices to fight GBV—without EU action.<sup>62</sup> Therefore, it follows that a PiS minister in the Council would likely veto the proposal. Poland is not the only country whose Council representation is made up of ECR parties; governing coalitions in Slovakia and Latvia include ECR group parties, and it is likely at least one of their ministers would oppose the proposal.<sup>63</sup> Therefore, while amending Article 83 would grant the European Union an express legal basis to adopt directives regulating GBV (i.e., via the “ordinary” legislative procedure and no more), it is unlikely that the Council will vote unanimously to grant the EU this power.

Of course, this is a political, and not a legal, problem. Minimum rules and definitions would assist the EU greatly in combatting GBV, and the only impediment is the political improbability of achieving the necessary votes in the Council. While minimum rules and definitions could alleviate some of the issues regarding GBV within the European Union, Article 83 does not grant the Union the power to issue directives to harmonize laws on this issue.<sup>64</sup> Minimum rules seek to create a “legislative floor” for definitions of crimes and certain law enforcement actions. In contrast, full harmonization would not only align Member States’ domestic regulation with an EU standard, but may also include additional obligations for Member States, such as requiring standardized investigative procedures or strengthening victim’s rights. Harmonization would therefore allow the EU to go beyond minimum rules and definitions in criminal statutes. Examples of possible harmonization from the past include harsher penalties for criminal violations, requiring Member States to allow civil remedies for victims, and creating directives requiring Member States to ensure

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<sup>60</sup> European Parliament Information and Notices, 2022 O.J. (C 209) 588. Note that there was one “yes” vote from the ECR from MEP Merlbarde of Latvia.

<sup>61</sup> European Parliament Resolution A9-0249/2021 (minority vote positions).

<sup>62</sup> *Id.* (“National legislation already covers offences that any form of aggression can cause.”).

<sup>63</sup> Minister Petr Fiala, Czech Republic, is a member of an ECR party. It is also likely that Victor Orbán, Prime Minister of Hungary, would not be in favor.

<sup>64</sup> TFEU art. 83(1). Note that harmonization may include minimum definitions; minimum harmonization means that the legislative “floor” is standardized, while states are still free to enact harsher or broader legislation. Contrast this with maximum harmonization, in which the standard EU rules become the only acceptable standard across all Member States. This article advocates for minimum harmonization but beyond minimum rules.

proper support mechanisms, including shelters and specialized counseling.<sup>65</sup> Even if two states legislate to an adequate level in one area, such as criminal law, they may not both do so in regard to support systems or civil penalties.

Article 83(2) does address harmonization of substantive criminal law, but only subject to certain conditions. If harmonization of criminal laws is necessary for the implementation of EU policy in an area that has been harmonized elsewhere in the treaties, then 83(2) authorizes the EU to establish minimum rules regarding definitions and sanctions for that area.<sup>66</sup> This may widen the scope of Article 83 beyond the ten areas enumerated in 83(1), thus opening a door for harmonization of GBV policy. However, the requirement that Article 83(2) may only apply in areas that have already undergone harmonization elsewhere means Article 83(2) does not present an independent basis for harmonization. Instead, it must be used in conjunction with an existing EU harmonization measure, which, in the case of criminal law, is not present elsewhere in the treaties.<sup>67</sup>

Finally, Articles 82 and 84 also offer the Union ways to streamline criminal law, but neither allows for a true harmonization of laws regarding GBV.<sup>68</sup> Article 82 deals with judicial cooperation between Member States in criminal matters. Much like its companion article for civil matters, Article 81, Article 82 deals mainly with the mutual recognition of judgments,<sup>69</sup> mutual admissibility of evidence,<sup>70</sup> and various aspects of criminal procedure.<sup>71</sup> The only area of substantive criminal law for which the Article authorizes harmonization are the rules regarding the rights of victims. Accordingly, Article 82(2)(c) is the basis for the Victim's Rights Directive, one of the existing measures the EU has in place for combating GBV.<sup>72</sup> Article 84 deals with measures to promote and support crime prevention between Member States.<sup>73</sup> However, unlike Articles

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<sup>65</sup> For previous examples of this, *see, e.g.*, Directive 2012/29/EU, *supra* note 32; Directive 2014/57/EU, *supra* note 41.

<sup>66</sup> TFEU art. 83(2).

<sup>67</sup> Bogensberger, *supra* note 49, at 906–07.

<sup>68</sup> TFEU arts. 82, 84.

<sup>69</sup> TFEU art. 83(2).

<sup>70</sup> TFEU art. 82(2)(a).

<sup>71</sup> TFEU art. 82(2)(d).

<sup>72</sup> Directive 2012/29/EU, *supra* note 32, at 57.

<sup>73</sup> TFEU art. 84.

82 and 83, it explicitly excludes any harmonization.<sup>74</sup> The aim of Article 84 is rather to facilitate and liaise between the Member States, not for the EU to prescribe action to the Member States.<sup>75</sup>

Overall, it is not surprising that the Treaties curtail the Union's power to harmonize criminal law. Member States see criminal law as a cornerstone of their sovereignty, and they want any ingress into the sphere of criminal law to be proportional to the evil to be remedied.<sup>76</sup> Any directive or regulation regarding criminal law and its harmonization raises concerns related not just to subsidiarity, but also to federalism and the sovereignty of Member States.<sup>77</sup> This is especially true in the realm of GBV, where many of the crimes at issue, such as domestic violence, lie firmly within the domestic realm, presenting a rarified risk of being cross-border in nature.

#### D. Comparison to the American Approach

The EU's approach to fighting GBV is slightly different than that of the United States under VAWA. The addition of GBV to the list of cross-border crimes under Article 83 would help facilitate law enforcement cooperation and lead to a more streamlined criminal approach to GBV.<sup>78</sup> However, the American VAWA went beyond simple criminal sanctions and improved law enforcement. VAWA established extensive civil programs, including community development programs,<sup>79</sup> funding for various initiatives to prevent crime in public transportation<sup>80</sup> and public parks,<sup>81</sup> and a national domestic violence hotline.<sup>82</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> Case C-1/19, Istanbul Convention, ECLI:EU:C:2021:198, ¶ 298 (Oct. 6, 2021) (“[W]ithin the field of crime prevention in respect of which Article 84 TFEU confers on the European Union the power to establish measures to promote and support the action of Member States.”).

<sup>76</sup> Ester Herlin-Karnell, *EU Competence in Criminal Law After Lisbon*, in *EU LAW AFTER LISBON* 344 (Biondi et al. eds., 2012).

<sup>77</sup> *Id.*

<sup>78</sup> *See supra* Part I.B.

<sup>79</sup> 42 U.S.C. §§ 13821–13853 (1994) (current version at 34 U.S.C. §§ 12181–12212).

<sup>80</sup> *Id.* § 13931 (1994) (current version at 34 U.S.C. § 12301).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* § 10416 (1994) (current version at 34 U.S.C. § 20985).

Article 83's exclusive criminal component, though broad, would probably not empower the EU's approach to be equally widespread. Many of the programs VAWA created tangentially related to the *criminal* nature of GBV but also touched upon socio-cultural permeations of GBV. One can best see this through the provision targeted by *United States v. Morrison*, the private right of action. By making GBV a civil rights issue, the United States created a paradigm shift by moving GBV from the criminal context (where underenforcement was a frequent issue) to a system that gave survivors of GBV the ultimate power to pursue their own justice through federal *civil* courts.<sup>83</sup>

### E. Conclusion

It is clear, therefore, that if the EU is serious about regulating GBV in an effective manner, it must move away from the existing structures that fail to cover the issue in its entirety and towards a new regulatory strategy. Since 2013, the Parliament has tried and failed to regulate this issue using the ASFJ articles.<sup>84</sup> This failure is partly due to political pressures that make it difficult for the Council to find unanimity regarding the issue. It is also partly due to a constitutional problem, since Member States may not view harmonization as a "proper tool" in the area of criminal law, and the ingress into a Member State's criminal law requires a powerful justification and the existence of a problem of European scope. Finally, as the American counterpart shows, GBV is a social issue that transcends criminal law and entails a civil/public law element. For the successful regulation of GBV, it may be necessary to look elsewhere in the Treaties.

## II. Exploring an Alternative Solution

One harmonization article that has been very effective in creating minimum standards across many areas of EU civil (not criminal) law is Article 114, the EU's competence to regulate the internal market.<sup>85</sup> On its face, Article 114 TFEU does not appear to be an ideal candidate for regulating GBV compared to the aforementioned articles on criminal activity.<sup>86</sup> The Article's first paragraph

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<sup>83</sup> *Id.* § 13981 (1994) (current version at 34 U.S.C. § 12361). For more on this paradigm shift within VAWA, see Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down But Not Ruled Out*, 39 FAM. L.Q. 157, 160 (2005) ("By situating women's experience of violence within the category of sex discrimination, the civil rights remedy reframed the problem as a public, societal, and political concern rather than a private matter of interpersonal dynamics or pathology.").

<sup>84</sup> BONEWIT & DE SANTIS, *supra* note 9, at 34.

<sup>85</sup> See TFEU art. 114.

grants the European Union, through the Council and Parliament, the power to harmonize or approximate Member State's laws insofar as they pertain to the "establishment and functioning of the internal market."<sup>87</sup> The second paragraph outlines the restrictions on the Article's application, in regards to taxes, free movement of persons, and the "rights and interests" of employed persons.<sup>88</sup> The next paragraph emphasizes proposals concerning health, safety, and environmental protections, instructing the Commission to "take as a base a high level of protection."<sup>89</sup>

Furthermore, it is clear from the Article's placement that its main aim is preventing competition between Member States, since it is located within Title VII of the TFEU, entitled "Rules on Competition, Taxation, & Approximation of Laws."<sup>90</sup> Indeed, Article 114 seeks to create a streamlined internal market, preventing Member States from promulgating divergent or contradictory rules that might upset the market.<sup>91</sup> In this regard, Directive 2011/83/EU on consumer rights emulates what we might consider the "model" Article 114 provision—a provision that seeks to align the laws of Member States and create minimum basic standards regarding the information available to consumers who enter into "off-premise contract."<sup>92</sup> The Directive clearly delineates how national discrepancies lead to a distortion of the internal market: "[d]isparities increase compliance costs to traders wishing to engage in the cross-border sale of goods or provision of services. Disproportionate fragmentation also undermines

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<sup>86</sup> See FEASIBILITY STUDY, *supra* note 21, at 147 (After a lengthy discussion on the possible applicability of a wide range of articles, the authors finish the section with two paragraphs on a "rest category." Article 114 TFEU belonged to this rest category, this the study concluding that "the approximation of law in the areas of our research most likely does not have a direct connection with the functioning of the internal market . . . . In that case, Articles 114 and 115 probably cannot be used.").

<sup>87</sup> TFEU art. 114(1).

<sup>88</sup> TFEU art. 114(2).

<sup>89</sup> TFEU art. 114(3).

<sup>90</sup> TFEU tit. VII.

<sup>91</sup> Stephen Weatherill, *The Competence to Harmonise and its Limits*, in RESEARCH HANDBOOK ON THE LAW OF THE EU'S INTERNAL MARKET 82, 84–85 (Panos Koutrakos & Jukka Snell eds., 2017) [hereinafter Weatherill, *Competence to Harmonise*].

<sup>92</sup> Directive 2011/83/EU, of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304) 64.

consumer confidence in the internal market.”<sup>93</sup> Having established such a distortion, the Directive implements basic harmonization to solve that issue.<sup>94</sup>

But Article 114 is not just about harmonizing consumer protection standards. Jurisprudence shows that the EU’s power under it can extend to non-economic aims,<sup>95</sup> and this Note suggests that this may extend to measures designed to combat GBV. To understand why, we must first venture across the Atlantic and observe Article 114’s American counterpart to see how the United States almost established a pioneering framework to combat GBV. Through this comparative lens, this Note will analyze the constitutional arguments that doomed the American approach, and how the European Court of Justice has rejected those arguments.

### A. The Commerce Clause

In the realm of federal systems that seek to ensure a single, internal market between all constituent states, constitutional provisions like Article 114 are not unique.<sup>96</sup> In the United States, which was originally conceived as an economic union between independent states,<sup>97</sup> the Constitution grants the Federal Government a broad power to regulate the internal market.<sup>98</sup> The Constitution provides that Congress shall “regulate commerce . . . among the several states.”<sup>99</sup> Article 114, together with Article 26 TFEU, parallel this so-called “Commerce Clause,” at least in terms of original intent.<sup>100</sup> The Commerce Clause empowers Congress to regulate the transfer of goods between states and

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<sup>93</sup> *Id.* at Preamble.

<sup>94</sup> *Id.*

<sup>95</sup> Bruno De Witte, *A Competence to Protect: The Pursuit of Non-Market Aims Through Internal Market Regulation*, in *THE JUDICIARY, THE LEGISLATURE AND EU INTERNAL MARKET* 25, 35–37 (Paul Syrpis ed., 2012).

<sup>96</sup> See *Australian Constitution* s 51(i); Constitution Act §91(2), 1867, 30 & 31 Vict., c 3 (U.K.), reprinted in R.S.C. 1985, app II, no 5 (Can.).

<sup>97</sup> THE FEDERALIST NO. 39 (James Madison). See also Francis Conte, *Reinforcing Democracy, Sovereignty and Union Efficacy: Supremacy and Subsidiarity in the European Union*, 26 DUBLIN U. L.J. 1, 2 n.6 (2004).

<sup>98</sup> *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942).

<sup>99</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>100</sup> Compare TFEU art. 26(2), with Randy E. Barnett, *The Original Meaning of the Commerce Clause* 68 U. CHI. L. REV. 101, 101 (2001) (“[A]ccording to the original meaning of the Commerce Clause, Congress has power to specify rules to . . . remove obstructions to domestic trade erected by states . . .”).



any economic activity that concerns multiple states.<sup>101</sup> It also prohibits individual states from frustrating interstate commerce and allows Congress to interfere with internal State legislation whenever it affects interstate commerce.<sup>102</sup> Similarly, Article 114 seeks to preserve fair competition between Member States; it authorizes the EU to harmonize national laws to fulfill the goal of setting up an internal market as outlined in Article 26, subject to certain restrictions.<sup>103</sup> Like the Commerce Clause, its focus is on goods, not services.<sup>104</sup> It also seeks to ensure that divergent standards among states do not frustrate the internal market, and it seeks to protect the bloc-like nature of the Union.<sup>105</sup> While Article 114 does not grant the EU an inherent regulatory power over the internal market,<sup>106</sup> it does enable the EU to directly interfere with Member States' laws and regulations, just like the Commerce Clause, thereby forcing harmonization as well as the establishment of minimum standards and definitions.<sup>107</sup>

At first, the Commerce Clause was used to fight legislation that restricted commerce between states.<sup>108</sup> However, the Commerce Clause doctrine underwent a new development in the twentieth century when it was successfully used to regulate meatpackers in Chicago. Even though the activity was nominally local, the industry was under Congress's regulatory purview because the meat subsequently entered interstate commerce.<sup>109</sup> However, during the Great Depression, the Supreme Court distanced itself from this holding and invalidated progressive legislation predicated upon the Commerce Clause.<sup>110</sup> Nonetheless, the Supreme Court eventually resolved these inconsistencies in

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<sup>101</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 2 (1824).

<sup>102</sup> *Id.*

<sup>103</sup> Compare TFEU art. 26 (declaring the EU's aims of establishing an internal market), with TFEU art. 114(1) (granting the EU powers to pursue the aim).

<sup>104</sup> Compare TFEU art. 114(2), with *Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Base Ball Clubs*, 259 U.S. 200, 208–209 (1922).

<sup>105</sup> TFEU art. 26(2).

<sup>106</sup> Case C-736/98, *Germany v. Council (Tobacco Advertising I)*, EU:C:2000:544, ¶ 83 (Oct. 5, 2000).

<sup>107</sup> TFEU art. 114(1).

<sup>108</sup> See *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 3 (1824).

<sup>109</sup> See *Stafford v. Wallace*, 258 U.S. 495 (1922).

<sup>110</sup> See *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

favor of progressive legislation due to external pressure in *West Coast Hotel v. Parrish* when it held that a state minimum wage was constitutional.<sup>111</sup> Soon thereafter, the Supreme Court sanctioned a more expansive interpretation of the Commerce Clause.<sup>112</sup>

What allowed Congress to expand its Commerce Clause powers was a shift in strategy towards effects-based arguments. In *NLRB v. Jones & Laughlin Steel Corp.*, the Court upheld the statutory right to unionize, anchored in the Commerce Clause, because these intrastate activities had “such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions.”<sup>113</sup> This argument was similar to the meatpacking cases but relied less on the fact that the industry itself was part of broader interstate commerce than on how, in the aggregate, the evil to be remedied had a substantial effect on interstate commerce.<sup>114</sup> The aggregate effects test was also at issue in the seminal 1942 case of *Wickard v. Filburn*. This time, the activity at issue was arguably not even commerce, let alone interstate commerce, since Mr. Filburn was a farmer who was merely hoarding wheat grown in excess of quotas during the Great Depression.<sup>115</sup> But in doing so, the Supreme Court found that he was substantially affecting the course of interstate commerce.<sup>116</sup> The aggregate effect of preventing goods from entering interstate commerce warranted government action pursuant to the Commerce Clause.<sup>117</sup>

*Wickard* and *Jones & Laughlin Steel Corp.* opened the door for Congress to justify a wide array of regulatory schemes through the Commerce Clause. Chief among these was the Civil Rights Act of 1964, which banned racial

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<sup>111</sup> *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (because Associate Justice Owen Roberts had previously voted to strike down similar legislation, it is thought, but not confirmed, that external pressures led him to join the majority in this case).

<sup>112</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding that the NLRB did in fact regulate interstate commerce); *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that hoarding wheat, though not interstate trade, was obstructing interstate commerce in the aggregate and thus could be regulated via the Commerce Clause).

<sup>113</sup> *Jones & Laughlin Steel Corp.*, 301 U.S. at 37.

<sup>114</sup> *Id.*

<sup>115</sup> *Wickard*, 317 U.S. at 114.

<sup>116</sup> *Id.* at 124.

<sup>117</sup> *Id.* Note that this is substantially similar to a sanctioned use of Article 114; Article 114 may be used to prevent distortions in the market and may even be used where a distortion is imminent. In this way, Article 114 operates in a similar way as the Commerce Clause did in *Wickard*.

discrimination in restaurants, accommodations, and other establishments.<sup>118</sup> The Supreme Court, in cases such as *Katzenbach v. McClung* and *Heart of Atlanta Motel*, affirmed these Commerce Clause arguments and the Civil Rights Act predicated on them.<sup>119</sup> Denying African Americans accommodation undoubtedly impacted interstate commerce, but crucially, the Civil Rights Act's purpose was not to control interstate commerce. It intended to end racial discrimination.<sup>120</sup> In *Katzenbach*, a small restaurant by the name of Ollie's Barbeque received only half of its goods from interstate commerce.<sup>121</sup> Compared to the national economy, its effect on interstate commerce itself was miniscule. Nevertheless, there was *an* effect; the value of food from out-of-state suppliers totaled \$69,683.<sup>122</sup> Indeed, as far as the Constitution is concerned, the size of any individual actor's effect is of little importance; rather, it is the aggregate of these effects, and their actual existence, that is essential to allowing Congress to regulate using its Commerce Clause power.<sup>123</sup>

Effects-based arguments were essential for modern Commerce Clause jurisprudence. Since Congress was able to successfully justify regulatory schemes that, on their face, had no direct intention of regulating commerce, it was able to extend its reach into areas that nominally were within the scope of state legislation (but where states had, for whatever reason, failed to act). Most importantly, the Supreme Court allowed Congress to determine the limits of Commerce Clause application by allowing the legislature a wide margin of discretion.<sup>124</sup> And in the late 1990s, Congress used the Commerce Clause to legislate against GBV.

### **B. The Violence Against Women Act and *United States v. Morrison***

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<sup>118</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1981–2000h-6).

<sup>119</sup> *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

<sup>120</sup> President Lyndon B. Johnson, Remarks Upon Signing the Civil Rights Bill (July 2, 1964) (transcript available in the University of Virginia Miller Center) (“[The Act’s] purpose is to promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity.”).

<sup>121</sup> *Katzenbach*, 379 U.S. at 296.

<sup>122</sup> *Id.* at 269 (adjusting for inflation, this is approximately \$675,000).

<sup>123</sup> *Id.* at 302.

<sup>124</sup> *Perez v. United States*, 402 U.S. 146, 156 (1971) (“Congress need [not] make particularized findings in order to legislate.”).

The Violence Against Women Act of 1994 (VAWA) was one of the most effective, comprehensive, and wide-reaching pieces of legislation introduced in the United States to combat GBV.<sup>125</sup> Introduced by Delaware Senator Joe Biden, VAWA sought to fight GBV through stronger criminal penalties, increased funding for various community-based programs, and, most importantly, a federal civil remedy for victims of sexual assault and other forms of GBV.<sup>126</sup> Once again, this civil remedy relied on the Commerce Clause for its authority. In extensive hearings, Congress assembled testimony, studies, records, and reports that showed an appreciable link between GBV and interstate commerce.<sup>127</sup> Women were less likely to participate in the national economy, particularly by not visiting movie theaters, going shopping, or using public transit after dark.<sup>128</sup> GBV affected national productivity, since victims are unable to work, or can only do so in a diminished capacity, due to physical and

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<sup>125</sup> Letter from Caroline Fredrickson, Director, ACLU, & LaShawn Y. Warren, Legislative Counsel, ACLU, to Sen. Arlen Specter, Chair, Senate Comm. on the Judiciary, & Sen. Patrick Leahy, Ranking Member, Senate Comm. on the Judiciary (July 27, 2005) (on file with the ACLU); for more on VAWA's efficacy see, e.g., Monica N. Modi et al., *The Role of Violence Against Women Act in Addressing Intimate Partner Violence: A Public Health Issue*, 13 J. WOMEN'S HEALTH 253, 254 (2014) (highlighting a 53% decrease in "intimate partner violence against females" after passage of VAWA); Rachel Boba & David Lilley, *Violence Against Women Act (VAWA) Funding: A Nationwide Assessment of Effects on Rape and Assault*, 15 VIOLENCE AGAINST WOMEN 168 (2009) (finding a significant association between decreases in reports of rape and sexual assault and the passage of VAWA, even after controlling for declining crime trends). See also Angela Gover & Angela Moore, *The 1994 Violence Against Women Act: A Historic Response to Gender Violence*, 27 VIOLENCE AGAINST WOMEN 8 (2021) (evaluating the mixed success of the original VAWA and its subsequent reauthorizations, while highlighting the large scope of the Act).

<sup>126</sup> Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. §§ 13925–14045 (1994)).

<sup>127</sup> Brief for the United States at 5–10, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29). For hearings, see, e.g., *Domestic Violence: Terrorism in the Home Hearing Before the S. Subcomm. on Child., Fam., Drugs and Alcoholism of the S. Comm. on Lab. & Hum. Res.*, 101st Cong. (1990); *Women and Violence Hearing Before the S. Comm. on the Judiciary*, 101st Cong. (1990); *Violence Against Women: Victims of the System: Hearing on S. 15 Before the S. Comm. on the Judiciary*, 102d Cong. (1991) [hereinafter *S. Hearing 102-369*]; *Violence Against Women Hearing Before the H. Subcomm. on Crime and Crim. Just. of the H. Comm. on the Judiciary*, 102d Cong. (1992); *Hearing on Domestic Violence, Hearing Before the S. Comm. on the Judiciary*, 103d Cong. (1993) [hereinafter *S. Hearing 103-596*]; *Violent Crimes Against Women Hearing Before the S. Comm. on the Judiciary*, 103d Cong. (1993); *Violence Against Women: Fighting the Fear Hearing Before the S. Comm. on the Judiciary*, 103d Cong. (1993) [hereinafter *S. Hearing 103-878*]. For testimony, see e.g., *S. Hearing 103-596*, at 1–4 (statement of Clare Dalton, Professor, Northeastern University Law School); *S. Hearing 102-369*, at 103–05 (statement of Cass Sunstein, Professor, University of Chicago); *S. Hearing 103-878*, at 7–11 (statement of Robert McAfee, President-Elect, American Medical Association).

<sup>128</sup> *United States v. Morrison*, 529 U.S. 598, 633 (2000).

emotional injuries.<sup>129</sup> Women miss work because of domestic violence, a further burden on national economic output.<sup>130</sup> A Senate study found that nearly 50% of women avoid public transit alone after dark, deterring women from traveling across state lines and greatly impeding the free movement of persons throughout the United States.<sup>131</sup> Notably, this was similar to the arguments used in the Civil Rights Cases in the 1960s.<sup>132</sup> Finally, GBV causes significant medical costs.<sup>133</sup> All of these effects were demonstrated to transcend state borders and therefore placed GBV within the boundaries of the Commerce Clause. Because the Commerce Clause is more restrained when dealing with criminal law, a civil remedy in federal court was one of the chief remedies that Congress decided was necessary to effectively combat this endemic issue affecting interstate commerce.<sup>134</sup> Scholarship into the field of GBV, especially victim's rights, underscores the effectiveness of civil remedies for GBV, arguing that a two-pronged approach together with criminal penalties presents the best method for combatting GBV.<sup>135</sup>

This amount of Congressional testimony seems superfluous considering the deference the Supreme Court had granted Congress in the past when dealing with Commerce Clause legislation. However, in 1995, not long after the enactment of VAWA, the Supreme Court broke its over 50-year streak of declining to overturn congressional Commerce Clause legislation in *United States v. Lopez*.<sup>136</sup> *Lopez* was a case challenging the Gun-Free School Zone Act, which prohibited guns within 1000 feet of school zones. But the Supreme Court found that Congress had not investigated the problem appropriately and offered no "express congressional findings regarding the effects upon interstate

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<sup>129</sup> *Id.* at 634.

<sup>130</sup> *Id.* at 636.

<sup>131</sup> *Id.* at 633.

<sup>132</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255–56 (1964).

<sup>133</sup> Brief for the United States, *supra* note 127, at 6–7.

<sup>134</sup> Violence Against Women Act of 1994, 42 U.S.C. §§ 13981–14045, *invalidated by United States v. Morrison*, 529 U.S. 598 (2000).

<sup>135</sup> See Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies*, 59 SMU L. REV. 55, 72 (2006) (describing the effectiveness of tort suits for victims of sexual violence).

<sup>136</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

commerce of gun possession in a school zone.”<sup>137</sup> However, *Lopez* went even further than this and invalidated the Gun-Free School Zones Act due to the fact that the possession of a gun was, in no way, shape, or form, economic activity.<sup>138</sup> The Court reasoned that, in the past, even when Congress had regulated activity that had an effect on commerce, and was not commerce itself, it was still dealing with economic activity.<sup>139</sup>

When the Supreme Court faced a challenge to VAWA a decade after *Lopez*, the Court, in a tight 5-4 decision, ruled that the civil remedy within VAWA was not a valid exercise of Congress’ Commerce Clause power.<sup>140</sup> The Supreme Court relied heavily on *Lopez* and its holding that Commerce Clause activity must be economic in nature; just like the possession of guns near schools, GBV was not economic activity.<sup>141</sup> Therefore, it was outside of the area of Commerce Clause application.

This economic nature test was a death knell for VAWA, but the Court also looked more critically at the evidence Congress had supplied to support its claim that GBV had an effect on interstate commerce. In VAWA, likely in anticipation of a *Lopez*-like challenge,<sup>142</sup> Congress had learned its lesson, and justified VAWA’s civil remedy with four *years* of congressional hearings and testimony, as well as eight separate Congressional reports, twenty-one state task force reports, and vast amounts of other testimony and evidence.<sup>143</sup> Unfortunately, this did not persuade the Court. The Court stated that it was not going to accept at face value Congress’ evidence and claims that this activity had an effect on interstate commerce.<sup>144</sup>

*Morrison* is the most recent case in which the Supreme Court rejected Congress’ attempt to regulate using the Commerce Clause. It stands as an example of how constitutional provisions regarding a single or an internal

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<sup>137</sup> *Id.* at 562.

<sup>138</sup> *Id.* at 567.

<sup>139</sup> *Id.* at 559.

<sup>140</sup> *Morrison*, 529 U.S. at 613.

<sup>141</sup> *Id.*

<sup>142</sup> *Lopez* was circulating in federal courts while VAWA was being drafted in Congress, with oral arguments before the Supreme Court taking place two months after VAWA was signed into law by President Bill Clinton.

<sup>143</sup> Brief for the United States, *supra* note 127, at 5.

<sup>144</sup> *Morrison*, 529 U.S. at 614.

market could theoretically regulate GBV. For European legal scholarship, it stands as a potential dry run of using an internal market-based instrument in the fight against GBV. Furthermore, irrespective of the Court's ultimate conclusion, VAWA's legislative history and the Court's *Morrison* opinion offer a comprehensive account of the ways in which GBV affects commerce between states in a federal system.<sup>145</sup>

### C. Regulating GBV Using Article 114: Limits and Applications

Having established the United States' failure to utilize its Commerce Clause powers to combat gender-based violence, this Note differentiates between American and European commerce provisions and concludes that, where the American Commerce Clause came up short, the European counterpart may be successful. Unlike the United States' Commerce Clause jurisprudence, as outlined in *Lopez* and *Morrison*, the application of Article 114 TFEU is not limited to pure economic activity. Its limits have different contours. Because of this, an effects-based argument like that used by the United States in *Morrison* might work within existing European Union law to create a legal basis for a binding instrument on GBV.

Although the European Union does not have a plenary power over Europe's internal market like the federal government does in the United States, Article 114 TFEU can and has regularly been used to address non-market goals.<sup>146</sup> For example, in the case *Tobacco Advertising I*, the European Court of Justice (ECJ) explicitly endorsed the proposition that a directive with Article 114 as its basis may in fact have as its true *raison d'être* a non-market function.<sup>147</sup> With this, the European Court rejected the holding of the American Supreme Court in

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<sup>145</sup> This holding by the Supreme Court has been criticized not only by progressive and liberal scholars, but also by originalist scholars. Some influential constitutional scholars in the United States have suggested that "commerce" in the eyes of the framers extended beyond pure economic activity. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 107 (2005).

<sup>146</sup> De Witte, *supra* note 95, at 25, 29 [citing examples such as Directive 2009/1007, of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, 2009 O.J. (L 286) 36 (EC) (banning trade in seal products); Directive 73/404/EEC, of the Council of 22 November 1973 on the Approximation of the Laws of the Member States Relating to Detergents, 1973 O.J. (L 347) 51 (governing the biodegradability standards for detergents); and Directive 77/187/EEC, of the Council of 14 February 1977 on the Approximation of the Laws of the Member States Relating to the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Businesses, 1977 O.J. (L 61) 26 (governing the transfers of undertakings, businesses, or parts of businesses)].

<sup>147</sup> *Tobacco Advertising I*, EU:C:2000:544, ¶ 88 ("[P]rovided that the conditions for recourse to [Article 114] . . . are fulfilled, the Community legislature cannot be prevented from relying on [Article 114 as a] . . . legal basis on the ground that public health protection is a decisive factor in the choices to be made.").

*Morrison* that harmonizing power under a “Commerce Clause” only covers true economic activity.<sup>148</sup> This core characteristic of Article 114—best seen in Directive 2014/60/EU on Cultural Objects, which amended Directive 93/7/EEC Directive 2014/60/EU—concerns cultural objects that are unlawfully removed from the territory of a Member State and regulates the return of those objects.<sup>149</sup> The return of cultural objects, which notably does not include either the sale or purchase of goods, nor the provision of services, per se, is not necessarily, and would likely not constitute, economic activity in the American framework. Nevertheless, predicated on Article 114, Directive 2014/60/EU (as well as Directive 93/7/EEC, which it replaced) had a goal of regulating the effects of illegally removed national treasures that have been on the art market.<sup>150</sup> However, the Directive was *not* designed to regulate the art market or any sort of trade in art.<sup>151</sup> While the validity of this particular Directive has not been challenged before the ECJ, based on the ECJ’s judgment in *Tobacco Advertising I*, it appears that the ECJ will find that addressing GBV is an appropriate reason for basing the directive on Article 114.

That the ECJ would and has accepted such a rationale is all the more surprising considering that the Treaties expressly forbid cultural policy from harmonization.<sup>152</sup> But this is not by mistake; the power to harmonize may extend beyond the European Union’s explicitly conferred Treaty competencies: “non-market policy concerns can be pursued through internal market legislation even when those concerns cannot directly be addressed *as such* by the European legislature.”<sup>153</sup> Clearly, when the European Union is focusing on a phenomenon that does not explicitly fall within its enumerated powers, it can still regulate the activities that meet the conditions for Article 114’s use.<sup>154</sup> This can even apply

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<sup>148</sup> *Id.*

<sup>149</sup> Directive 2014/60, of the European Parliament and of the Council of 15 May 2014 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and Amending Regulation (EU) No 1024/2012, 2014 O.J. (L 159) 1.

<sup>150</sup> *Id.* at recital 2.

<sup>151</sup> *Id.* at recital 8.

<sup>152</sup> TFEU art. 167(5).

<sup>153</sup> De Witte, *supra* note 95, at 33. *See also Tobacco Advertising I*, EU:C:2000:544, ¶ 88.

<sup>154</sup> De Witte, *supra* note 95, at 35–37. (These conditions being: one, either the lack of an alternative competence, or, if an alternative competence exists, the center of gravity falling more towards the regulation of the internal market; two, the proposed Act, in addition to its non-market aim, must “either help[] to remove disparities between national provisions that hinder the free movement of goods, services or persons or that cause distorted conditions of competition”; and three, the principle of subsidiarity must be respected.).



to criminal law harmonization. The European Union has already based a harmonizing directive related to criminal law on Article 114: The EU's Anti-Money Laundering Directive 2015/849 (AMLD). In the AMLD, the European Union Legislature lists a set of definitions for money laundering,<sup>155</sup> including harmonized criminal sanctions,<sup>156</sup> and creates a uniform framework for combating money laundering notwithstanding the strict limits on criminal law harmonization elsewhere in the Treaties.<sup>157</sup> The justification for the AMLD comes primarily from a case decided in the early 2000s, which confirmed that, while criminal law was principally a national competence of each Member State, if criminal sanctions are necessary to achieve a policy goal that lies within the shared or exclusive competence of the Union, then the European Union may impose criminal sanctions to advance that goal insofar as it is necessary to do so.<sup>158</sup>

Accordingly, we can draw the following conclusions from the ECJ's Article 114 jurisprudence: first, Article 114 can be used to promote non-market aims as long as its other conditions are met, like the American Commerce Clause; second, contrary to the American Commerce Clause, the specific type of activity regulated by the European Union is of less importance, as long as the regulation itself can genuinely improve the functioning of the internal market; and third, even if other Articles specify that they cannot harmonize laws in non-market areas, assuming that the conditions satisfy Article 114's requirements for application, Article 114 remains an appropriate legal tool for harmonization.

However, the application of Article 114 to advance non-market aims is not without limitations. European case law and scholarship show that its application, including through a GBV instrument or directive, is only appropriate if it clears three key limitations: the centre of gravity test, the threshold test, and the subsidiarity test.<sup>159</sup>

## 1. The Centre of Gravity Test

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<sup>155</sup> Directive 2015/849, of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and Repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 2015 O.J. (L 141) 73, 83 (EU).

<sup>156</sup> *Id.* arts. 58–62.

<sup>157</sup> HERLIN-KARNELL, *supra* note 76, at 339.

<sup>158</sup> Case C-176/03, *Comm'n of the Eur. Cmty's v. Council*, ECLI:EU:C:2005:542, ¶ 48 (Sept. 13, 2005).

<sup>159</sup> De Witte, *supra* note 95, at 35–37.

When the European Union uses Article 114 TFEU or a similar market-focused provision to advance a non-market aim, the ECJ is to assess what the purpose of the legislation in question is, or where the legislation's "centre of gravity" lies.<sup>160</sup> If the legislation's primary focus is rectifying a market imbalance, or is otherwise primarily related to the functioning of the internal market of the Union, then it must rest on the relevant internal market basis.<sup>161</sup> However, if the market aim is ancillary to the non-market policy aim, the Union must use an existing competency outlined in the TFEU.<sup>162</sup> The competency selected can be crucial when dealing with provisions that use a different voting standard. On one hand, Article 114 uses the ordinary legislative process, so legislation grounded in Article 114 only requires a qualified majority from the Council and a simple majority from the parliament.<sup>163</sup> On the other hand, other treaty areas, such as the common defense policy, require unanimous assent, or "special legislative procedure."<sup>164</sup> Keeping with this example, a European Union directive that has common defense and security as its centre of gravity must therefore rest on those applicable provisions, including the associated heightened voting standard, even if there is an ancillary improvement upon the functioning of the internal market associated with the legislation.

However, the centre of gravity test provides for an exception, as outlined in *Tobacco Advertising I*. Namely, if a treaty provision applies to the social aim but does not specifically provide for harmonization of laws, then the ECJ may apply Article 114, even if under normal circumstances the centre of gravity test would bar its application.<sup>165</sup> Because *Tobacco Advertising I* was concerned with public health, and no harmonization competence existed in reference to public health, the ECJ forewent a centre of gravity analysis. Instead,

[i]n the absence of a distinct Community harmonizing competence in respect of health protection . . . the question of

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<sup>160</sup> *Id.* at 35.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> TFEU art. 114(1); TFEU art. 294 (describing the procedural requirements for "ordinary legislative procedure").

<sup>164</sup> *See, e.g.*, TEU art. 42(2) (describing the requirement for unanimous consent for action under the common defense policy).

<sup>165</sup> VASILIKI KOSTA, FUNDAMENTAL RIGHTS IN EU INTERNAL MARKET LEGISLATION 24 (2015); *see also* Opinion of Advocate General Fennelly, Case C-376/98, *Germany v. Parliament & Council (Tobacco Advertising I)*, ECLI:EU:C:2000:324, ¶ 58 (Jun. 15, 2000).

whether the Community has acted within its powers cannot be determined by reference to a measure's putative "centre of gravity" as between these two incommensurable objectives. The issue of competence must instead be resolved by assessing the Directive's compliance with the objective requirements of the internal market.<sup>166</sup>

The rationale behind this exception is clear: if harmonization is proper and necessary for the functioning of the internal market, then the ECJ will not prevent the necessary harmonization by forcing a paradox in which the legislator must go through a separate article to harmonize, only for the Article to then bar harmonization through the same Article.

Turning to GBV, it is clear that any EU action regarding GBV would not have as its principal aim the improved functioning of the internal market, which means the centre of gravity test would need to be applied. As in *Tobacco Advertising I*, the first stage of such an inquiry would involve looking towards the treaties where this social aim might be applicable. Under the centre of gravity test, the EU legislator may be drawn to the AFSJ articles, since they seem at first glance to be the proper legal basis.<sup>167</sup>

A 2010 feasibility study on GBV regulation published by the European Commission's Directorate-General for Justice under the auspices of the European Union's Daphne Program reinforces this view. After a lengthy discussion on the possible applicability of a wide range of articles, the authors finish the section with two paragraphs on a "rest category." Article 114 TFEU belonged to this rest category, with the study concluding that "the approximation of law in the areas of our research most likely does not have a direct connection with the functioning of the internal market . . . In that case, Articles 114 and 115 probably cannot be used, since the treaty provides for more specific provisions, namely in the title on AFSJ."<sup>168</sup>

But, as explained above, this is not an accurate view of the ECJ's case law. The articles in the title on AFSJ, namely Articles 82-84, do not create an independent mechanism for harmonization.<sup>169</sup> The only possibility for harmonization exists in Article 83(2), which allows the EU legislator to look

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<sup>166</sup> Opinion of Advocate General Fennelly, C-376/98, *Tobacco Advertising I*, ¶ 58.

<sup>167</sup> TEU art. 3(2); TFEU tit. V.

<sup>168</sup> See FEASIBILITY STUDY, *supra* note 21, at 148.

<sup>169</sup> See *supra* note 68.

towards an area which is already harmonized and then create minimum rules for criminal law definitions when that is necessary to effectuate the already present harmonization. This is an affirmative grant of power for the EU to harmonize criminal laws related to GBV instead of an exclusion of Article 114's power. Article 114 creates the door for which 83(2) may then be applied.

Therefore, because no independent basis for harmonization exists, as in *Tobacco Advertising I*<sup>170</sup> and the Directives of Cultural Objects<sup>171</sup> and Money Laundering,<sup>172</sup> the appropriate basis for the legislation rests with the internal market provision, Article 114. All that is required is that it meet the other requirements for the application of Article 114.

## 2. The Threshold Test

As previously stated, legislators can freely invoke Article 114 when crafting legislation even if the principal aim is not to ensure the functioning of the internal market.<sup>173</sup> However, this use is conditioned on the legislation actually having an appreciable effect on the functioning of the market. The second test regarding Article 114 is therefore a threshold test, with a minimum threshold of improvement that the legislation must meet.<sup>174</sup> This is an obvious requirement; the proposed legislation cannot only address the social policy aim, but must provide a genuine improvement upon the functioning of the internal market.<sup>175</sup> The ECJ has made clear that this threshold is integral to protecting the principle of conferral in the Treaties, and that without it, the European legislature's powers "would be practically unlimited."<sup>176</sup>

The limits outlined by the ECJ are twofold. First, the legislation must "genuinely *have as its object* to improve the conditions for the establishment and functioning of the internal market."<sup>177</sup> Immediately, it becomes apparent that this is not an objective test, but rather, a subjective one. A measure can have as its object to improve the functioning of the market but not in fact do so.

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<sup>170</sup> Opinion of Advocate General Fennelly, *Tobacco Advertising I*, C-376/98, ¶ 58.

<sup>171</sup> Directive 2014/60, *supra* note 149, recital 2–3.

<sup>172</sup> Directive 2015/849, *supra* note 155, recital 1–2.

<sup>173</sup> *See supra* note 147.

<sup>174</sup> De Witte, *supra* note 95, at 35–37.

<sup>175</sup> *Id.*

<sup>176</sup> *Tobacco Advertising I*, EU:C:2000:544, ¶ 107.

<sup>177</sup> *See, e.g., id.* ¶ 84. (emphasis added).

Secondly, the measure must address a difference in national laws that as such have a “direct effect” on the internal market, or, in the alternative, create an “appreciable” distortion of competition within the EU.<sup>178</sup> Furthermore, the EU has the power to legislate pursuant to Article 114 if it seems “likely” that such distortion will emerge in the future.<sup>179</sup> This seems, at the outset, to be a more objective test, with the possibility of an analysis of the distortions of competition and the effects of different national laws. However, this is not how the ECJ has applied this test in practice.

The reality is that the threshold test has been broadly construed by the ECJ. Like the United States Supreme Court prior to *Lopez*, the ECJ accepted the European Legislature’s arguments and findings of distortion without a deeper inquiry.<sup>180</sup> Instead, the ECJ grants the EU legislature a wide degree of deference.<sup>181</sup> This has been criticized by many EU scholars, chief among them Stephen Weatherill, who do not see the Court as exercising its power of judicial review. Rather, these critics claim the Court is providing a drafting guide for the legislature in order to craft legislation using Article 114 so that it may easily circumvent any restrictions.<sup>182</sup> In regard to the ECJ case *Vodafone*, which dealt with harmonizing roaming charges within the EU for mobile phone networks, Weatherill noted:

[The ECJ] drew on both the explanatory memorandum to the proposal and the impact assessment to substantiate the finding that there was a likelihood of divergent development of national laws. The recital stated there was pressure for Member States to take measures to address the problem of the high level of retail charges for roaming services, and the Court adds that this was moreover confirmed by the Commission at the hearing. This is yet another Mandy Rice Davies moment: the Commission,

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<sup>178</sup> Stephen Weatherill, *The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has become a “Drafting Guide,”* 12 GER. L.J. 827, 832 (2011) [hereinafter Weatherill, *Drafting Guide*]. For alternative views, see, e.g., Marcus Klamert, *What We Talk About When We Talk About Harmonisation*, 17 CAMBRIDGE Y.B. OF EUR. LEGAL STUD. 360, 361 (2015) (“[C]ase law on harmonisation until now has been far from providing a drafting guide for the legislature.”).

<sup>179</sup> Weatherill, *Drafting Guide*, *supra* note 178.

<sup>180</sup> *Id.* at 838.

<sup>181</sup> See Case C-58/08, *Vodafone v. Sec’y of State*, EU:C:2010:321 (Jun. 8, 2010), ¶ 52 (); Case C-380/03, *Germany v. Parliament & Council (Tobacco Advertising II)*, EU:C:2006:772, ¶ 145 (Dec. 12, 2006).

<sup>182</sup> Weatherill, *Drafting Guide*, *supra* note 178, at 828.

having piloted the measure through the EU legislative process, then advises the Court it is constitutionally justified – *well, it would, wouldn't it*. The Court did not stand outside the legislative choice that had been made. Instead, it aligned itself uncritically with the institutions whose choices were being challenged by the applicants.<sup>183</sup>

Consequently, the ECJ rarely invalidates a law on the basis of the threshold test as it did in *Tobacco Advertising I*. Furthermore, even when it does, the European legislature often amends its directives as to succeed on a second constitutional challenge.<sup>184</sup>

In effect, as Bruno De Witte explains, to meet this test, “the authors of the act must make a plausible case that the act either helps to remove disparities between national provisions that hinder free movement of goods, services, or persons or that cause distorted conditions of competition.”<sup>185</sup> A “plausible case” is not a particularly high bar for the EU legislator to meet, owing to the high level of deference offered to the EU legislature when assessing the appropriate measures to enact.<sup>186</sup>

When it comes to regulating GBV, therefore, the case law suggests that the ECJ does not analyze whether directives are in fact improving the functioning of the internal market, and instead bases its conclusion on the overall *genuine objective* of the legislation. It is unclear how far this really goes and to what extent a directive with such a genuine objective can nevertheless fail to pass the ECJ's muster, if at all. Furthermore, the ECJ is willing to accept at face value the legislature's findings that the proposed directive will protect the internal market without too much further inquiry, even extending this to findings that distortions of competition are likely to arise.<sup>187</sup> This state of affairs is convenient for a possible directive on GBV. It is conceivable that EU legislators will find little difficulty in justifying their use of Article 114 in a Directive recital, especially in light of the wealth of legislative findings amassed by the EU and comparable U.S.-based legislation following *United States v. Morrison*. And the ECJ would furthermore accept at face value the finding that GBV creates a direct effect on the functioning of the internal market.

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<sup>183</sup> *Id.* at 842.

<sup>184</sup> *Tobacco Advertising II*, EU:C:2006:772, ¶ 2.

<sup>185</sup> De Witte, *supra* note 95, at 36.

<sup>186</sup> *See supra* note 165.

<sup>187</sup> Weatherill, *Drafting Guide*, *supra* note 178, at 832.

That being said, even if the ECJ were to undergo a more stringent inquiry into the EU legislator's arguments, it is likely that under current European caselaw the application of Article 114 to GBV would meet the threshold for having a direct effect on the internal market. Given the economic impacts of GBV, especially the impoverishing effect of violence on women, the loss of productivity, and the restrictions upon women's freedom of movement within the EU,<sup>188</sup> GBV clearly has a direct effect on the internal market. Consider the arguments in *Morrison*, showing that GBV led to women not participating in interstate commerce; the EU can use the selfsame argument. The loss in productivity and increased healthcare costs in Member States with weaker legal protections for women may also lead to distortions of competition,<sup>189</sup> strengthening the argument for the proper application of Article 114 TFEU.

While one can argue that current ECJ jurisprudence regarding Article 114 is too generous to the EU legislature's interpretations of the proper application of the Article, that same jurisprudence allows for the EU to easily argue that GBV creates a situation where the application of Article 114 is proper. A directive seeking to rectify national law disparities and alleviate the economic effects of GBV on the EU economy does genuinely have as its object the improvement of the functioning of the internal market. And GBV clearly exercises a direct effect on the EU internal market, as well as perpetuating distortions of competition between those Member States with and without strong protections for women.

### 3. Subsidiarity

Finally, any action taken under Article 114 must conform to the European Union's subsidiarity and proportionality principles.<sup>190</sup> Subsidiarity and proportionality each serve distinct purposes; proportionality requires that the undertaken action is proportional to the evil to be remedied, whereas subsidiarity governs whether or not action should be taken on a European level in the first place. Proportionality is therefore considered after a legal basis for EU action has been identified and the action taken, whereas subsidiarity is a factor in considering if there is a legal basis for action in the first place.<sup>191</sup>

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<sup>188</sup> BONEWIT & DE SANTIS *supra* note 9, at 21.

<sup>189</sup> *Id.* Consider a scenario where a woman is considering her next vacation and does so on the basis of where she feels safer. This is in essence no different than a distortion in competition regarding the advertisement of tobacco; divergent national rules lead to situations where some Member States have a distinct advantage, disrupting the competition inherent to the European Union.

<sup>190</sup> TEU art. 5(3); TEU protocol 2. *See also* De Witte, *supra* note 95, at 37.

Subsidiarity is a core element of all EU action.<sup>192</sup> It states accordingly that, if something is best left to Member States, then that is where it should remain. This is the core expression of European federalism as well: because European directives affect sovereign nations, the EU legislator must defend the necessity for imposing a legislative scheme upon them. This is similar to the American Commerce Clause: in the United States, the Commerce Clause works in concert with the Necessary and Proper Clause, granting Congress the power, only insofar necessary, to establish minimum standards and laws.<sup>193</sup>

The subsidiarity principle requires that every action taken by the EU legislature must be limited to situations where individual Member State action alone would be insufficient. This is to ensure that decisions are “taken as closely as possible to the citizen.”<sup>194</sup> In order to make the principle justiciable, the EU formulated general guidelines, annexed to the Treaties, with which the Union must comply.<sup>195</sup> Action on the Union level is justified only if one or more of these conditions are fulfilled: if the issue has transnational aspects which cannot be satisfactorily regulated by action on Member States, if actions by Member States alone or a lack of action by the Union would conflict with the requirements of the Treaty or would otherwise significantly damage Member State interests, or if actions at Union level would produce clear benefits by reason of scale or effects.<sup>196</sup>

The European judiciary broadly interprets the subsidiarity requirement, and the ECJ rarely applies subsidiarity to Article 114 legislation. Because harmonization per se cannot be accomplished by any one Member State alone, ECJ Advocate General sometimes states that subsidiarity is met under the first guideline; that is, that any area the Union seeks to harmonize necessarily

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<sup>191</sup> Gareth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, 43 COMMON MKT. L. REV. 63, 66–67 (2006); see also Stephen Weatherill, *Competence Creep and Competence Control* [hereinafter Weatherill, *Competence Creep*], 23 Y.B. OF EUR. L. 1, 2–3 (2004).

<sup>192</sup> TEU art. 5.

<sup>193</sup> *Gonzalez v. Raich*, 545 U.S. 1, 35 (2005) (5-4 decision) (Scalia, J., concurring) (describing that Congress’s power to regulate under the Commerce Clause is concurrent with the Necessary and Proper Clause).

<sup>194</sup> European Council, Birmingham Declaration, DOC/96/6, Point 5 (1992) (The Birmingham Declaration was an annex to the 1992 Maastricht TEU, which sought to add context to the recently negotiated treaty).

<sup>195</sup> Protocol 30 annexed to the Treaty of the European Community, 11997D/PRO/07, O.J. C (340) (1997).

<sup>196</sup> *Id.*



contains transnational aspects that cannot be satisfactorily regulated by action on Member States.<sup>197</sup> This can have two implications: one, that once the Union decides to harmonize, and the above conditions are met, then subsidiarity need not apply at all;<sup>198</sup> or two, that subsidiarity ceases to be a consideration *once it has become necessary that the Union harmonize to achieve its goals*.<sup>199</sup> Thus, subsidiarity is relevant in deciding if harmonization is needed, but once that determination is made, the harmonizing measure cannot then violate subsidiarity. The ECJ has accepted the latter interpretation, and ruled that subsidiarity is necessarily met when the Union takes up harmonization as a measure.<sup>200</sup>

For the present analysis, either interpretation, regardless of how accurate it may be, leads to the same conclusion. Because GBV creates a cross-border economic effect, the issue can be said to have transnational aspects that require EU action. Thus, harmonizing measures are necessary, and the requirements of subsidiarity are met.<sup>201</sup>

#### 4. Summary

To summarize, the EU has the power to pursue non-market social aims through Article 114 as long as no independent harmonizing competence is present in the Treaties. Though the legislation must genuinely have as its object the improvement of the internal market, the threshold which it must meet is quite low, and the ECJ has been deferential towards the EU's arguments regarding the object and overall impact of the legislation towards the internal market.

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<sup>197</sup> Case C-376/98, *Fed. Republic v. Eur. Parl. & Council*, ECLI:EU:C:2000:324, ¶ 142 (Oct. 5, 2000) (“I conclude, therefore, that [Article 114] of the Treaty is exclusive in character and that the principle of subsidiarity is not applicable.”).

<sup>198</sup> *Id.* See also A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MARKET L. REV. 1079, 1091 (1992) (also arguing that harmonization is an exclusive competence of the EU and that subsidiarity does not apply); Davies, *supra* note 191, at 75 (“It seems possible to conclude that subsidiarity has no relevance to those functional competences whose aim is to create the uniformity necessary for an internal market . . .”).

<sup>199</sup> George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 376–83 (1994) (discussing that subsidiarity is generally applied in the pre-legislative stage).

<sup>200</sup> *Tobacco Advertising II*, EU:C:2006:772, ¶¶ 75–79.

<sup>201</sup> Since this Note is solely concerned with a legal basis for EU action on GBV, and does not seek to analyze in depth the actual measures to be taken, this section will only broadly consider Article 114's subsidiarity implications in regard to GBV.

### III. Objections

Though both cases were close decisions, many scholars regard *Morrison* and *Lopez* as an appropriate limitation on an increasingly all-encompassing Commerce Clause doctrine.<sup>202</sup> The wide range of application of the Commerce Clause, the odd quirk that Congress was able—through its own reporting—to set its own limits for the applicability of the Commerce Clause, and the wide range of ingress into states' rights left many scholars thinking that a limit to the doctrine was proper and appropriate.<sup>203</sup>

The aim of this Part is to assess those claims on both the American and European sides, to address the counterarguments that have been raised with respect to *Morrison* and the ECJ's Article 114 jurisprudence, which, according to the above analysis, leads to an interpretation of the Article that can be used in fighting GBV. More fundamentally, this Part will show that the concerns raised by both American and European scholars tap into a broader debate about the role of federalism in response to broad regulatory schemes.

#### A. Creeping Competencies

*Morrison* was largely seen as a continuation of the Roberts Court's newfound appreciation for federalism.<sup>204</sup> Beyond simply exceeding the enumerated powers of Congress per the Constitution, a core argument in the decision was that, if allowed to stand, the federal cause of action in VAWA would allow the federal government to improperly interfere with a state's right to determine its own criminal and civil law, generally referred to as a state's "police power."<sup>205</sup> In this way, the *Morrison* opinion strongly echoes pre-Great Depression Commerce Clause opinions.<sup>206</sup>

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<sup>202</sup> See, e.g., Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 753 (1995) (calling *Lopez* a "long overdue revival of the doctrine that the federal government is one of limited and enumerated powers."); Johnathan H. Adler, *Is Morrison dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 759 (2005) (heralding *Morrison* as a "breakthrough" in the Court's enumerated powers doctrine).

<sup>203</sup> Adler, *supra* note 202, at 759.

<sup>204</sup> *Id.* See also Diane McGimsey, *The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675 (2002); Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause after Morrison*, 25 OKLA. CITY U. L. REV. 843, 843–45 (2000).

<sup>205</sup> *United States v. Morrison*, 529 U.S. 598, 615 (2000).

<sup>206</sup> Compare *Morrison*, 529 U.S. at 617–18 ("The Constitution requires a distinction between what is truly national and what is truly local . . . . The regulation and punishment of intrastate violence

Similar to the critiques of the expanding use of the Commerce Clause in the United States, European scholars often state that modern use of Article 114 strains the original intent of the Article, which was, ostensibly, to ensure uniform national rules in trade and commerce. Certainly, using Article 114 to regulate GBV presents a sharp departure from the original idea of what the provision was meant to achieve, and it is largely pointless to argue that it does not. But likewise, it is also true that an increasingly interconnected and globalized EU economy requires non-economic harmonization to preserve the internal market, and an expansion of competencies is only a natural consequence of this.

The U.S. Congress, like the EU, is entitled only to those powers expressly conferred to it.<sup>207</sup> However, through the Commerce Clause, Congress was able to expand its powers unilaterally, often referred to in the EU context as “creeping competencies.”<sup>208</sup> Thus, we see the Supreme Court in *Morrison Lopez*. In *Lopez*, the Court had noted that

Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.<sup>209</sup>

Creeping competencies is a similar concern raised by scholars who are disturbed both by the increasing scope of the EU's power in general and the ever-increasing applicability of Article 114.<sup>210</sup> The ECJ, in the cases of *Tobacco*

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that is not directed at . . . interstate commerce has always been the province of the States.”), with *Hammer v. Dagenhart* 247 U.S. 251, 273–74 (1918) (“The grant of power of Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture . . . . The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states . . . .”). Such a reference is probably due to Justice Rehnquist's conservative judicial philosophy.

<sup>207</sup> U.S. CONST. amend. X.

<sup>208</sup> See Weatherill, *Competence Creep*, *supra* note 191.

<sup>209</sup> *Lopez*, 514 U.S. at 564.

*Advertising I* and *II*, has been criticized as facilitating this expanse of EU power.<sup>211</sup> In the first instance, the European Court of Justice found that the EU legislator had gone too far beyond the scope of Article 114 and had failed to resolve a true discrepancy between Member States. By banning advertisement on various items such as parasols, ashtrays, and magazines, the ECJ no longer saw a link to the functioning of the internal market.<sup>212</sup> However, it did state that a directive that regulated tobacco advertising in magazines and periodicals could be justified in order to regulate the internal market for press materials.<sup>213</sup> So, in a follow-up directive, the EU did exactly that, and when that directive was similarly challenged (*Tobacco Advertising II*), the ECJ accepted that justification.<sup>214</sup> In this way, the ECJ has been accused of offering to the EU a “drafting guide” on how to create legislation which conforms to the technical requirements of Article 114.<sup>215</sup>

### B. A Normative Response

Observing that European scholarship is reaching a similar boiling point, applying Article 114 to GBV may seem as such an unacceptably broad interpretation of the Article as to basically render it an all-encompassing general power to regulate the internal market. To put it another way, “it is simply not hard to find actual or likely divergence between national laws which might conceivably cause interruption to the internal market.”<sup>216</sup> That is not incorrect; combining that statement with the fact that harmonization in the EU under Article 114 can have secondary aims affecting any subject area, one can see that the possible area of EU legislation is unlimited.

But is this really such a bad thing? In effect, the statement here is that where national laws are an impediment to EU action, the EU has the power to

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<sup>210</sup> See Weatherill, *Competence Creep*, *supra* note 191; Weatherill, *Drafting Guide*, *supra* note 178.

<sup>211</sup> Weatherill, *Drafting Guide*, *supra* note 178, at 839–40.

<sup>212</sup> *Tobacco Advertising I*, EU:C:2000:544, ¶ 107–13.

<sup>213</sup> *Id.* ¶ 117.

<sup>214</sup> *Tobacco Advertising II*, EU:C:2006:772, ¶ 2.

<sup>215</sup> Weatherill, *Drafting Guide*, *supra* note 178, at 832.

<sup>216</sup> Herlin-Karnell, *supra* note 76, at 344 (“It goes without saying that if the mere fact that divergent national approaches to, for example, organized crime could create obstacles to trade capable of constituting a justification for harmonization, then this would represent a kind of *carte blanche* for the EU penal legislator.”).

intervene. Divorce this statement from any normative meaning, and I would hazard that most would agree it is a sensible proposition. Gender-based violence is an EU-wide problem; the divergences between Member States create spillover effects across the EU. Is it so bad that a supranational problem is given a supranational solution?

Part of this also stems from a fundamental disagreement on what the EU, and what federalism, is and should be.<sup>217</sup> What is the proper role of the EU in criminal law? Should the EU be empowered to regulate the substantive criminal law of the Member States? And should Article 114 be used to that end, even when the link to the internal market is more abstract than, say, in anti-money-laundering legislation? The ECJ itself has been largely silent on those limits, leaving the door open for wider applications of Article 114. Whether the EU legislature will accept this invitation and attempt to push the boundaries of the Article in regulating GBV, as Congress did in 1996, remains to be seen.<sup>218</sup> This Note has, for the most part, attempted to avoid normative arguments regarding the proper way to regulate GBV, offering instead a possible, creative way to use Article 114 to that end.

## CONCLUSION

Gender-based violence remains a serious problem, both for the European Union and for the United States. Throughout the past decades, the EU has attempted to standardize the definitions of different crimes under the GBV umbrella, as well as to harmonize criminal sanctions in various criminal fields adjacent to GBV.<sup>219</sup> Recent attempts to include GBV as a serious crime with cross-border implications, which would allow the EU to harmonize definitions in the criminal area, have run into a political brick wall.<sup>220</sup> Even so, because of the wide variety of actions necessary to combat GBV, harmonization may be the better tool to touch on Member State disparities in civil law as well.

This Note analyzed American attempts to regulate GBV through the Commerce Clause, and demonstrates that because the EU's jurisprudence developed differently, the arguments that failed in the United States may in fact create a legal basis for the application of Article 114 towards GBV in the EU.

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<sup>217</sup> Weatherill, *Competence to Harmonize*, *supra* note 91, at 101 (“Article 114 is, however, one manifestation of a much larger debate about how far centralization should reach in the EU.”).

<sup>218</sup> This has been referred to by some as “constitutionally dubious adventurism,” a term which I think does injustice to the legislative process.

<sup>219</sup> *See supra* Part I.A.

<sup>220</sup> *See supra* Part I.B; Part I.C.

Ultimately, because the ECJ has repeatedly shown that Article 114 may be used to promote non-market aims, and because American jurisprudence has shown that GBV can and does have a substantial effect on interstate commerce, such an application is likely to be considered within the limits of the treaties.

Finally, this Note illustrates that the scope of Article 114 is part of a broader debate about the role of federalism in the European Union. Ultimately, European Union law regarding Article 114 stands before a watershed moment similar to the one that the United States experienced in the early 1990s. Unlike the United States, however, the European Union can seize the moment and use its internal market competence to enact legislation that can help protect its half a billion citizens from gender-based violence.