CHAPTER THREE

RENOUNCING POWER AND RESISTING CHANGE

Daily Work and Institutional Consciousness

Paola: "It happened to us as soon as we arrived [at the Court of] Appeal: A problem of conflict between our supreme court [the Court of Cassation] – its plenary session – and the Court of Justice of Strasbourg, which told us the exact opposite."

Tommaso Pavone (TP): "You mean the European Court of Human Rights?"

Paola: "No, the … of Luxembourg! Apologies – the [European] Court of Justice, in a preliminary ruling, said something different, it went beyond interpretation and entered into the merits using the facts of the case, and so it bound us since it basically said: 'You have to resolve it in this way'. So we found ourselves with two opposing judgments …"

Marta: "And, furthermore, the plenary session for us is the maximum for interpretation …"

Paola: "They're binding … just imagine that I was the judge charged with writing the judgment! And I asked my [chamber] president … [turning to Marta], I'm recounting how we decided to decide by using the filter in that case."

Marta: "Yes, yes."

Paola: "… so I told my president: 'We'll decide this one using 348 *bis*' – a filter. We almost never use it …"

TP: "What does that mean?"

Paola: "That is, an admissibility filter. We sift through the paperwork and decide if it's manifestly inadmissible …"

TP: "Ah, so you declared it inadmissible …"

Paola: "And thus, there are no reasonable possibilities in law to welcome the appeal …"

Marta: "… so in this way we got rid of the case, using a civil procedure, because we would have had to decide which of the two rulings – we would have had to write a treatise on EU law …"

TP: "… political scientists who sometimes study this type of problematic … posited that, in fact, perhaps lower court judges … would oftentimes be

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> happy to welcome this sort of situation because it means they're no longer bound by superior judges, and they could even disapply a national law, so a sort of – I don't know – cultural transformation for a judge that acquires new powers . . . "
>
> **Paola**: "But that makes some sense only up to a point."
>
> **Marta**: "Mmh, that doesn't characterize us."
>
> **Paola**: "Plus, the principles [of European law] don't belong to us . . . "[1]

If you are not an aficionado of Italian civil procedure, you might have missed how these judges renounced an opportunity to serve as agents of change.

Paola and Marta are two Italian judges who were confronted with a conflict between national and European law shortly after being promoted to the Court of Appeal of a large Italian city. Their national "boss" (the Court of Cassation) told them the answer to the dispute was X. By contrast, their European "boss" (the European Court of Justice [ECJ]) maintained that the legal solution was Y. A space of ambiguity emerged, a classic opportunity to exercise agency and reshape policy.[2] After all, they could have referred the case to the ECJ to determine whether the Court of Cassation was correctly interpreting European Union (EU) law. By turning to a "second parent" in Luxembourg,[3] they could have proposed how the case should be decided. If successful in persuading the ECJ, the latter's judgment would have been legally binding upon the Court of Cassation. Paola and Marta thus had an opportunity to tell their superiors what to do while Europeanizing domestic policy along the way.

Instead, they found a procedural means to get rid of the case and preserve the status quo. But why? After all, this behavior runs counter to the expectations of the judicial empowerment thesis described in the previous chapter. Why were Paola and Marta so unenthusiastic about this opportunity to empower themselves and promote change?

[1] Interview with two judges, Court of Appeal of Bari, March 2017 (in-person; date/names redacted).

[2] Historical institutionalists emphasize that "the ambiguities [rules] embody provide critical openings for creativity and agency; Individuals exploit their inherent openness to establish new precedents." See: Mahoney and Thelen, "Theory of Gradual Institutional Change," at 12. On how this type of argument has been applied to explain innovative judicial decision-making, see: Stern, Rachel. 2013. *Environmental Litigation in China: A Study in Political Ambivalence*. New York, NY: Cambridge University Press, at 123–149.

[3] Alter, "European Court's Political Power," at 466–467.

This chapter's epigraph is ripe with clues that resurfaced repeatedly in conversations with 134 judges across Italy, France, and Germany: from confusing the ECJ and the European Court of Human Rights; to the fear of expending days "to write a treatise on EU law"; to the belief that EU laws "don't belong to us." These might seem like the opinions of a couple of lethargic or Euroskeptic judges. Both inferences are wrong. What Paola and Marta *are* conveying is how the trudge of daily work within civil service judiciaries can ossify habits and collective identities in ways that calcify judicial behavior. They are speaking to what social scientists call "path dependence": the fact that institutions can entrench mindsets and practices highly resistant to change.

To unpack these claims, in Section 3.1 I adapt the concept of path dependence to study the behavior of judges – particularly within lower courts – as they confront the prospect of institutional change, and I explain why it is useful to conceive path dependence as a form of consciousness. I then leverage fieldwork across Italian, French, and German courts to trace how a history of insufficient training (Section 3.2) combined with the enduring pressures of daily work (Section 3.3) entrenched mindsets and habits renouncing judicial empowerment and resisting Europeanizing change. Finally, I illustrate these dynamics in greater depth via a group conversation with six judges in a lower French court (Section 3.4).

3.1 PATH DEPENDENCE AND JUDICIAL PRACTICE

The concept of path dependence is central to each of the three "new institutionalisms" in the social sciences.[4] Most existing accounts draw on economic scholarship[5] and stress how contingent events can generate "increasing returns"[6] from adopting a new institutional practice and augment the costs of deviating from said practice. Institutions

[4] That is, rational choice or economic institutionalism, historical institutionalism, and sociological institutionalism. See: Hall, Peter, and Rosemary Taylor. 1996. "Political Science and the Three New Institutionalisms." *Political Studies* 44(5): 936–957; Mahoney, James. 2000. "Path Dependence in Historical Sociology." *Theory and Society* 29: 507–538.

[5] See, in particular: Arthur, Brian. 1994. *Increasing Returns and Path Dependence in the Economy*. Ann Arbor, MI: University of Michigan Press.

[6] Pierson, Paul. 2000. "Increasing Returns, Path Dependence, and the Study of Politics." *American Political Science Review* 94(2): 251–267; Pierson, Paul. 2004. *Politics in Time: History, Institutions, and Social Analysis*. Princeton, NJ, Princeton University Press, at 17–53.

thus become resistant to change even if they prove inefficient. These approaches tend to adopt a "punctuated equilibrium" model, wherein new institutions created during "critical junctures"[7] render collective action for change difficult, particularly when multiple actors can veto reform[8] or constituencies of beneficiaries mobilize to keep new rules in place.[9]

This approach to path dependence seeks to explain why new institutions endure. But when institutional change unfolds as a process of layering – as when EU law gradually percolates into national legal orders – asking how new rules get locked-in puts the cart before the horse. The first order of business should be to probe whether institutions that are already up and running resist the prospective reconstructions wrought by newly layered rules.[10] To intercept how this dynamic unfolds inside national judiciaries, I adopt a sociological approach to path dependence: I want to unpack what resistance to Europeanizing change looks and sounds like from the granular perspective of "street-level" judges,[11] who should have the most to gain by turning to EU law and the ECJ.

My starting premise is that civil service judiciaries are rule-governed communities staffed by individuals whose behavior is shaped by memories of past action[12] and the patterned demands of present labor. Particularly at their lower rungs, inherited routines and quotidian demands

[7] Mahoney and Thelen, "Theory of Gradual Institutional Change," at 3; Capoccia, Giovanni, and R. Daniel Kelemen. 2007. "The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism." *World Politics* 59(3): 341–367.

[8] Tsebelis, George. 2002. *Veto Players: How Political Institutions Work*. Princeton, NJ: Princeton University Press.

[9] Pierson, Paul. 1996. *Dismantling the Welfare State?* New York, NY: Cambridge University Press; Pierson, Paul. 1996. "The Path to European Integration." *Comparative Political Studies* 29(2): 123–163.

[10] Path dependence is thus central to gradual institutional change, contra some arguments: Mahoney and Thelen, "Theory of Gradual Institutional Change," at 3.

[11] As we will see, the lower we descend national judiciaries, the more the constraints upon judges resemble those upon "street-level bureaucrats." See: Lipsky, *Street-Level Bureaucracy*, at 29–30; On why civil law judges resemble street-level bureaucrats more than common law judges, see: Biland, Émilie, and Hélène Steinmetz. 2017. "Are Judges Street-Level Bureaucrats? Evidence from French and Canadian Family Courts." *Law & Social Inquiry* 42(2): 298–324.

[12] Abbott, Andrew. 2016. *Processual Sociology*. Chicago, IL: University of Chicago Press, at 1–32.

favor the emergence of what practice theorists[13] call "habitus": an "embodied history" and taken-for-granted mindsets rejecting new stimuli that call accrued ways of doing into question.[14] Building on these notions, I suggest that we can fruitfully conceive path dependence in contexts like national courts as a type of *institutional consciousness*: an accrued social identity tied to institutional place that structures how actors make sense of lived experience. By "consciousness," I mean "the way people conceive of the 'natural' and normal way of doing things, their habitual patterns of talk and action."[15] That is, consciousness is "not only the realm of deliberate, intentional action," but also about habitual matters that "people do not think about."[16] While consciousness can be a catalyst for change,[17] its entanglement with bureaucratic routine can turn it into a cognitive shackle, "becom[ing] part of the material and discursive systems that limit and constrain future meaning making."[18]

Over the course of fieldwork, it became clear that the puzzling resistances to EU law that I kept encountering in national judges exemplify a long-standing consciousness of path dependence that can be traced to the historical interaction of two mechanisms. First, lackluster training in and knowledge of European law – universal in the past and still diffuse today – entails that judges broadly lack a reflex probing whether national laws conform with EU law. Lower court judges in particular are habituated to apply well-known rules as conventionally interpreted, and they usually avoid confrontations

[13] Pouliot, Vincent, and Jérémie Cornut. 2015. "Practice Theory and the Study of Diplomacy: A Research Agenda." *Cooperation and Conflict* 50(3): 297–315; Pouliot, Vincent. 2015. "Practice Tracing." In *Process Tracing: From Metaphor to Analytic Tool*, Andrew Bennett and Jeffrey Checkel, eds. New York, NY: Cambridge University Press; Dunoff, Jeffrey, and Mark Pollack. 2018. "A Typology of International Judicial Practices." In *The Judicialization of International Law*, Andreas Follesdal and Geir Ulfstein, eds. New York, NY: Oxford University Press.

[14] See: Bourdieu, Pierre. 1990. *The Logic of Practice*. Stanford, CA: Stanford University Press, at 53–54; 60–61.

[15] Merry, Sally Engle. 1990. *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans*. Chicago, IL: University of Chicago Press, at 5.

[16] Ibid.; Nielsen, "Situating Legal Consciousness," at 1059.

[17] McCann, Michael. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago, IL: University of Chicago Press.

[18] Silbey, Susan. 2005. "After Legal Consciousness." *Annual Review of Law & Social Science* 1: 323–368, at 334; Smith, *Institutional Ethnography*, at 68.

with new and lesser-known laws and courts, where the risk of error is high. Knowledge deficits also impinge on street-level bureaucrats, but they are especially consequential for judges who wish to safeguard their professional reputation as custodians of legal expertise.[19]

Second, work pressures that are most acute in the lower rungs of civil service judiciaries "thicken" how judges experience temporality in constraining ways. Temporality is thickened because physical objects, like case files processed in built and resource-scarce spaces, imbue daily routine with a weighty materiality. Speedily processing documents and getting rid of files in cramped office spaces disciplines the rhythm of daily life.[20] As a result, seeking out legal training, invoking complex EU rules, and drafting referrals to the ECJ become perceived as counterproductive or burdensome ruptures of routine to be avoided if possible.

The resulting institutional consciousness magnifies the reputational risks and labor costs that judges associate with Europeanization, reifying their sense of distance and lack of ownership over EU law. In so doing, this consciousness legitimates judges' renouncement of power and resistance to change. It explicates why judges have been broadly disinclined to claim the opportunities for judicial review and expansive policymaking bestowed by European integration. More generally, it illustrates that "when institutions evolve incrementally, existing behaviors become reinforced, preventing new behaviors from emerging . . . [since] breaking from tradition requires strong carrots and weak sticks."[21] The judicial empowerment thesis presumes an emancipatory activism in judges because it focuses on the one-shot "carrots" and neglects the everyday "sticks." Its proponents argue that "lower courts found few costs and numerous benefits in making their own referrals to the ECJ and in applying EC law."[22] At least, they would "save themselves the work of deciding the case themselves."[23] As we will see, these plausible claims often fail to map onto the patterned realities of judicial practice.

[19] Garoupa, Nunu, and Tom Ginsburg. 2015. *Judicial Reputation*. Chicago, IL: University of Chicago Press.

[20] Here too, judiciaries can develop "patterns of practice" similar to those that bureaucrats develop under resource scarcity: Lipsky, *Street-Level Bureaucracy*, at 81–158.

[21] Bednar and Page, "When Order Affects Performance," at 94.

[22] Alter, "European Court's Political Power," at 466.

[23] Burley and Mattli, "Europe before the Court," at 62–63.

3.2 MANAGING KNOWLEDGE AND JUDICIAL REPUTATION

3.2.1 The Problem of *Lacunae*

In September 1993, some thirty-six years after the Treaty of Rome established the European Community, the governing council of the Italian judiciary inaugurated its first training course on European law. Delivering the seminar's opening remarks, professor Giovanni Conso concluded: "The judge perceives the Community law as extraneous … [he] tends, therefore, to reject, almost instinctively, the Community rules," revealing a "resistance towards the communitarian phenomenon" and a "sort of judicial chauvinism" linked to a "lack of education in EU law."[24]

To the judges in attendance, these remarks from the recently retired President of the Italian Constitutional Court probably felt like a personal rebuke. My approach is to instead take seriously how well-meaning, hardworking, and otherwise ambitious judges faced – and continue to face – daily institutional incentives to turn their backs on EU law and the ECJ. First and foremost, if European integration is to induce domestic courts into serving the interests of an emergent transnational polity, then newly lawyered EU rules must come to be *known*. A novel body of transnational legal knowledge must be integrated within local judicial practice and foster some sense of identification with the new political order. Yet nothing about this process is intuitive, costless, or risk free.

To unpack this claim, we must take history seriously, even though we are not explaining an outcome that has come to pass. After all, surprisingly little has changed in the state of affairs that Italian Constitutional Court President Conso decried almost thirty years ago. The signs – both quantitative and qualitative – are everywhere for those who wish to look. In a 2011 survey of over 6,000 national judges conducted by the European Parliament, three-fifths admitted that they did not know how to refer a case to the ECJ if the occasion required

[24] Bartolini, Antonio, and Angela Guerrieri. 2017. "The Pyrrhic Victory of Mr. Francovich and the Principle of State Liability in the Italian Context." In *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*. Fernanda Nicola and Bill Davies, eds. New York, NY: Cambridge University Press, at 341.

it.[25] Fast-forward to 2016 and consider the remarks of Roberto Conti, a leading Italian civil judge, whose tone suggested the confiding of an open secret:

> Let me tell you, quite sincerely … that the dialogue with the European Court of Justice has been lacking over the years for one primary reason that is often unstated: that EU law has not been well known in our legal order … even I, as part of a cohort of fairly young judges, in 1997 had no knowledge of EU law. So think of a judiciary – we are about 9,000 – where the majority are older than me![26]

As with other judges in Italy, France, and Germany, discussing knowledge gaps provokes unease. Judges in civil service judiciaries may not be the "culture heroes" and "bevy of platonic guardians"[27] that they are in common law countries, but none will deny that they, too, ought to know the law. Just as Hamilton justified the judicial power as "neither Force nor Will, but merely Judgement,"[28] so did the most prominent civil law figure – Montesquieu – argue that courts are *bouche de la loi*, "the mouth that pronounces the words of the law."[29] A latin maxim – *iura novit curia*, or "courts know the law" – captures this same spirit. Judges may lack the purse or sword, but at least they have expert knowledge.

Except when they do not. In discussing EU law, national judges usually referenced *iura novit curia* in opposition to the realities of everyday practice. "[I]t's a theoretical principle," confides an Italian judge, for "the reality is that no judge can master in a deep way all the universe of administrative law" derived from EU legislation.[30] "Many colleagues have found themselves in the situation … of not being prepared" to apply EU law, echoes a lower court colleague. Yet – she adds sardonically – "*iura novit curia*! We must know the laws,

[25] European Parliament. 2011. "Judicial Training in the European Union Member States." Directorate General for Internal Policies. Available at: www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET(2011)453198_EN.pdf.

[26] Interview with Roberto Conti, October 12, 2016.

[27] See: Merryman and Perez-Perdomo, *The Civil Law Tradition*, at 34–37; Hand, Learned. 1958. *The Bill of Rights*. Cambridge, MA: Harvard University Press, at 73–74.

[28] Hamilton, Alexander. 1961 [1788]. "The Federalist No. 78." In *The Federalist*, Jacob E. Cooke ed., Middletown, CT: Wesleyan University Press, at 523.

[29] Montesquieu. 1951. *De l'ésprit des lois*, Chapitre VI, Livre XI, Paris: Gallimard.

[30] Interview with Claudio Zucchelli, Council of State and Council of Administrative Justice for Sicily, April 12, 2017 (in-person).

even if nobody has taught us or explained how they work!"[31] When sharing these remarks at a German law school in 2017, one attendee wondered aloud whether I was really questioning *iura novit curia*. The student's query conveys how the maxim remains part of the imaginary of civil law education, while the judges' comments indicate how it can evaporate in the lived reality of judicial practice.

Of course, the judge as master of the laws is an unrealizable ideal. But tending to this ideal serves an important social function. As with all professionals, the ability to apply abstract knowledge (legal principles) to concrete facts (cases) lies at the heart of judges' claims to authority.[32] Expertise enhances their individual and collective reputation for quality, which legitimates the judicial power, attracts social esteem, and insulates courts from outside encroachment.[33] All of the judges that I met instinctively want to know the laws they apply (and have others know that they know the laws they apply).

It is in this vein that a new and complex field of transnational rules may be perceived as threatening. Although Italy, France, and Germany are founding members of the EU, European law was not integrated in most of their law schools' curricula until the 1990s and early 2000s. To this day, judges and lawyers in all three states are not required to undergo continuing training in EU law (see Figure 3.1). These deficits are particularly glaring given that up to 40 percent of state legislation is partially or fully regulated by European law.[34]

To counteract these shortfalls in national judicial training,[35] in 1967 the ECJ obtained funding from the European Commission to

[31] Interview with Monica Velletti, Tribunal of Rome October 7, 2016 (in-person).

[32] Abbott, Andrew. 1988. *The System of Professions: An Essay on the Division of Expert Labor*. Chicago, IL: University of Chicago Press, at 8.

[33] Garoupa and Ginsburg, *Judicial Reputation*.

[34] Toeller, Annette E. 2010. "Measuring and Comparing the Europeanization of National Legislation: A Research Note." *Journal of Common Market Studies* 48(2): 417–444.

[35] For France, the figure is based on: Décret No. 91-1197 du 27 Novembre 1991; Arrête du 7 décembre 2005; European Commission. 2011. "Judicial Training Structures in the EU: France." Available at: https://e-justice.europa.eu/fileDownload.do?id=d607ab8c-3fbb-44d1-86e5-69da430ae370. For Germany, the figure is based on: The German Judiciary Act, as last amended by Article 1 of the Law of 11 July 2002 (Bundesgesetzblatt, Part I p. 2592); European Commission. 2014. "Judicial Training Structures in the EU: Germany." Available at: https://e-justice.europa.eu/fileDownload.do?id=c5d9bc8b-e31f-442b-87d2-ecdf023e3b4b; European Parliament. 2017. "The Training of judges and Legal Practitioners." Directorate General for Internal Policies, PE 583.134-March 2017,

	France	Germany	Italy
EU Law mandatory in law schools?	**No:** EU law is not considered part of basic legal training under national law, but law school curricula increasingly integrate EU law	**Yes (since 2002):** Federal reforms to university legal education in 2002 require integrating "links to European law" in all subject matters	**Yes (since 2000):** EU law was incorporated as a mandatory subject in all law schools between 1995 and 2000
EU Law a subject of the bar exam?	**Yes (since 2005):** The candidate can further select EU law as a subject for their oral exam	**Yes (since 2002):** The basics of EU law are part of the first and second state exams in all Länder	**No:** But the candidate can select EU law as a subject for their oral exam
Continuing training in EU Law required for lawyers?	**No:** Continuous training is mandatory for all lawyers since 1971, but EU law is not a required subject	**No:** Continuing training is only required for specialized lawyers, and EU law is not a required subject	**No:** Continuous training is mandatory for all lawyers since 2015, but EU law is not a required subject
Continuing training in EU Law required for judges?	**No:** five days of continuing training per year are required since 2008, but EU law is not a required subject	**No:** At the regional level, continuing training is required only for some Länder, and EU law is not a required subject. At the federal level continuing training at the German Judicial Academy is voluntary, including in EU law	**No:** EU law became a mandatory component of the judicial entrance exam in 1997, but mandatory continuous training (one course every four years, required since 2007) does not require EU law

Figure 3.1 Overview of legal training in EU law in France, Germany, and Italy

"launc[h] a generous information campaign"[36] centered on inviting national judges to funded seminars and dinners in Luxembourg. Much has been made of these initiatives, but they mostly targeted recalcitrant supreme courts[37] rather than humbler judges of first instance. The first systemic effort to integrate lower courts in EU judicial training occurred with the establishment in 2000 of the European Judicial Training Network (EJTN).[38] Yet as late as 2011 only 10 percent of national judges surveyed had participated in such training, and half of lower court judges reported never taking any coursework on EU law (see Figure 3.2).

Historically, then, those few lower courts who turned to EU law and the ECJ tended to shoot in the dark, and the results were not always pretty. Consider the following historical examples from Italy, Germany, and France:

1. *Dispatch from Italy*: In the famous 1991 *Francovich* case,[39] the ECJ first proclaimed that states can be held liable for damages if they violate European law. But few are aware that the case should have never made it to Luxembourg. The *pretore* (small claims judge) of Vicenza had mailed the *dossier* to the wrong court in the wrong city: the European Court of Human Rights in Strasbourg. It was only "thanks to the initiative of an astute postman" – who had presumably grown accustomed to judges making this error – that the reference was "redirected to the correct recipient" in Luxembourg.[40]

at 32; Richards, Diana. 2016. "Current Models of Judicial Training." *Judicial Education and Training* 6: 41–52, at 44; Deutsche Richter Akademie. 2017. "Chronik." Available at: www.deutsche-richterakademie.de/icc/drade/nav/87c/87c060c6-20f5-0318-e457-6456350fd4c2. For Italy, the figure is based on: Bartolini and Guerrieri, "Pyrrhic Victory of Mr. Francovich," at 341; European Commission. 2014. "Judicial Training Structures in the EU: Italy." Available at: e-justice.europa.eu/fileDownload.do?id=e453a343-4b04-431d-933c-c8f9b8f43d2c.

36 Rasmussen, *On Law and Policy in the European Court of Justice*, at 247; See also: Burley and Mattli, "Europe before the Court," at 63.

37 See: Slaughter, Anne-Marie. 1997. "The Real New World Order." *Foreign Affairs* 76(5): 183–197; Slaughter, *New World Order*, at 65–66.

38 European Judicial Training Network. 2017. "The European Judicial Training Network." Available at: www.ejtn.eu/PageFiles/9572/EJTN_Corp_Presentation_Official_Sept2017_FINAL.pdf.

39 Joined cases C-6/90 and C-9/90, *Francovich*, ECR I-5357.

40 Bartolini and Guerrieri, "Pyrrhic Victory of Mr. Francovich," at 341. In an interview with a lawyer involved in the case, I confirmed this fact: Interview with Alberto Dal Ferro, lawyer at Studio Legale Morresi, March 6, 2017 (via Skype).

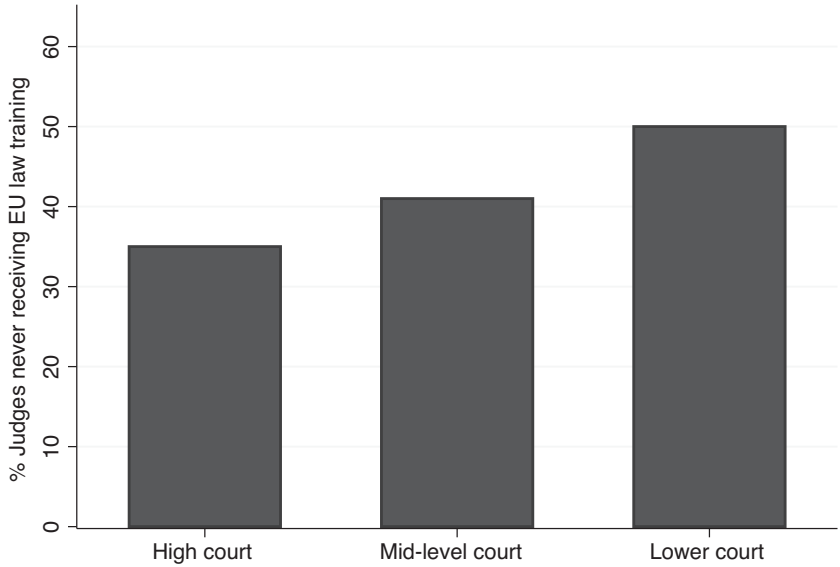

Figure 3.2 Percentage of judges having never received EU law training, by court level
Notes: Adapted from European Parliament (2011: 36). Results are based on a 2011 survey of 6,087 judges across 27 member states of the European Union.

2. *Dispatch from Germany*: In 1988, the regional civil court in Munich requested an expert opinion from the Max Planck Institute for Comparative and International Law to certify the applicability of foreign law in a case. It turns out that the judges did not realize that the "foreign" laws at hand comprised European rules that they could directly apply, and that it was the ECJ's task – not that of a local research institute – to interpret them. Some jurists published scathing mockeries of these clueless judges: "It's difficult to resist satirizing," wrote professor Gert Nicolaysen.[41] Apparently, the judges and the Bavarian Ministry of Justice were so embarrassed by Nicolaysen's commentary that they publicly suggested that he should forget about ever applying for a professorship in Munich.[42]
3. *Dispatch from France*: In 1990, Eric Morgan de Rivery – a French competition lawyer – cited European law before a large court of appeal in a case concerning the deregulation of the electricity

[41] Nicolaysen, Gert. 1988. "Difficile Est Satiram Non Scribere." *Europarecht* 23: 409–412.
[42] Interview with Thomas Bruha and Peter Behrens, Europa-Kolleg of Hamburg, January 25, 2018 (in-person).

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> market. The opposing lawyer resorted to ridicule: "'Listen to my colleague, who invokes a foreign law … that he calls Community law!' Instead of retorting, 'look, stop this, it's not correct, your colleague is right', the presiding judges approvingly burst out laughing … I was shocked! That shocked me," Morgan de Rivery recalls. Perhaps he should not have been: just two years prior, after persuading a lower civil court to refer a case to the ECJ,[43] the investigative judge seemed unaware of what they had gotten themselves into: "Alright, we'll see you at the Hague," they said, convinced they would soon be traveling to the International Court of Justice. "No, excuse me, it's not the Hague," the lawyer corrected. The judge's retort did not inspire confidence: "Oh, right, sorry, I meant Strasbourg!"[44]

3.2.2 Burden, Insecurity, and Fear

No judge wishes to publicly confuse one international court for another, to expose their limited grasp of EU law before lawyers and parties, and to be mocked in law journals. So file by file and glance by glance, the incentive is to look the other way. A retired member of the European Commission Legal Service recalls learning as much when in the 1980s he met with 120 German administrative judges in Karlsruhe:

> I was told that, in fact, 90–95% of the judges try to avoid that because they do not feel comfortable with European law. It's not Euroskepti[cism] – they like Europe – but to apply European law [one] needs some skills, and if you don't have [them] … they said: "There are [only a] very few percentage of judges [who] dare to go to Luxembourg" … they may ignore the attitude of the ECJ, to do everything to understand what the judge really wants … If you don't know even this … [then] if you can walk around it, you will.[45]

This legacy of insufficient training suffuses conversations with German lower court judges to this day. Representative is the lament of a social court judge:

> The gaps of knowledge … We had a congress, six weeks ago, where we discussed this … you have almost sixty years of tradition of European law

[43] C-369/88, *Criminal proceedings against Jean-Marie Delattre* [1991], ECR I-01487.

[44] Interview with Eric Morgan de Rivery, lawyer at Jones Day in Paris, September 12, 2017 (in-person).

[45] Interview with Ingolf Pernice, ex-Professor at Humboldt University of Berlin, November 3, 2017 (in-person).

> in social security.[46] But it's not often recognized. So if you ask judges at the social security court: "Is your work much influenced by the European Union?" 95% would say: "No, I don't have cases." But that's wrong! There's a lack of consciousness in this area.[47]

Neither is this state of affairs unique to German lower courts. Well into the early 2000s, an Italian civil judge in Milan confessed that she did not "recall any judges in particular who confronted themselves" with European law, since "no judge knew how to conduct the research … you needed the lawyers to cite the ruling [of the ECJ] for you."[48] And when in 2013 a judge at the first instance court of Milan in charge of EU judicial training surveyed her colleagues, she was left stunned: "Judges had no idea what the potential value was of an EU directive rather than an EU regulation, and how to apply it. The responses were fairly stupefying. In the sense that, we indeed found ourselves having to set up meetings on the As, Bs, and Cs of EU law."[49] The general reach of these knowledge deficits was confirmed by the European Parliament's 2011 survey, where only 35 percent and 66 percent of first instance judges admitted at least "some extent" of knowledge of how to refer a case to the ECJ and how to directly apply an EU law, respectively (compared to 70 percent and 80 percent of high court judges – see Figure 3.3).[50]

But what does it *feel like* to be a judge faced with the frailty of your own legal knowledge? In conversations, the problem of *lacunae* was associated with three perceptions: (1) a sense of *burden* or difficulty, (2) a sense of *insecurity* or risk, and (3) a sense of *fear* or exposure.

First, as a result of steep knowledge deficits, becoming familiar with European law can be perceived as a weighty uphill climb. "Lacking training," a member of the civil court of Bari admits, "we find it tiring to confront ourselves with European law."[51] "EU law today is

[46] See: Regulation No. 3 of the Council of the EEC of 25 September 1958 concerning social security for migrant workers, *Official Journal* No. 30 of 16 December 1958, at 561.

[47] Interview with Frank Schreiber, Hesse social court, December 4, 2017 (in-person).

[48] Interview with Francesca Fiecconi, Court of Appeal of Milan, December 2, 2016 (in-person).

[49] Interview with Giulia Turri, Tribunal of Milan, November 25, 2016 (in-person).

[50] These results are not driven by recently acceding member states: 67% of judges in pre-2004 accession states reported having at least "some extent" of knowledge of when to apply EU law, compared to 72 percent of judges in newly acceding states. See: European Parliament, "Judicial Training in the European Union," at 113.

[51] Interview with Ernesta Tarantino, Tribunal of Bari, March 20, 2017 (in-person).

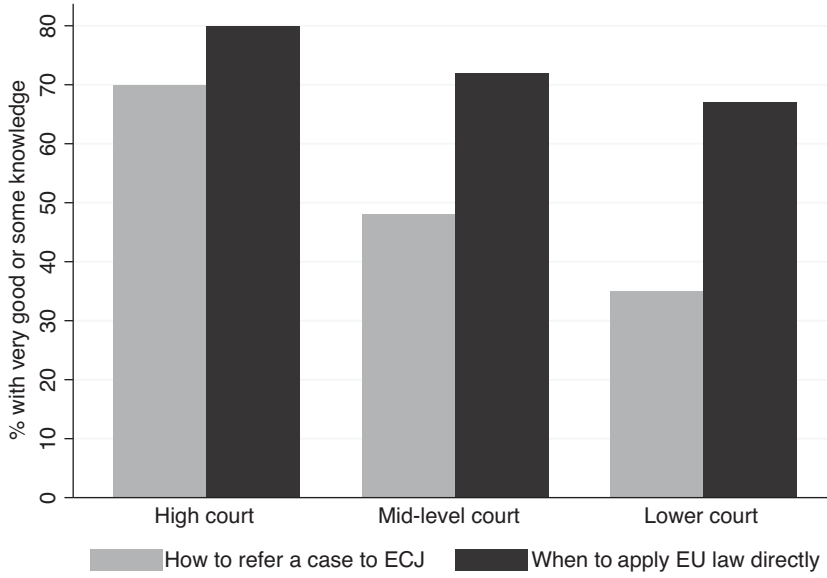

Figure 3.3 Percentage of national judges with "very good" or "some extent" of knowledge of how to refer a case to the ECJ and when to directly apply EU law, by court level
Notes: Adapted from European Parliament (2011: 114–115).

something complex," acknowledges a French judge while describing the concerns of his lower court colleagues; "And since we perceive it to be complicated, we oftentimes treat it in a complicated way … 'Oh là là, this 2001 regulation, what is it? Oof! Nothing's understandable, I don't know!'"[52] A German administrative judge adds that "it is quite hard to follow the judgments of the European Court of Justice. It's quite a lot of decisions that you obviously have to have in mind, and sometimes they're not easy to understand."[53] We will shortly address how this burdensome feeling is joined at the hip with judges' working routines.

Frequently highlighted alongside a sense of burden is a perception of insecurity and risk. Nowhere is the principle of *iura novit curia* so vulnerable to disenchantment as when judges are confronted with a body of rules they hardly know. One concern raised by multiple inter-

[52] Interview with Roger Grass, September 29, 2017.
[53] Interview with Klaus Dienelt, Administrative Court of Darmstadt, January 11, 2018 (via phone).

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viewees is the risk of being manipulated by a crafty lawyer – a particular concern in civil law countries, where judges' fears of ceding ground to lawyer-driven "adversarial legalism" have been deeply rooted.[54] Some judges confirmed and decried such manipulation attempts firsthand.[55] One judge in Hesse notes that "some judges may be afraid, not knowing enough about EU law, they may feel tricked, or manipulated."[56] An Italian civil judge confirms how "every judge's concern" is that "the lawyer exploits this knowledge of his and tries to manipulate the judge, and make him pose a question [to the ECJ] that is not founded."[57] Indeed, judges' insecurity is exponentially magnified when faced with the prospect of soliciting the ECJ. "If I just have a look around, in the offices next to me," confides a German judge in Darmstadt, "most of my colleagues would never make a preliminary [reference] because they feel not quite sure about the standard and the status-quo of the judgments of the European Court."[58] In fact, several judges who spoke to me conceded that they would not know how to initiate a dialogue with the ECJ in the first place. The words of a French judge are representative of what others told me off-the-record:

> I'm not sure if this should be off [the record] or not, but I would not even know who to address myself to, at the European Court of Justice, to know what I can ask … we aren't offered training that could help us … we have the fear of referring for nothing. To refer a question that was already posed, or a question which has already been settled in one way or another, because we're not specialists in EU law. We don't know enough.[59]

Tellingly, even judges possessing "process expertise" of how the preliminary reference procedure works are adamant that it is a risky tool for change given that judges lack "substantive expertise" in EU law.[60] Some cited widespread concerns about looking "stupid": a civil law judge in Paris remarks that since "you won't necessarily have the reflex

[54] Kagan. "Should Europe Worry about Adversarial Legalism?"; Kelemen, *Eurolegalism*.
[55] Interview with Matthias Zigann, judge at the Landgericht in Munich (specialized patent chamber), December 19, 2017 (in-person).
[56] Interview with Frank Schreiber, December 4, 2017.
[57] Interview with Michele Marchesiello, ex-judge at the Tribunal of Genoa, November 10, 2016 (in-person).
[58] Interview with Klaus Dienelt, January 11, 2018.
[59] Interview with a judge at a French administrative court of first instance, October 2017 (in-person; name/date redacted).
[60] On substantive and process expertise, see: Kritzer, *Legal Advocacy*, at 203.

and the knowledge … a lower court judge might say to himself, 'Well, maybe the question has already been posed and I don't know it, so I'll ask a worthless question … I'll look a bit stupid'."[61] After all, "it's never pleasant to be told that you didn't do your homework in drafting a question before seizing another court," a colleague confirms.[62] This concern is not unfounded: the ECJ is four times more likely to declare a referral inadmissible when it is submitted by a lower court than a court of last instance.[63]

Sometimes this insecurity can even boil over into a sense of "reverential fear."[64] Applying EU law or turning to the ECJ "scares you, of course!" acknowledges an otherwise Euroenthusiastic judge in Naples, since if you make a mistake "someone can challenge you, [and] you can be afraid of ending up in the newspapers."[65] Consider how Giuseppe Buffone and Philippe Florès, an Italian and a French lower court judge, respectively, describe feeling exposed when they first solicited the ECJ:

> Our judgments are the name of the Italian people, we represent the Italian Republic, we bear the weight of this responsibility, which you perceive only if you do this work. Only if you have a sense of being a judge. You don't just refer like that, in a week or two … because it's a reference that circulates at the European level … vis-à-vis EU law you're more insecure, so it's not easy … if it also comes back as inadmissible, well![66]

> [We] could make a mistake, voilà, it's a complex field of law, that upsets the habits we might have … You have a lower court judge who is afflicted by his daily case files, by his preoccupations. To launch himself into a preliminary reference which will expose him, expose him vis-à-vis a law he has not mastered well … Might he see a problem that doesn't exist? And does he pose the question correctly? … [the ECJ could reply] we've answered this 50,000 times already, or it's a question of purely

[61] Interview with Sophie Canas, Court of Cassation and ex-judge at the Tribunal de Grande Instance of Paris, September 22, 2017 (in-person).
[62] Interview with Lise Leroy-Gissinger, Court of Appeal of Aix-en-Provence, October 24, 2017 (in-person).
[63] See: Pavone and Kelemen, "The Evolving Judicial Politics of European Integration."
[64] Interview with Margherita Leone, Tribunal of Rome, September 29, 2016 (in-person).
[65] Interview with Paolo Coppola, Tribunal of Naples, February 13, 2017 (in-person).
[66] Interview with Giuseppe Buffone, Tribunal of Milan, December 14, 2016 (in-person).

> national law that doesn't concern EU law, and there the judge will feel completely ridiculous.[67]

Both judges here interpret their colleagues' reluctance to solicit the ECJ as an understandable response to knowledge deficits, a reflex they partly share themselves. But Florès also touches upon something crucial: that "a lower court judge who is afflicted by his daily case files" may perceive EU law as something that "upsets the habits we might have." For these remarks reveal the confluence of another embodied constraint: the discipline required to manage one's time and daily work as a judge in a civil service judiciary.

3.3 MANAGING WORKLOAD AND THICKENED TIME

If knowledge deficits in EU law foment fears of making a mistake, why do judges not tend to these *lacunae*? This is a key question, since a recent survey analysis of German, Dutch, Polish, and Spanish judges finds that attending judicial training and participating in exchanges with foreign judges bolsters their sense of competence in EU law.[68] Taking seriously the bureaucratic constraints encoded in judges' daily work provides an answer. Judges' burdensome attempts to maintain some semblance of control over their workload in the built, resource-scarce spaces of lower courts proved the most recurrent leitmotif in our conversations. While these pressures are most acute in Italian lower courts, most interviewees in France and Germany stressed them as well.[69]

Consider a revealing conversation I had with three German judges. Berta is a judge at a small claims court (*Amstgericht*), whereas Hendrik and Christa work at a lower regional court (*Landgericht*) and court of appeal (*Oberlandesgericht*), respectively. Take note of how they describe daily work and how it shapes the choices they make about enrolling in EU law coursework or soliciting the ECJ:

[67] Interview with Philippe Florès, Court of Appeal of Versailles, October 4, 2017 (in-person).

[68] Mayoral, Juan, Jaremba, Urszula, & Tobias Nowak. 2014. "Creating EU Law Judges: The Role of Generational Differences, Legal Education and Judicial Career Paths in National Judges' Assessment Regarding EU Law Knowledge." *Journal of European Public Policy* 21(8): 1120–1141.

[69] Survey evidence from Slovenia and Croatia suggests that the following inferences travel to newer member states as well: Glavina, "To Refer or Not to Refer."

Christa: "It's exactly the same [as with French and Italian judges . . .] The three of us everyday [work] two hours more than are paid."
Hendrik: "It's very average [to do] this."
Berta: "I come from the *Amstgericht*, the first instance . . . and we have a lot of work to do, and in our court, all people, all judges are complaining. Here I have the idea that people are more content – at the *Oberlandesgericht*."
Christa: "It's much fewer cases that you have to decide in a single month here . . . at the *Amstgericht*, if you're a judge in private law cases, you have to decide about 50 cases a month. At the *Landgericht*, the next higher court, it's between 15 and 17, and we have about 8, 9."
TP: "Right, so if you're at the *Amstgericht*, that's a lot, you'd have to . . . "
Berta: "Chop, chop, chop, chop!"
. . . [. . .] . . .
Berta: "Once I referred to [the ECJ], but it was really, really complicated . . . it takes me a lot of time, yeah . . . one month."
Christa: "Which means another twenty cases are not solved, in that time! So she has to do that."
Berta: "The other colleague . . . he was burned out, and he was depressive . . . no, he wasn't able to help me. But it was a lot of work, so I did it because I thought [national law] was so . . . unjust . . . "
Christa: "You can't really afford to refer a case . . . if there's a need to do it, you do it . . . "
Hendrik: "If it's totally clear! Totally clear! You would do it, of course."
Christa: ". . . [and] the courses on EU law don't help us with our daily work . . . the only thing you learn there is you discuss cases decided by the European Court. And this wouldn't enable you to predict the next decision! . . . it takes a long time to prepare a referral to Brussels, and while you wait, the case is in your register, it becomes two years old! Everybody asks you: 'Why has the case been there two years?' . . . "
Hendrik: "I would put it slightly different[ly]. I think this education would probably help a little. But it would not help as much as I will lose time in taking this education . . . judges will be evaluated by their boss, if you want, by the president of each court . . . and one of the main things they can do is compare the numbers."
Christa: "And the age of the pending cases!"
Hendrik: "And I think that even among the judges, they think too much: 'This is very important'. . . . so there is this spirit: 'I have to [close] many cases per year to get a good evaluation!' It still counts a lot, because it's the only objective thing that we have . . . "
Christa: "Nevertheless, every judge would refer the case to Brussels if there is no way out . . . but if there's any way you could [avoid] that . . . "[70]

[70] Interview w/ 3 judges in a populous German Länder, December 15, 2017 (in-person; names redacted).

Notice how the problem of *lacunae* is interwoven in this conversation – as when Christa twice speaks of "referring to Brussels" (it is the European Commission, not the ECJ, that is located in Brussels). But these judges are also painting a picture of enclosure and routinized discipline contradicting the presumptions of emancipation and spontaneous creativity central to the existing scholarship on the judicial construction of Europe. It is a picture depicting a fast, regularized temporality: "Chop, chop, chop, chop!" It is a sense of being entrapped in routine: "Every judge," notes Christa, would only collaborate with the ECJ "if there is no way out." It is an environment requiring utilitarian calculations: attending a course on EU law "would not help as much as I will lose time," Hendrik assumes. And it is exhaustion, as when Berta poignantly mentions her colleague who "was burned out, and he was depressive," such that "he wasn't able to help me."

What I would like to evoke is a sense of the *thickness of time* in the everyday life of lower court judges. Not unlike the notion of a "chronotope" developed by Mariana Valverde, here there is an "intrinsic connectedness of spatial and temporal relationships … Time, as it were, thickens, takes on flesh."[71] For judges, time is thickened and "takes on flesh" not only because it is compressed into little chunks, but also because these chunks take on the form of material objects – case files – tied to built and often overcrowded places – courtrooms and offices that may be shared. This makes the pace of everyday work sticky, limiting breakups of routine and disciplining judicial practice in ways not unlike trying to run through quicksand. In their own words, lower court judges repeatedly evoked this sense of spatiotemporal compression, like a German first instance judge:

> We still have a felt heavy workload, [it's] very stress[ful]. When judges describe their work, it will always be: "It's stress." So you won't get a very relaxed judge! In the media or in fairytales I was told "judges at 1PM are at the golf course or at the tennis court!" But that isn't real … there's a heavy density of work. It's always getting more dense, and dense, and dense![72]

3.3.1 The Demands of the File

Nowhere is the thickening of time as evident as in Italian lower courts. That high litigation rates can overwhelm Italian judges is well

[71] Valverde, Mariana. 2015. *Chronotopes of Law*. New York, NY: Routledge, at 9–10.
[72] Interview with Frank Schreiber, December 4, 2017.

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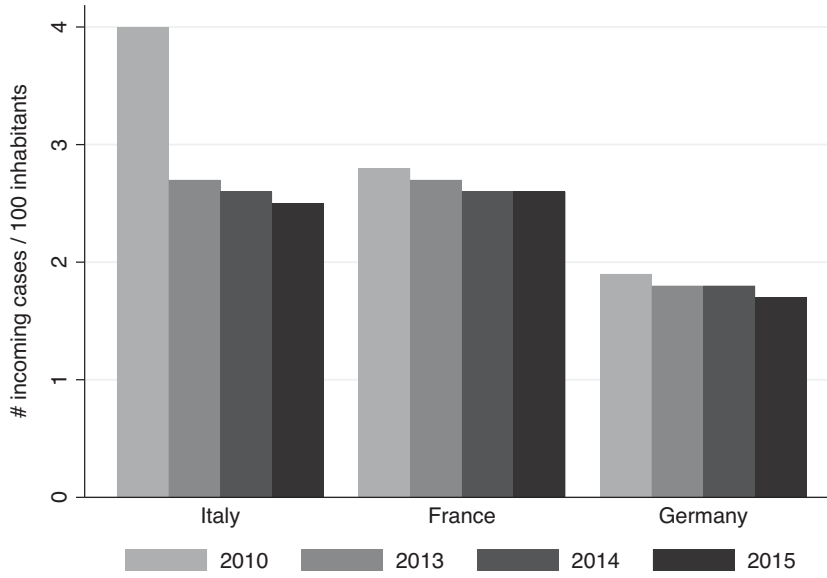

Figure 3.4 Civil and commercial disputes per 100 people at first instance, 2010–2015

known:[73] according to two measures of judicial workload in Figures 3.4 and 3.5,[74] the Italian judiciary is under comparatively greater stress. But it is one thing to cite aggregate statistics and another to witness their daily incarnation as they obstruct Europeanization.

The first thing that captures one's eye when entering an Italian city's courthouse is the ubiquity of stacks of *fascicoli* (case files). The importance of files as material objects of judicial practice has already been evidenced by sociologists:[75] for our purposes, files are a physical reminder of the daily duties that both distract and remove the gloss from an encounter with European law. One first instance judge in Bari confessed that when she was first appointed, her docket comprised

[73] See, for example: International Monetary Fund (IMF). 2014. "Italy: Selected Issues." Washington, DC: IMF. Available at: www.imf.org/external/pubs/ft/scr/2014/cr14284.

[74] Data is adapted from: European Commission. 2017. "The 2017 EU Justice Scoreboard: Quantitative Data." Available at: www.euroskop.cz/gallery/91/27594-quantitativedatafromthe2017eujusticescoreboard.

[75] Latour, Bruno. 2010. *The Making of Law: An Ethnography of the Conseil d'État*. Malden, MA: Polity Press, at 70–106; Zan, Stefano. 2003. *Fascicoli e Tribunali*. Bologna: Il Mulino.

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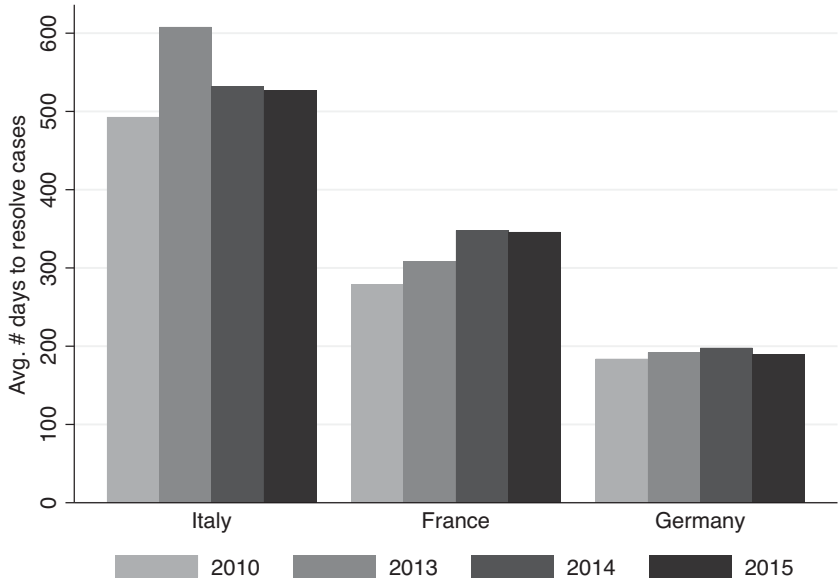

Figure 3.5 Time to resolve civil and commercial disputes at first instance, 2010–2015

some 13,000 *fascicoli*.[76] I did not doubt her, for I routinely witnessed case files being stuffed into suitcases to facilitate transportation, stacked atop carts, or lined into barricades separating judges from lawyers during oral arguments. And because courts of last instance only have to decide points of law whereas lower courts *also* have to adjudicate questions of fact, the latter's files are not only more numerous – often they are also thicker.[77]

Consider three fieldwork dispatches from Italian lower courts. In December 2016, while a civil judge was relaying how the digitalization of paperwork is modernizing judicial practice, a clerk knocked on the office door. He proceeded to push in a cart stacked with five heavy piles of files destined for my interlocutor, the tallest stack at least a couple of feet tall and perilously leaning over the cart's side (see Figure 3.6a).[78] Many judges told me that they dislike reading memos off a screen, so like their colleagues past they continue to request physical paperwork from the lawyers. Second, when conducting participant observation at the lower and appeal courts of Bari, a lawyer led me into a courtroom so

[76] Interview with Ernesta Tarantino, March 20, 2017.
[77] Interview with Roberto Conti, October 12, 2016.
[78] Interview with Francesca Fiecconi, December 2, 2016.

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Figure 3.6 Files being carted into a judge's office, Court of Appeal of Milan (a); files partially conceal judges during oral arguments, Court of Appeal of Bari (b)
Source: Author photos (2017).

crowded that I assumed a ceremony was taking place. No – the dozens of lawyers impatiently encircling the judges with paperwork in hand were all scheduled for the day's proceedings. The judges at this labor chamber, on the other hand, were hidden behind a barricade of files laying atop the bench. I was granted permission to snap a photo once the courtroom had begun to empty, but thankfully a few seconds before the judges dismantled the file barricade (Figure 3.6b).

Witnessing the ritual frenzy of oral arguments helped me perceive how the materiality and pace of judicial practice intersect. At the Tribunal of Naples – where, in 2014, the criminal chambers alone decided some 232,692 cases and faced a backlog of 122,321 proceedings[79] – oral arguments constitute a stream of lawyers and clients simultaneously attempting to solicit the judge's attention, as chronicled in the following fieldnotes:

9:38AM: "There are eight people (some of these are probably the lawyers' clients) in the room involved in two separate disputes … it's only been 15 minutes since we arrived."

10:02AM: "A set of files from the bookshelf behind the desk falls to the ground – I pick it and put it back up."

10:10AM: "It's clear that it's impossible for an observer to keep up with all the lawyers who have entered. There are cases being discussed, and paperwork for each being signed and consulted, simultaneously."

11:00AM: "[The judge] explains … [that] on busy days oral arguments continue through 1:30PM. Then [he] writes the judgments. At 8PM the

[79] Tribunale di Napoli. 2014. Bilancio Sociale 2014. Available at: www.tribunale.napoli.it/allegatinews/A_7223.

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> building automatically shuts off the lights. But when [he] arrived in Naples, he often would take up to 10:30PM to finish writing judgments (he had a huge docket; now, because he's very efficient, his docket is reduced) … So he would call the electricians and ask them to keep the lights on for him."[80]

As time thickens and takes on a weighty materiality, it shortens judges' time horizons and truncates their openness to encountering novel fields of law. This inference contradicts a core tenet of the judicial empowerment thesis: namely, that judges' long-term vision enabled them to play off the shorter time horizons of politicians to advance European integration.[81] In reality, the default mindset of the lower court judges I encountered aims for the speedy processing of lawsuits, rather than a prolonged search for the points of contact between facts, national law, and EU law. As one Genoese judge emphasizes, "given the quantitative aspect of the workload, this can distract from the evaluation of additional" realms of law.[82] Judges speak of being "frustrated,"[83] "overwhelmed,"[84] and "crushed"[85] by a "massacre-like"[86] stream of lawsuits, which obstructs efforts to "deepen" EU law by "thinking higher."[87] A binary opposition arises, contrasting an immediate daily workload with an abstract body of EU law floating higher, waiting to perhaps be deepened someday – but not today.

While this perception is most evident in Italian lower courts, French and German judges are not immune to the demands of thickened time.[88] This becomes clear by tracing how interviewees describe the economy of everyday judging.

3.3.2 The Economy of Everyday Judging

Across conversations with lower court judges, there was clear agreement that workload pressures dissuade participation in EU legal

[80] Fieldnotes, Tribunal of Naples, Labor division (judge Paolo Coppola), February 21, 2017.
[81] Alter, *European Court's Political Power*, at 118–121, 133–134.
[82] Interview with Maria Teresa Bonavia, Court of Appeal of Genoa, November 8, 2016 (in-person).
[83] Interview with Giuseppe Buffone, December 14, 2016.
[84] Interview with Margherita Leone, September 29, 2016.
[85] Interview with Monica Velletti, October 7, 2016.
[86] Interview with Francesca Fiecconi, December 2, 2016.
[87] Interview with Giulia Turri, November 25, 2016.
[88] In the case of France, see: Bell, John. 2006. *Judiciaries within Europe*. New York, NY: Cambridge University Press, at 103.

training and encourage a *cost-benefit analysis* that tips the scales against soliciting the ECJ.

Recall how one German judge – Hendrik – believed that coursework on EU law "would probably help a little. But it would not help as much as I will lose time."[89] The judges surveyed by the European Parliament in 2011 sent a similar message in their open-ended responses: judicial training is "perceived as a burden," hence judges "will be less willing to attend judicial training seminars on more remote fields like European law"; a French judge shared how after taking part in EJTN training, "I was asked by my court then to catch up with two weeks' work … This is prohibitive for anyone who is not especially crazy about European cooperation."[90]

This logic was repeatedly invoked by my interlocutors to explain why they do not seek out opportunities to gain a better grasp of European rules. In Paris, a long-standing civil judge confesses that his colleagues "at first instance and in the courts of appeal are content to rid themselves, as much as possible, of case files they have to deal with," for in order to enroll in an EU law course "you need time!"[91] A colleague at the Administrative Court of Marseille adds that "we're within a flow of cases and case files and work which doesn't permit us the time" to attend "continuing training in this domain."[92] A few hundred kilometers away at the first instance court of Milan, judges paint similarly constraining picture:

> The workload is something that completely frustrates the judge … so many judges don't come [to EU training sessions] because on Monday, Tuesday, Wednesday, Thursday, and Friday they hold hearings, on the afternoons they must write the judgments, they must attend section conferences, they have administrative duties to tend, and in this bureaucratic silence EU law dies.[93]

A second impact concerns the attractiveness of soliciting the ECJ. Workload pressures incentivize a short-term instrumental rationality, where the opportunity cost of a referral is weighed as the number of days spent deciding an estimated number of quotidian lawsuits. Usually,

[89] Interview w/ 3 judges in a populous German Länder, December 15, 2017.
[90] European Parliament, "Judicial Training in the European Union," at 34.
[91] Interview with Alain Lacabarats, French Court of Cassation, October 3, 2017 (in-person).
[92] Interview with Hélène Rouland-Boyer, Administrative Tribunal of Marseille, October 23, 2017.
[93] Interview with Giuseppe Buffone, December 14, 2016.

the scales are tipped in favor of addressing immediate needs, thus breeding a *habitus* of non-referral. A judge of first instance in Trento puts it this way: "It's evident that if one is under a lot of pressure, one says: 'Alright, those ten days, I'll dedicate to writing those judgements that impact my docket.'"[94]

Understandably, overburdened judges in Italy are particularly emphatic about the need to adopt a utilitarian logic. "Every week that I put everything down I don't write five judgments," highlights a judge of first instance in Rome, adding that to refer a case to the ECJ "you'd definitely need a week's worth of work."[95] Similarly, for an administrative judge in Milan, one only solicits the European Court when "the question jumps before your eyes" since work-wise, a reference "is like writing ten judgments."[96] "Over that period where you're writing the reference," confirms another colleague, "you could lose three, four, five working days. And so, inevitably, if you're suffocated by the docket … you'll never refer at all."[97]

Even in slightly less burdened French and German Courts, conversations with judges surfaced echoes. One regional court judge recalls how his former president actively dissuaded dialoguing with the ECJ: "We have a lot to do, we do not have to refer the case … let the Federal Court of Justice do it. They have fewer cases so they can do it more diligently than we."[98] Most judges who feel pressure to "be efficient, and get things done" hardly need to be told this, for they already embody this spirit in their daily routine.[99] A judge who drafted a few references while on secondment at the Federal Court of Justice confesses stopping upon returning to a lower court: "The problem is time. For a reference you need time … you have a lot of cases to deal with … you're doing day by day business – chop, chop, chop! – you have to decide quickly … I am reluctant to do it."[100]

Judges sketch the contours of this *habitus* presuming that it is common to colleagues in comparable judicial settings. This suggests

[94] Interview with Giorgio Flaim, Tribunal of Trento, January 26, 2017 (in-person).
[95] Interview with Lilia Papoff, Tribunal of Rome, October 13, 2016 (in-person).
[96] Interview with Elena Quadri, Regional Administrative Court of Lombardy, December 13, 2016 (in-person, written interview notes).
[97] Interview with Giuseppe Buffone, December 14, 2016.
[98] Interview Ralf Neugebauer, judge at the Higher Regional Court of Duesseldorf, January 8, 2018 (via phone).
[99] Interview with Andreas Middeke and Svenja Kreft, Administrative Court of Muenster, December 19, 2017 (via Skype).
[100] Interview with Jan Tolkmitt, Landgericht Hamburg, January 25, 2018 (in-person).

that it is part of an institutional – rather than an individual – identity. For example, consider the parallel remarks of a German administrative judge and a French civil judge. The German judge notes how "most of the colleagues do not have the time to sit [on] a file over weeks just to decide if this question has to be decided by the European Court of Justice … I think most of my colleagues would never say this. Of course not. But … the normal reaction is 'ok, I'm not sure that I will have the time for such kind of work'."[101] Similarly, the French judge highlights how

> it's not something you can do when you're at the Court of Appeal or a first instance court … Here it's impossible … to refine a preliminary reference, to review all the jurisprudence of the ECJ *et cetera*, for all of that, there would be 10 or 15 case files that will have accumulated in the meantime … you'd have to work for a month to catch up, that's for sure. Already we often have to work on weekends, so it's difficult to find the space, except if it happens just before the holidays, where you work during vacation.[102]

What bolsters the persuasiveness of the foregoing remarks is that even the few judges I encountered who referred cases to the ECJ to challenge national laws or supreme court decisions lament the substantial labor costs. Giovanni Tulumello – an administrative judge in Palermo – shares how for his first referral, "for two weeks I didn't do anything else … because this was a new domain for me, I had to study … everything that was piling up at the regional administrative court and the tax court, I had to make it up by working evenings and weekends."[103] Other speak of having to undertake research after working hours, "to think about it for six months"[104] and even a couple of years,[105] so as to quell any lingering uncertainties or trepidations. When all else fails, some are forced to take time off work and labor through vacation days.[106] The most memorable experience relayed to me is that of Marianne Grabrucker, a retired German patent judge, as she described how soliciting the ECJ disrupted and monopolized her life:

[101] Interview with Klaus Dienelt, January 11, 2018.
[102] Interview with Lise Leroy-Gissinger, October 24, 2017.
[103] Interview with Giovanni Tulumello, Regional Administrative Court of Sicily, April 5, 2017 (in-person).
[104] Interview with Giuseppe Buffone, December 14, 2016.
[105] Interview with Philippe Florès, October 4, 2017.
[106] Interview with Giorgio Flaim, January 26, 2017.

> [For] four months, I never went out, walking the dog, or whatever! Just having your potatoes and your muesli, and that's all! And I was sitting sometimes [for] 12 to 14 hours … Four months – no life! … At the courthouse we have guardmen, and they [check], in the evening every two hours, all the rooms. And one of these guardmen said one evening – around 12AM – "Oh, Mrs. Grabrucker, you need to sleep! Please go! Leave the house! I can't stand to see you sitting here! And if I would have been married to you, I would never believe that you are working, I would think you have a lover!" [laughter] "Trademark law is my lover," I said.[107]

Grabrucker's language of being in love with a legal field that is harmonized by EU law suggests that deeply intrinsic motives are necessary to overcome the instrumental rationality that pushes judges to turn away from EU law and the ECJ. "Ruthless egoism" does not "do the trick by itself," as the judicial empowerment thesis assumes.[108] In fact, self-interest often works the other way around: "If I have an escape, I'll take it, and I'll take it gladly," admits an Italian civil judge, "for my own behalf. Because referring means, well, not writing four judgments, you see?"[109]

This cost-benefit logic is not applied case by case like a one-shot game. As an embodied history, it incrementally ossifies: to this day, lower court judges are *not habituated* to solicit the ECJ and to invoke EU law. And "if you don't apply these things … it's clear that your mastery of these problems erodes."[110] As a result, unless judges serve on a small set of specialized chambers where lawyers regularly cite European law, its relevance can be perceived as negligible or indirect. "Those cases [where] EU law is applied," explains a German social court judge, "you get one or two times per year. So there's a problem – the normal judge forgets about it."[111] One Italian judge of first instance depicts the psychological reaction that accompanies the rupture of routine that EU law represents: "There were some oral arguments were I brought along 500 files. You can understand that if in one of those files someone questioned the constitutional legitimacy of an Italian law, I

[107] Interview with Marianne Grabrucker, ex-judge at the Munich Administrative Court, the Federal Administrative Court, and the Federal Patent Court, December 15, 2017 (in-person).
[108] Burley and Mattli, "Europe before the Court," at 54; 62; Weiler, "Quiet Revolution," at 523.
[109] Interview with Monica Velletti, Tribunal of Rome, October 7, 2016 (in-person).
[110] Interview with Tania Hmeljak, Tribunal of Palermo, April 21, 2017 (in-person).
[111] Interview with Frank Schreiber, December 4, 2017.

would already get the shivers … so let's not even talk about a question linking national law to international law!"[112]

Taking the pull of habitual practice seriously problematizes a core tenet of the judicial empowerment thesis. For example, Alter claims that "a court that virtually never hears European law cases might be happy to refer the odd case that comes up to the ECJ."[113] My conversations suggest that the reverse is usually true. For instance, in 2016 Michael Schoenauer, a judge at the first instance court of Munich, became the court's first criminal law judge to refer a case to the ECJ in over thirty years.[114] Initially, "everyone was interested … and everyone was waiting for someone to do the work." Yet after the ECJ returned its ruling[115] judges relapsed to their ingrained practices, and the ECJ's judgment "completely got forgotten … many colleagues at the *Landgericht* wouldn't know it or apply it."[116]

3.4 PATH DEPENDENCE AS CONSCIOUSNESS

3.4.1 Contours: Distance and Lack of Ownership

When we combine the long-standing problem of knowledge deficits of EU law with the enduring demands of workload management in civil service judiciaries, we get a context that is highly favorable to the emergence of an institutional consciousness of path dependence. As an accrued social identity through which judges interpret their world, this consciousness favors a relapse to entrenched habits and the enclosure of judicial practice within preexisting national law.

The contours of this institutional consciousness became vivid throughout my conversations with German lower court judges. One judge describes its inward-looking reflex via the metaphor of the "closed bench": "In the closed bench, they prepare their case, and they have their opinion, they work seriously, but along [the same path]. And they don't want to be argued during the oral hearings … ok, closed session, we decide in our little room … you're not allowed to have

[112] Interview with Ernesta Tarantino, March 20, 2017.
[113] Alter, *Establishing the Supremacy of European Law*, at 50.
[114] The previous criminal case referred by the Landgericht of Munich was: Case 16/83, *Criminal proceedings against Karl Prantl* [1984], ECR 1299.
[115] Joined cases C-124/16, C-188/16 and C-213/16, *Criminal proceedings against Ianos Tranca and Others* [2017], ECLI:EU:C:2016:563.
[116] Interview with Michael Schoenauer, First Instance Court of Munich, December 19, 2017 (in-person, written interview notes).

your own ideas."[117] Alongside this reflex of closure is a partitioning of national judicial practice from EU law.[118] "You see EC law as something foreign," admits a colleague in Darmstadt, "as an isolate[d] thing that you've put over national law, on the top. This thinking you hear often."[119] Another argues that "we don't have enough time to really take care of European law as a plus."[120] This can exacerbate the sense that "the ECJ is a foreign court … There's a lot of colleagues who read decisions by the Federal Court of Justice every day, but it's not a lot of us that refer to the ECJ's rulings."[121]

These themes also crystallized in interviews with French and Italian judges. Consider the stark words of a French civil judge:

> It no doubt creates a mistrust [of the ECJ] that is unspoken … Well, you might hear it sometimes in a lower court, where the words flow … But it's in the mind! It's certainly in the mind … if you say, "There's a [European] directive that says that in these cases we should reach this result," in [this] case the reflex will be one of closure. Of people saying: "No, we have what we need! Why do we need to go searching for supranational law?" So the battle is not yet won … the mass isn't ready to change completely.[122]

These same elements surfaced in interviews with Italian judges, especially those tasked with promoting training in EU law. One judge in Milan explains that lower courts make "tons of references to the Constitutional Court, which they interpret as their own court. Vis-à-vis the ECJ … there isn't this culture that EU law is something that concerns you."[123] In Rome, a colleague confides that "in our jurisdiction EU law and international law generally were marginalized … the value of EU law didn't permeate our conscience."[124] This institutional consciousness is brought to life by Eugenia – an civil judge of first instance – as she self-consciously describes her and her colleagues' aversion to EU law:

[117] Interview with Marianne Grabrucker, December 15, 2017.
[118] In Chapter 6, we will see how this logic of partition can arise in the bar as well as the bench.
[119] Interview with Frank Schreiber, December 4, 2017.
[120] Interview with three judges in a populous German Länder, December 15, 2017.
[121] Interview with Michael Schoenauer, December 19, 2017.
[122] Interview with Thierry Fossier, French Court of Cassation, October 3, 2017 (in-person).
[123] Interview with Giuseppe Buffone, Tribunal of Milan, December 14, 2016 (in-person).
[124] Interview with Roberto Conti, October 12, 2016.

> If one has the sensibility, the mental openness, perhaps they'll ask to attend these [EU law] courses that look farther, but if one lacks this, ha ha! He stays ancient … plus, oftentimes … these European laws are different from ours. And so also because of this the confrontation, due to our more antique mindset, I repeat, can become difficult … we already have our own laws, lots of them, some of them are also really beautiful … so we maybe don't even feel a need to search elsewhere for points of reference for our decisions.[125]

Notice how Eugenia references an "antique mindset" in a way that is not altogether pejorative. In fact, she associates herself with this mentality when she juxtaposes "our own laws" that are "really beautiful" with "these European rules [that] are different from ours." In its most extreme (and rare) manifestation, this consciousness can motivate judges to abandon tacit resistance for outright rebellion against a perceived foreign invasion. During a conversation with two lower court judges, one was particularly emphatic about rejecting EU law, for "it seems to me that I'd have to renege on all of the culture upon which I was educated."[126] And when I was conducting fieldwork in Palermo, a lawyer handed me a decision by a lower court judge who rejected his appeal to apply EU law and solicit the ECJ[127] in fiery terms: "The laws stemming from the European Union do not have any legal direct effect in the domestic order," and "the judgments" of the "European Court of Justice … cannot bind the Italian judge," for only in this way can "the Italian people exercise their sovereignty."[128]

3.4.2 An Annotated Transcript

In tracing an institutional consciousness of path dependence permeating national courts, I relied on the neat analytic categories of knowledge deficits and workload pressures. While this approach helps to organize evidence and avoid "conceptual stretching,"[129] it also obscures how, for judges, lived experience is *constituted* holistically by a

[125] Interview with a judge at a lower civil court in a large Italian city, March 2017 (in-person; name/date redacted).

[126] Interview with judges at a civil court in a large Italian city, March 2017 (in-person, names/date redacted).

[127] Interview with Giuseppe di Rosa, KEIS Law Studio Legale and Pegaso Università Telematica, April 18, 2017 (in-person).

[128] See: Sentenza No. 847/2013, Tribunale di Termini Imerese (Rel. Razzonico), at 9–11.

[129] Sartori, Giovanni. 1970. "Concept Misformation in Comparative Politics." *The American Political Science Review* 64(4): 1033–1053, at 1034.

conjunction of factors. This, in turn, risks obfuscating how I imposed my own interpretations upon those of my interlocutors.

To attenuate these concerns and promote "analytic transparency,"[130] I conclude this chapter with an annotated transcript of a group conversation with judges working in a lower court.[131] In this way, I invite the reader to listen to judges discuss their work, their views about institutional change, and their opinions of EU law. What will hopefully be clear is the degree to which the themes discussed in this chapter are interwoven, and how judicial resistance to Europeanizing change is both richly textured and anchored in everyday practice.

But why select *this* conversation over more than a hundred others? Consider the serendipitous opportunity I had: a dialogue with six judges at the *Tribunal de Grande Instance* (first instance court) of Marseille, France's second-largest city. I had invited one of the court's judges for an interview, expecting a one-on-one discussion. But as occurred several times during my field research, the judge invited other colleagues to join. This, I was told, is a logic of "safety in numbers" – in a group, hopefully someone would be able to answer this eager researcher's queries about EU law! In no other conversation was I able to observe the confluence of so many prospective points of view while renouncing as much control over discussion. Approximating the methodological *esprit* of Katherine Cramer's studies of informal political talk,[132] I tried to listen "in context" – here, a conference room in the court's top floor – and to nudge the conversation back to the research at hand should it stray too far afield.

The group comprised four women and two men, from approximately forty to sixty years of age, residing in at least four separate chambers, and ranging in seniority. Despite this individual diversity, judges expressed a shared institutional consciousness structuring how they related EU law to their daily life as lower court judges. We jump into the conversation as the judges discuss the reasons for their scarce knowledge of EU law (and show some conceptual slippage between the EU legal order and the European Convention of Human Rights):

Camille: "… we find ourselves with European law which has finally become French law, so we don't perceive it. Conversely, where we meet European

[130] See: Moravcsik, Andrew. 2014. "Transparency: The Revolution in Qualitative Research." *PS: Political Science & Politics* 47(1): 48–53.

[131] Interview with six judges, Tribunal de Grande Instance de Marseille, October 25, 2017 (in-person, names redacted).

[132] Cramer, *Politics of Resentment*.

law – I see it in air transport, because there there's a European directive that is directly applicable – is when they [the lawyers] don't know what to tell us, they speak to us about Article 6 of the European Convention . . . "

Felicia: "But you know, I'm thinking back to a field where we don't apply it, but the lawyers would like us to: that's nationality, for example. That's a field where we say that each state does what it wants with its own rules, but the lawyers keep fighting this, which isn't in vain, by the way. Perhaps someday we'll get to a point where these rules . . . "

Fabrice: "That will, no doubt, be the final domain."

Ivonne: ". . . what's interesting in what they say is that, in the end, it's more so the European Convention and the jurisprudence of the European Court of Human Rights which are fairly well integrated by judges . . . [agreement from the group] . . . than all the EU regulations, which we apply little, because there's little litigation, I think, here in Marseille."

In these remarks, judges make clear that they see themselves as conduits – not agents – of institutional change. It is up to lawyers to persuade them to Europeanize national rules, not for them to do so by their own motion. The conversation turns to the problem of legal training: why do these judges not simply attend a course on European law at the *École Nationale de la Magistrature*?

Ivonne: "Clearly I think there's a deficit of knowledge, of competence, and of practice of European law in French courts, with a few exceptions, besides some very particular litigation . . . "

TP: ". . . right, so perhaps in this area it's easier to say: 'Well, I'll take a week to go enroll in a course on . . . '"

Felicia: "No!"

TP: "No?"

Victor: "We have five days of continuing training per year, you know . . . "

. . . [. . .] . . .

TP: "But the majority of your training, you're the ones that have to do it . . . "

Felicia: "All on our own."

TP: "On your own."

Ivonne: "And we only do it out of necessity."

Camille:". . . we research the problem when it comes before us [broad agreement] . . . we're not going to undertake a theoretical study on big questions . . . Little by little, we manage to train ourselves in this way. But each time we start from specific cases, because independent of our days of training we don't have much time to study, or else we'd need 48 hours in a day!"

Felicia: "On the other hand, I – who now reads many ECJ judgments – we are in difficulty because it's not our culture . . . an ECJ judgment is not at all the same as a Court of Cassation judgment . . . we'd need to be trained to read. I think it's the EU that ought to take charge of proposing coursework . . . "

Victor: "They might also rethink their methods. To draft judgments that are more a tad more intelligible . . . "
Fabrice: "We'll never succeed in that."
Felicia: "It's their way of doing things. I think French authorities don't think it's their problem . . . "

Just as in many Italian and German courts that I visited, these judges turn to legal training as a burdensome last resort when faced with a recurrent, nagging problem. Nestled within the discussion is also a clear sense of *distance* to the EU, alongside stern criticisms borne out of perceived neglect: why does the EU not propose feasible coursework for us? Why does the ECJ not write in a manner that is more legible for us? This sense of distance becomes ever-more palpable as the conversation proceeds, legitimating a renouncement of agency:

Ivonne: "At the Court of Cassation, on extremely sensitive affairs . . . they have three or four months to prepare . . . but us, we're in a different world, right? We're in a world where we go much faster, and, voilà, we lack the vocation to create law, despite everything . . . "'
TP: "So in effect it's about resolving the cases in a rapid way, to provide rapid justice . . . "
Victor: "Yes, to respect the principle of reasonable delay, of course." [broad agreement]
Ivonne: "Yes, and we're not forcibly dealing with questions of principle. In any case, we can cut out questions of principle . . . If a question of principle presents itself, voilà, it's true we can submit a preliminary reference [to the ECJ], but it's not in our DNA to solicit an interpretation of the Court of Justice [broad agreement]. We don't – I think we don't even know how to do it!"
Felicia: "That's right, we don't even know how to do it!"

In these remarks, my interlocutors acknowledge the elephant in the room, that they would not know how to solicit the ECJ in the first place. Victor and Fabrice proceed to query how the EU legal system works: notice how underlying the questions is a search for reasons *not to participate*:

Victor: "Once we seize the Court, to get an answer, how long does it take?"
TP: "That depends. There's an expedited procedure . . . but that still takes five or six months. For the other questions, it takes 16 to 19 months to receive an answer of the Court of Justice."
Victor: "Because we have laws, you know. Lower courts are supposed to take nine months. So if we take six months – that puts us to fifteen!"

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Ivonne: "Yeah, but it's not like we're soliciting the European Court of Justice, voilà. Who, amongst us, in their career, will have seized the Court of Justice?"

Fabrice: "Is it up to lower courts to do it?"

TP: "You think that, perhaps, it's better if it's the supreme – that it be a dialogue between Cassation and the Court of Justice?"'

Fabrice: "Yes."

TP: "Why do you think this would be preferable?"

Fabrice: "Because I think the first instance judge, his true work is to provide a concrete answer – in conformity with the text, to be sure, but mostly to answer the problem brought by the parties. And it matters little if this answer isn't exactly in conformance with the wishes of a European text . . . "

. . . [. . .] . . .

Ivonne: "This perhaps demonstrates that in the end European law is . . . scarcely applicable in the quotidianity of the judge . . . I think we live the jurisprudence of the EC . . . CJ . . . "

Felicia: "ECJ."

Ivonne: ". . . ECJ! Right, we must even start with the Court! The Court of the European Union as, in the end, a law of principles . . . But for the judge, in his everyday, that remains very far away. I also think that it's because of this that we don't apply it. That we lack that culture. It concerns more the supreme courts, which have more proximity . . . it's your colleagues who are over there, and they return to the Court of Cassation. Because they don't know where they could possibly work after their years at the Court of Justice. Whew! They've forgotten . . . that they have to divorce people!" [Laughter]

Ivonne's laughter conveys a perception that it would be beneath the ECJ to dialogue with lower court judges dealing with quotidian divorce cases. In theory EU law can be directly invoked by the humblest of national judges, but Ivonne and her colleagues are adamant that in practice it "remains very far away."

To conclude our conversation, I probe how Ivonne and her colleagues react when faced with a counterfactual scenario. I share some of my field research in Genoa, a nearby city with a similar port economy where national judges and lawyers have come to regularly solicit the ECJ (the key role that entrepreneurial lawyers played in the Genoese case is discussed in Chapter 7). Might this prompt the judges to question an institutional consciousness of path dependence?

TP: "I wanted to speak to you a little bit about the case of Genoa, in Italy. Because, in essence, it a city near Marseille, with a port of comparable size . . . "

Ivonne: "Brilliant! Voilà! We will found – we will found a law firm!"

TP: "Are there reasons that you can think of why … this dynamic did not happen in Marseille?"
Ivonne: "Well, I think Marseille has an extremely difficult economic life … there's certainly business lawyers in Marseille but we don't see them in court …"
Felicia: "And in your example, it's really the initiative of individuals which matters …"
Ivonne: "But it's extremely interesting!"
Felicia: "One needs – it's almost accidental, as you recounted it …"
Ivonne: "Well, strategic …" [broad chatter and discussion]
Françoise: "But why these judicial affairs in Italy? Because it's true that – I imagine that it could happen, law firms that have this drive. We would hear them, but would we – we should ask ourselves this question: would we reply: 'Ugh, we don't have time!'"
Felicia: "Absolutely, yes." [broad agreement]

The end of this conversation showcases the stickiness of an institutional consciousness that encourages habit and discourages change. The initial reaction to an alternative reality just a few hundred kilometers away is one of great interest and excitement. Ivonne even indulges in daydreaming about everyone around the table opening up a law firm so as to mobilize European law! But quickly, reality sinks in. Françoise, the youngest colleague who has been quietly listening for the entire conversation, finally intervenes and asks the crucial question: suppose law firms in Marseille *did* specialize in European law and asked lower court judges to solicit the ECJ. Would we break out of our habits and participate?

No. It would require too much time. The daydream ends.

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