Revisiting Judicial Empowerment in the European Union:
Limits of Empowerment, Logics of Resistance

Tommaso Pavone – Department of Politics, Princeton University
tpavone@princeton.edu

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Abstract:
Judicial empowerment is often cited as a driver of transnational governance, particularly in the European Union (EU). In this view, lower national courts enthusiastically began referring cases to the European Court of Justice (ECJ) to acquire new powers of judicial review. Revisiting this argument, I argue that path-dependent, everyday practices within domestic judiciaries stemming from insufficient EU legal training, workload pressures, and cultural aversions to judicial review can resist Europeanization even when it would lead to empowerment. The argument is evaluated via a critical case study of judicial practice in Italy that is placed in a broader comparative context.

Word Count: 10,946

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1. Introduction

In 1991, Joseph Weiler made a path-breaking contribution to the study of transnational governance via a captivating claim: The European Union (EU) - perhaps the world's most developed example of regional integration and supranational delegation - is neither solely a bargaining process controlled by European states (ex. Moravcsik 1998) - nor the creation of supranational technocrats at the European Commission (ex. Ross 1995; Sandholtz 1992). Rather, European integration is a process driven in fundamental ways by the collaborative actions of national and European judges.

In so doing, Weiler articulated a political theory of integration via law that situated the EU within broader processes in the judicialization of politics (Shapiro & Stone Sweet 2002; Ginsburg 2003; Hirschl 2007). In Weiler's view, European political development has been "a narrative of plain and simple judicial empowerment" (Weiler 1991: 2426). On the one hand, by 'courting' national courts into a dialogue, the European Court of Justice (ECJ) garnered the raw material - domestic disputes involving national and EU law - to reshape the balance of power between the EU and the member states. On the other hand, by applying EU law over conflicting national law, lower courts in founding member states gained powers of judicial review previously denied. All it took was a willingness to punt cases to the ECJ via Article 177 of the Treaty of Rome (now Article 267 of the Treaty on the Functioning of the EU, known as the "preliminary reference procedure") and set aside national laws when they conflicted with the ECJ's interpretation of EU rules.

In other words, beyond affirming broader claims about the expansion of judicial power vis-à-vis legislative or executive actors, Weiler's theory stresses that it is low-level judges who have the most to gain from European integration: "Lower courts and their judges," Weiler wrote, "were given the facility to engage with the highest jurisdiction in the Community and thus to have de
facto judicial review of legislation. For many this would be heady stuff" (Weiler 1991: 2426). Over the years, Weiler doubled-down on these claims (Weiler 1994: 523).

This judicial empowerment thesis (hereafter, "JET") quickly became the master frame for analyzing Europe's exemplary process of transnational integration through law (Kelemen & Stone Sweet 2017). For example, Burley and Mattli influentially elaborated how "assumptions of good will, harmony of interests, or dedication to the common good need not be postulated to account for integration. Ruthless egoism does the trick by itself... While offering lower national courts a "heady" taste of power, the ECJ simultaneously strengthens its own legal legitimacy" (1993: 54; 62). In a subsequent elaboration, Alter's "inter-court competition" model (Alter 2001) emphasized how lower court judges began to collaborate with the ECJ to break from the disliked case law of their superior courts, thereby becoming "the motors of EC legal integration" (Alter 1996: 467).

In this article, I propose that the JET masks some key dynamics behind the ways transnational integration through law unfolds on the ground, particularly within those domestic judiciaries whose aggregate rates of referral to the ECJ appear to support lower court empowerment arguments. I argue for shifting focus to the way institutional path-dependencies discipline judges' everyday practices and their openness to Europeanization. By probing the lived experience of lower court judges as they manage professional knowledge and their work, it becomes clear that what appears as an opportunity for empowerment in theory is often perceived as a fastidious burden in practice. Specifically, the reputational drive to mask gaps in EU legal knowledge, the utilitarian incentive to manage one's workload, and the cultural attachment to a traditional self-conception as a civil law judge can interact to entrench habits resistant to collaborating with the European Court. Understanding these micro-politics of judicial practice, then, illuminates how the "judicial construction of Europe" (Stone Sweet 2004; Kelemen 2016)
can remain "contained" (Conant 2002) and the ways transnational governance via law is negotiated on the ground (Halliday and Shaffer 2015).

To make this argument, I unpack a "most likely" case for the JET to hold - that of the Italian judiciary - and situate it in a broader comparative context of European legal orders. By combining a quantitative analysis of Italian preliminary references to the ECJ with hundreds of qualitative interviews with lawyers and judges, I use process tracing methods to reconstruct the unwritten practices that discipline the dialogue between national and European judges. The results suggest that even within a founding member state of the EU, to this day a broad set of entrenched habits within lower courts obstruct collaborations with the ECJ to enforce EU law. To conclude, I discuss the comparative and theoretical implications of this finding and elucidate future research paths.

2. Judicial Empowerment Revisited

The JET continues to muster substantial scholarly support. For example, one recent re-evaluation posits that the thesis "underestimated just how transformative the constitutionalization of the EU legal system really was [since] judicially-driven integration proved to be self-reinforcing" (Kelemen & Stone Sweet 2017: 205). Indeed, most of the debate about the extent to which the EU is a judicial construction has focused less on the dynamics of domestic judicial collaboration with the ECJ and more on the extent to which it liberates the European Court from the influence of national governments (Carrubba et al. 2008; Stone Sweet & Brunell 2012). Nevertheless, a number of qualifications - and a few challenges - have been made.²

Alter's scholarship provides one important qualification. She argues that member state governments and national high courts can obstruct a mutually-empowering dialogue between the

² For an excellent overview, see Phelan (2015: 41-69).
ECJ and lower courts, for example by limiting access to lower courts or deriving a Eurosceptic jurisprudence from domestic constitutions (Alter 2000: 513-514; Martinsen 2015). Importantly, however, the claim that "lower courts are much more willing to send references to the ECJ" (Alter 2000: 513) remained a component even of Alter's analysis of backlash to European legal integration. Indeed, scholars who have perceptively analyzed national judges' resistance to EU law (Rasmussen 2007; Davies 2013; Bobek 2014; Dyevre 2016) have focused primarily on domestic supreme courts (Pollack 2013: 1273-1275) which - even in Weiler's original claims - we would expect to jealously defend the scope of their interpretive powers.

Other works have assessed how different types of constitutional and political structures interact with judicial empowerment to temper its effects. For example, some scholars have posited that states with a dualist constitutional tradition might disincentivize a judicial dialogue with the ECJ (Carrubba & Murrah 2005), although most qualitative case study and quantitative econometric analyses find little support for this claim (Alter 2001; Dyevre 2013; Dyevre & Lampach 2017). A more convincing qualification is provided by Wind (2010), who finds that judges in Nordic states with a majoritarian political tradition and a scarce history of counter-majoritarian constitutionalism are reluctant to directly support the ECJ's supranational judicial review powers. However, Wind's is more so a claim against the generalizability of the JET rather than a challenge to its validity for the EU's founding member states.

Importantly, none of this scholarship considers the ways European integration unfolds within the everyday work environment of lower courts. By taking seriously this underexplored dimension within one of the judicial orders that inspired the JET in the first place, this article extends this important debate.
2.1 Theory: European Integration Meets the Everyday Politics of Judging

The proposed argument is simple: Behind the numbers and on the ground, "political integration through law" can be fruitfully studied as a historical institutionalist process (Pierson 1996) that sparks a micro-politics of everyday practice and knowledge management within the pre-existing judicial apparatus of national states. To understand the limits of transnational legal governance, we must thus take seriously the ways in which supranational norms are negotiated and resisted\(^3\) in local institutional practice.

In the EU, political integration constitutes "layering" surpanational laws atop existing domestic laws. Since the EU lacks the tools through which national states coerce compliance - such as military power or direct taxation (Kelemen 2016) - compliance with EU law hinges in no small part upon the "conversion" of national courts into European courts of first instance ready to enforce supranational law.\(^4\) Under the JET, national judges interpreted this as a relatively costless political opportunity (Alter 1996: 466). But like all processes of political development (Orren & Skowronek 2004), this conversion has not been frictionless, for it entails changing entrenched institutional practices and professional self-understandings to accommodate a new body of rules and legal knowledge. Particularly for judges within lower courts, these pre-existing institutional

\(^3\) I use the term 'resistance' to mean diffuse, everyday habits and frames of mind – oftentimes taken for granted - that condition judges to try to avoid contact with European law and a direct dialogue with the ECJ via the reference procedure. In contrast to 'rebellion', which is a fully conscious act of non-compliance spurred by oftentimes intense disagreement of a national court either with a European law or with a decision by the ECJ, the resistances described here are usually not deliberate or intense acts of non-compliance. While less dramatic in the short-term than the rebellions of a single judge or court, these everyday forms of resistance are more diffuse and enduring in the long-term, imposing broad constraints upon judge-driven integration in Europe.

\(^4\) For the most influential theoretical treatments of institutional "layering" and "conversion," see Streeck and Thelen (2005: 22-30) and Mahoney and Thelen (2010: 16-22).
practices hold such self-reproducing dynamics of "path-dependence" (Mahoney 2000) that - to this day - they resist the costly investments required to dialogue with the ECJ. Three reasons stand out.

First, baseline gaps in knowledge - universal in the past due to the absence of judicial training in European law, and still diffuse today - entail that judges are unlikely to assess the conformity of national law with EU law if unsolicited by a stubborn lawyer, and will seldom incur risks of raising a preliminary reference on their own. That is, because judges seek to protect their individual and collective reputation as custodians of legal expertise (Garoupa and Ginsburg 2015), they are uncomfortable when (and often seek to avoid) dealing with a relatively unknown field like European law. Second, workload pressures - greatest amongst lower courts - imply that even where a judge acquires knowledge of EU law, their attention will usually be monopolized by the piles of files before them today rather than the prospect of a dialogue with the ECJ tomorrow. This utilitarian drive to manage judicial labor entrenches a type of diffuse, Foucaultian discipline (Foucault 1975) that constrains judges' everyday decision making and dissuades breakups of routine to dialogue with the ECJ. Finally, entrenched self-conceptions as national civil law judges foster reluctance to take on the creative role of European judge endowed with the power to disapply national law in favor of EU law. This logic is derived from judges' semiotic identification with the figure of the civil law judge, conceived as an important but relatively uncreative interpreter of Parliamentary statutes (Merryman & Perez-Perdomo 2007).

At the "street level"\(^5\) of lower courts, then, the deliberate rebellions against the ECJ by a few supreme courts that have attracted most scholarly attention are replaced by a subtler but more diffuse resistance disciplined by the quotidian demands of the institutional environment. And

\(^5\) Here, I borrow from the policy implementation literature focused on the practices and constraints of "street-level bureaucrats" (ex. Lipsky 1980). I thank an anonymous reviewer for this parallel.
because the decision to submit a preliminary reference is at the judge's discretion,\textsuperscript{6} lower courts were provided with a formal means to evade a dialogue with the ECJ. When a few iconoclastic judges did challenge these practices for motives in line with judicial empowerment, they often incurred reputational costs and remained marginalized.

2.2 \textbf{Research Design: A Most Likely Case Study and Multi-Method Approach}

I evaluate the proposed argument via a "most likely case study" of judicial practice in Italy. The case selection logic is to pick a "crucial" case that maximizes the probability that the theory under scrutiny is supported by the resulting empirical evidence. As a result, if contradictory evidence emerges, a strong claim can be made that the theory requires revision (Eckstein 1975; Gerring 2007: 237-238; Gerring and Cojocaru 2016: 404).

Italy constitutes a "most likely case" for empowerment for three reasons. First, the Italian judiciary is one of the contexts that inspired the JET in the first place (Weiler 1991: 2426; Alter 1996: 467; 471). Indeed, the postwar Italian constitutional order denied judges - besides the Constitutional Court - the power to set aside national laws that conflicted with 'higher' sources of law. Second, in countless seminars at law schools, empowerment narratives are invoked to describe Italian lower court references that made history, such as those involving first instance judges in \textit{Costa v. ENEL} (1964\textsuperscript{7}) and \textit{Simmenthal} (1978\textsuperscript{8}). That many such classics originated from lower courts before the Constitutional Court formally acquiesced to the ECJ's supremacy and direct effect doctrines in 1984\textsuperscript{9} lends further historical credence to the JET. Finally, amongst the EU's

\begin{itemize}
\item \textsuperscript{6} Case C-283/81, CILFIT [1982], ECR 3415; Case 173/03, Traghetti del Mediterraneo, [2006], ECR I-5204.
\item \textsuperscript{7} Case C-6/64, Costa v. ENEL [1964], ECR 587.
\item \textsuperscript{8} Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, [1978], ECR 629.
\item \textsuperscript{9} Decision No. 170 of 8 June 1984, S.p.a. Granital v. Amministrazione delle Finanze dello Stato.
\end{itemize}
six founding member states, Italian lower courts have submitted the greatest total number and overall share of preliminary references to the ECJ (see the next section).

Empirically, I leverage a multi-method approach that draws first on disaggregated quantitative data on Italian preliminary reference activity to uncover the propensity of lower court judges to dialogue with the ECJ. In so doing, I demonstrate how the existing debate concerning the JET has problematically inferred judicial behavior at the micro-level from aggregate preliminary reference data. When these data are disaggregated, they demonstrate that lower court judges are much less likely to refer cases to the ECJ than high court judges.

To surface the micro-level causal mechanisms that underlie this counterintuitive finding, I subsequently draw from semi-structured interviews with 225 legal professionals. By triangulating between the experience of lawyers who seek preliminary references on the one hand and judges who must decide whether to grant them on the other hand, I leverage process tracing methods (Bennett and Checkel 2015) to reconstruct the lived reality and workplace practices that discipline lower court judges' encounter with EU law.

3. **Quantitative Evidence: Lower Courts as Infrequent Interlocutors of the ECJ**

Despite the sophisticated argumentation in Weiler (1991) and Burley and Mattli (1993), both pieces are remarkably scarce of systematic empirical evidence. The first quantitative statistics cited to support the JET were provided by Alter (2000: 504-505), who found that "of the ECJ's preliminary ruling decisions discussed in two legal textbooks... 62 percent of the references had been made by lower courts."
When more systematic data began to be collected, however, their bearing on judicial empowerment arguments was more ambiguous (see Stone Sweet and Brunell 1998a: 89-90; Cichowski 2007: 80-81). Nevertheless, many scholars continue to assume the empirical validity of the JET. Even Wind (2010: 1048)'s challenge to the JET affirms that the prediction that "lower courts... refer the greatest number of cases as a means of revolting against the often strict national legal hierarchy... holds for all of the Member States other than the Nordic Countries."

In truth in several of the six founding EU member states, the number of high court references to the ECJ have often surpassed low court references (see the Conclusion section). Furthermore, in France, Belgium, the Netherlands, and Luxembourg, lower courts have submitted a minority of all preliminary references. However, in Italy courts of first instance have indeed submitted the vast majority of references to the ECJ. Specifically, drawing from a new dataset of preliminary references (Kelemen and Pavone 2016), it is evident that of the 1,223 referrals to the ECJ by Italian judges through 2013, 76% originated from courts of first instance (Fig. 1).\textsuperscript{10} Both of these figures are the highest amongst founding EU member states.

Yet the fundamental problem with this sort of aggregate data analysis is rather obvious, and it astonishing that it has not been hitherto raised: In any judicial system with an organizational hierarchy, there are exponentially more courts of first instance than courts of appeal and last instance. In Italy, for example, the civil court system alone contains some 1,300 tribunali of first instance, 26 courts of appeal, and only one Supreme Court of Cassation. This would be less problematic if the judicial empowerment were a structure-to-structure (Bennett 2013: 218) causal mechanism with lower courts behaving as a single collective actor. Yet in reality it is the single

\textsuperscript{10} Lower courts were classified as courts with first-instance jurisdiction, or who only possess appellate jurisdiction is a small share of special cases and whose decisions can always be appealed. This broadly follows the coding scheme of Stone Sweet and Brunell (1998a) and Wind (2010).
judge (or a panel of judges in a single court) who must decide whether to raise a preliminary reference. In short, the debate surrounding the JET has problematically inferred the propensity of individual courts and judges to refer cases to the ECJ from analyses of aggregate preliminary reference data.

**Figure 1:** Aggregate evidence: Share and number of references from lower courts in the six founding EU member states, 1961-2013

Following Dyevre and Lampach (2017), I disaggregate these data - specifically at the individual court level - to alleviate problems of ecological inference. This permits assessing whether micro-level statistics correlate with the observable implications of the JET. Fig. 2 provides an overview of the analytic results, which are misaligned with the expectations of the JET.

First, if instead of assessing the total number of references from Italian lower courts we probe the propensity of individual courts to refer to the ECJ, we find that the average lower court has referred less than four cases over a six-decade period. By contrast, the Court of Cassation (the supreme civil and criminal court) and the Council of State (the supreme administrative court) have
each used the reference procedure over 100 times. Note that this analysis is actually rather generous vis-a-vis lower court reference rates, since it comprises only the subset of lower courts who have dialogued with the ECJ at least once. If the denominator comprised all of the thousands of lower courts that could refer to the ECJ, the resulting propensity to refer would approach zero. Clearly, a given lower court judge is exceptionally unlikely to ever refer a case to the ECJ.

**Figure 2: Disaggregated Evidence: Propensity to refer by court level, 1964-2013.**

<table>
<thead>
<tr>
<th>Court Level</th>
<th># References</th>
<th># References / # Referring Courts</th>
<th>% Repeat Referral (≤1 yr)</th>
<th>% Repeat Referral (≤5 yr)</th>
<th>Avg Duration of Repeat Referral-Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Instance</td>
<td>926</td>
<td>3.47</td>
<td>22.9%</td>
<td>45.1%</td>
<td>2.6</td>
</tr>
<tr>
<td>Appeal</td>
<td>63</td>
<td>2.1</td>
<td>15.4%</td>
<td>45.2%</td>
<td>2.1</td>
</tr>
<tr>
<td>Last Instance</td>
<td>229</td>
<td>114.5</td>
<td>80.0%</td>
<td>95.7%</td>
<td>6.5</td>
</tr>
</tbody>
</table>

**Notes:** One-year repeat referral probabilities are computed through 2012, since data spans through 2013; Five-year repeat referral probabilities are computed through 2008 for the same reason.

Relatedly, one might ask: Given that a national court refers to the ECJ at time $t$, what is the probability that said court refers again at some time $t+n$? That is, how habitual or temporally stable is reference activity from those lower courts who do dialogue with the ECJ? Once again, the disaggregated findings are stark: A lower Italian court that refers in one year has less than a one in four probability of referring in the subsequent year. By contrast, the parallel statistic for the Court of Cassation and Council of State is 80%. If the time interval is extended to a five-year period, the findings are relatively unchanged. Importantly, these dynamics are relatively time-invariant.\(^\text{11}\)

\(^{11}\) For example, in the pre-1990 period analyzed by Weiler, a repeat referral within a year occurred 21.8% of the time for lower courts and 84.6% of the time for high courts; for a five-year interval, the statistics are 40% for lower courts and 100% for high courts.
Finally, one might inquire: For those courts that do refer in back-to-back years (which, again, is the exception for low and mid-level courts), how long does this iterated dialogue with the ECJ last on average? The answer is less than three years for lower and mid-level Italian courts, and over six years for courts of last instance. In other words, when the data is disaggregated at the level at which the JET's causal mechanisms are supposed to operate, the empirical evidence does not conform with the observable implications of the thesis.

4. Qualitative Evidence: Everyday Practices of Resistance

While revealing, even disaggregated quantitative statistics cannot tell us if Italian lawyers perceive judicial resistance to a dialogue with the ECJ and why it would emerge in the first place. To answer these questions, over 200 semi-structured interviews were conducted with Italian lawyers, judges, and law professors (see Fig. 3). Interviewees were probed both for their knowledge of contemporary practices as well as for changes over the past several decades.

**Figure 3: Descriptive statistics of interview sample**

<table>
<thead>
<tr>
<th>City</th>
<th># Interviewees</th>
<th># Interviews</th>
<th># Lawyers</th>
<th># Judges</th>
<th># Law Profs</th>
<th># Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rome</td>
<td>41</td>
<td>46</td>
<td>23</td>
<td>17</td>
<td>14</td>
<td>5</td>
</tr>
<tr>
<td>Genoa</td>
<td>29</td>
<td>28</td>
<td>20</td>
<td>7</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>Milan</td>
<td>36</td>
<td>35</td>
<td>17</td>
<td>16</td>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>Trento/Bolzano</td>
<td>28</td>
<td>26</td>
<td>15</td>
<td>7</td>
<td>9</td>
<td>2</td>
</tr>
<tr>
<td>Naples</td>
<td>20</td>
<td>24</td>
<td>14</td>
<td>6</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Bari</td>
<td>28</td>
<td>23</td>
<td>13</td>
<td>10</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td>Palermo</td>
<td>26</td>
<td>20</td>
<td>12</td>
<td>10</td>
<td>9</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>17</td>
<td>17</td>
<td>5</td>
<td>5</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>225</strong></td>
<td><strong>219</strong></td>
<td><strong>119</strong></td>
<td><strong>78</strong></td>
<td><strong>70</strong></td>
<td><strong>18</strong></td>
</tr>
</tbody>
</table>

**Notes:** The number of interviewees and interviews does not match because some subjects were interviewed repeatedly and others as a group. Note further that many legal professionals occupy multiple roles. Interviews were conducted on June-August 2015 and September 2016-April 2017.
Legal practitioners were purposively selected via a form of "standardized" snowball sampling. Snowballing has been praised for producing findings that are both "emergent" and "interactional" through flexible face-to-face engagement (Gray et al. 2007: 151-178; Noy 2009). However, the method can exclude actors central to the causal process of interest by getting stuck in a closed network. As a result, the origins of multiple snowballs across three northern Italian cities (Genoa, Milan, and Trento/Bolzano), three southern Italian cities (Naples, Bari, and Palermo), and the capital of Rome, was standardized: In each city, at least one member of the governing council of the local bar association, of each city tribunal, and of each law school faculty was interviewed. Furthermore, where possible, interviewees were asked to refer the names of local lawyers or judges with personal experience in referring cases to the ECJ, even if they lay outside their network.

4.1 Confronting Judicial Resistance: The experience of "Eurolawyers"

To begin, I provide evidence from semi-structured interviews with lawyers, who are usually the actors who solicit the judge into applying EU law or dialoguing with the ECJ in the first place. The focus is on interviews that are (1) representative of general sentiments but (2) articulated by lawyers with the greatest experience soliciting preliminary references – whom Vauchez (2015) terms "Eurolawyers." After all, elite interviewing in processualist scholarship should aim to "identify the key political actors that have had most involvement with the processes of interest" (Tansey 2007: 766). As "repeat players" (Galanter 1974) in the field of EU law, Eurolawyers are uniquely situated illuminate whether lower court judges are "enthusiastic" about opportunities to dialogue with the ECJ.
The consensus amongst lawyers interviewed is that the national judges' default position is usually resistant to encounters with EU law and the ECJ, that this was particularly true in the past, and that resistance remains concentrated in courts of first instance. This is inconsistent with the observable implications of the JET, since most national judges – particularly in the first decades of the European Community and in lower courts – should have an incentive to collaborate with the ECJ to expand their interpretive powers.

For example, a co-founder of one of the first Italian firms in Milan to specialize in European law in the 1970s notes that a decision by the judge to refer to the ECJ "remains rather rare, and in the past it was virtually impossible… it didn't happen, because judges didn't study this topic, they didn't know it, they looked at you funny as you talked!"12 "[Judges] didn't have the faintest idea what [EU law] was about," confirms a lawyer who in the 1960s began practicing European law before lower courts in northern Italy; "In my very first lawsuits… when I cited European law before the judge and I asked for a preliminary reference… I had to perform a sort of crash course in European law."13 To this day, Eurolawyers affirm that "the judge, certainly, let's say, on his own initiative, rarely - nay, almost never - turns to the EU judge."14 Indeed, virtually all lawyers interviewed were adamant that judges of first instance are unenthusiastic about dialoguing with the ECJ. "The judge isn't going to do the homework," confides one interviewee in Rome; "So if one doesn't write [the reference], the judge often doesn't write it himself."15

13 Wilma Viscardini, Dona Viscardini Studio Legale in Padova, September 29, 2017 (via e-mail).
14 Aristide Police, Clifford Chance and University of Rome-Tor Vergata, October 4, 2016 (in-person).
Some lawyers surfaced personal statistics to crystallize the extent of judicial resistance. In Genoa, one interviewee notes that if he "[asks] the court to refer to the ECJ 10 times... the reference is made two times, and zero point [x times] the judge himself decides that there's an EU law question that isn't raised by the parties."\(^\text{16}\) In Rome, a colleague similarly concludes with frustration that only ten percent of his requests for a referral are granted: "The judge often tries to do everything he can not to refer."\(^\text{17}\)

Crucially, judges' resistance to dialoguing with the ECJ to enforce European law was most pronounced during the first decades of European integration. A longstanding Eurolawyer describes how "in the past, we complained a lot that judges weren't referring, especially Italian judges. Now we've transitioned a bit."\(^\text{18}\) "The judge expects you to propose a prospective reference," notes a colleague with four decades of experience in preliminary reference cases; "Today, there are also some very able judges... when I got started, you'd hope that he would copy your [proposal for a reference]."\(^\text{19}\) In Rome, a specialist in EU competition law is similarly direct: "When I first started working...more than 30 years ago... it was the judge who told you: "Write it for me."\(^\text{20}\) This resistance, interviewees suggest, belies insecurity when dealing with a little-known, 'foreign' area of law. As one interviewee put it, well into the 1990s lower court judges were reluctant to refer cases to the ECJ out of a "fear... [of] making a bad impression."\(^\text{21}\)

\(^{16}\) Francesco Munari, Munari Giudici Maniglio Panfili Associati and University of Genova, October 24, 2016 (in-person).
\(^{17}\) Vincenzo Cannizzaro, Cannizzaro & Partners and University of Rome, October 4, 2016 (in-person).
\(^{18}\) Fabio Ferraro, De Berti Jacchia Franchini e Forlani and University of Naples Federico II, February 6, 2017 (in-person).
\(^{19}\) Giuseppe Giacomini, Conte & Giacomini Studio Legale in Genova, October 24, 2016 (in-person).
\(^{20}\) Cristofooro Osti, Chiomenti Studio Legale in Rome, September 29, 2016 (in-person).
\(^{21}\) Francesco Munari, Munari Giudici Maniglio Panfili Associati and University of Genova, October 24, 2016 (in-person).
While this state of affairs has generally improved over time, judicial resistance does remain, particularly in courts of first instance and small towns. As a leading litigator of EU law in Milan explains, "if they're not judges of last instance they aren't obligated [to refer], they prefer not to go, and to decide themselves." Indeed, a Eurolawyer and former clerk (referendaire) at the ECJ notes that courts of last instance are "more structured to [refer to the ECJ] on their own," whereas in "the smaller tribunals in other locations where they handle EU law with less frequency, there, yes, the initiative of the lawyer is very useful." Another colleague agrees that while supreme courts often submit "a lot of references… [judges] in other locations…encounter some difficulties, especially in smaller towns - how do you write a reference?" Many interviewees find this unsurprising, since lower courts face first-order difficulties when faced with the field of EU law: "Oftentimes the lower courts think they have to refer a question to the Court of Justice in a foreign language. They don't know they can do so in Italian. They're afraid!... Oftentimes they don't know where the Court of Justice is located... Obviously higher courts are more used to it.

5. Judges and Practices of Resistance

Methodologically, relying solely on interviews with lawyers can be problematic, for two reasons. First, Eurolawyers may have an inflated sense of their own influence - the problem of "exaggerated roles" that can arise when interviewees discuss their impact over a given social process (Berry 2002: 680). In so doing, lawyers might overstate judges' resistance to EU law. Second, lawyers

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22 Enrico Raffaelli, Studio Legale Rucellai e Rafaelli in Milan, December 14, 2016 (in-person).
25 Vincenzo Cannizzaro, Cannizzaro & Partners and University of Rome, June 17, 2015 (in-person).
can only speculate as to the reasons behind judges' behavior, since their time in court is usually limited.

In this light, interviews with judges (see Fig. 4) are essential to provide external validity to lawyers' claims via "triangulation" (Arksey and Knight 1999: 21-32). Because judges' reputation (Garoupa and Ginsburg 2015: 24-25) depends on the perception of their mastery of the law, their incentive is to stress their practical proficiency in all legal fields. If, on the contrary, judges confirm the presence of diffuse practices resistant to encounters with EU law and the ECJ, then confidence in lawyers' claims is bolstered. Furthermore, judges are privileged witnesses to the everyday institutional pressures that condition their willingness to dialogue with the ECJ, allowing us to illuminate the mechanisms driving the judicial behavior that lawyers describe.

**Figure 4: Breakdown of interview sample of judges**

<table>
<thead>
<tr>
<th>Classification Scheme</th>
<th>Class</th>
<th># Interviewees</th>
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<tr>
<td><strong>By level</strong></td>
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<tr>
<td>High Court</td>
<td>16</td>
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<tr>
<td>Mid-Level Court</td>
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<tr>
<td>Low Court</td>
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<td><strong>By competence</strong></td>
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<tr>
<td>Constitutional</td>
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<tr>
<td>Administrative</td>
<td>23</td>
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<tr>
<td>Civil/Criminal</td>
<td>48</td>
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<tr>
<td>Other</td>
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Almost without fail, judges corroborated lawyers' claims, detailing the institutional logics within the lower rungs of the judiciary that render collaborating with the ECJ fastidious, costly, even scary. The origins of this diffuse resistance can be traced to the interaction of three variables: (1) Insufficient knowledge of European law, (2) workload and time constraints, and (3) cultural aversions to non-domestic sources of law.
5.1 **Knowledge Gaps and Workload Management**

The first two logics judges underlined are baseline gaps of knowledge and workload pressures. These mechanisms are inextricably linked. To be sure, that the first coursework on EU law by the High Council of the Judiciary was only established in 1993 and that judges did not need to know EU law to pass the judicial entrance exam until 1997 is in the public record (Bartolini and Guerrieri 2017: 412-413). Notably, this situation is not unique to Italy, nor has it significantly improved in recent years: In a 2011 survey of domestic judges, the European Parliament found that three-fifths did not know how to refer cases to the ECJ (Directorate General for Internal Policies 2011: 5).

What is more unique to Italy is another well-known problem, namely that comparatively high litigation rates can overwhelm judges, pressuring them to decide cases quickly (IMF 2014: 7-14). Crucially, how these two factors interact to condition judges' lived experience and their openness to a dialogue with the ECJ remains unexplored. Interviewees suggest that in lower courts, insufficient knowledge of EU law breeds insecurity that can only be remedied by continuing training, yet workload constraints make it undesirable or impossible to obtain such training.

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**Knowledge and judicial reputation:** Like most judges in Europe, Italian judges are drawn to the image of the Montesquieuian judge as the knowledgeable "voice of the law." As a result, insufficient training in EU law – beginning in law school and continuing within the judiciary - puts them in an uncomfortable position they would rather avoid. And although opportunities to

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26 The Latin expression often cited by interviewees is *iura novit curia* – "courts know the law."

27 EU law only became a mandatory examination field in Italian law schools between 1995 and 2000 (Bartolini and Guerrieri 2017: 420).
obtain EU training have increased in recent years, these opportunities are often insufficient to stay up-to-date on a continuously-evolving and complex area of law, generating insecurity.

In interviews, judges discussed their colleagues' scarce EU legal knowledge with some discomfort, as if confiding a secret: "Let me tell you, quite sincerely," confides a judge who began his career at the Tribunal of Palermo, "that the dialogue with the ECJ 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... to this day, conducting research on the website of the ECJ is problematic for some colleagues." 28 "I don't recall any judges in particular [in the 1980s and 1990s] who confronted themselves with this reality," confesses a longstanding first instance and appeal judge in Milan; "no judge knew how to conduct the research... you needed the lawyers to cite the ruling [of the ECJ] for you." 29 "Lacking training," echoes a colleague at the Tribunal of Bari, "we also don't have a propensity and positive outlook - with great sincerity - we find it tiring to confront ourselves with European law." 30

In response to this state of affairs, since the mid-1990s EU law courses have been established at the Judicial Training School near Florence and in districts associated with each Court of Appeal. The logic is that "greater training that is ever more constant would habituate [judges] to dialogue [with the ECJ] with greater ease." 31 Yet there are two limitations to these efforts. First, undergoing continuing EU legal training is not required: As one judge at the Tribunal of Rome highlights, "the problem with this sort of training...is that it's person-based. That is, it's the judge... [who] must ask to participate in that specific course." 32 As a result, a "utilitarian conception of

28 Roberto Conti, Court of Cassation, October 12, 2016 (in-person).
29 Francesca Fiecconi, Court of Appeal of Milan, December 2, 2016 (in-person).
32 Monica Velletti, Tribunal of Rome, October 7, 2016 (in-person).
judicial training" pushes judges to focus instead on more recurring, everyday themes in national law.\textsuperscript{33} Finally, even those judges who know European law and participate in EU legal training emphasize that it is usually too brief and intermittent, and "at the end of the day... we've trained ourselves on the job."\textsuperscript{34}

Insufficient knowledge of EU law breeds two sorts of insecurities for lower court judges. The first concerns their interactions with lawyers. While specialist Eurolawyers can serve as important carriers of EU knowledge, judges are wary that they could be manipulated to serve the partial interests of the lawyer's client. One judge who has spearheaded several EU training initiatives for lower court judges tries to solicit participation precisely by stressing how dependent they would otherwise be on the lawyer's actions: "If you don't have the right pair of glasses and you have the file in your hands, you can't see this phenomenon - unless the lawyers tell you."\textsuperscript{35} "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 that is not founded," confirms a retired judge of first instance, "and the judge that gives into this seduction errs."\textsuperscript{36}

Second, insufficient knowledge of EU law breeds insecurity vis-à-vis dialoguing with the ECJ. Lower court judges highlight that their inexperience with drafting preliminary references engenders a fear of being publicly embarrassed should their referral be declared inadmissible. This concern is not unfounded: One recent study finds that the ECJ is four times more likely to declare a lower court reference inadmissible than a reference from a court of last instance (Kelemen and Pavone 2017). "It's very risky to refer [to the ECJ]," explains a judge at the administrative court in

\textsuperscript{33} Giuseppe Buffone, Tribunal of Milan, December 14, 2016 (in-person).
\textsuperscript{34} Giovanni Tulumello, Regional Administrative Court of Sicily, April 5, 2017 (in-person).
\textsuperscript{35} Raffaele Sabato, Court of Cassation, February 17, 2017 (in-person).
\textsuperscript{36} Michele Marchesiello, ex-judge at the Tribunal of Genoa, November 10, 2016 (in-person).
Milan, "because your reference could be declared inadmissible. And this becomes known." A first instance judge in Rome similarly notes how "a little reverential fear for what the Court could tell us exists, and this begets the fact that you only get there if you're firmly convinced." Another lower court judge explains that "our judgments are the name of the Italian people...we bear the weight of this responsibility...You don't just refer like that, in one week or two - you must think about it for six months! Precisely because it's a reference that circulates at the European level...we should add that vis-a-vis EU law you're more insecure...if it also comes back as inadmissible, well..."  

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Workload pressures: If gaps in EU legal knowledge breed insecurity, why do judges not simply tend to these lacunae? Taking seriously the institutional constraints that are encoded in judges' everyday work practices provides an answer.

The most important constraint reveals itself the second one enters a city's palace of justice: The ubiquity of stacks of fascicoli (case files). The importance of files as material objects of judicial practice has already been evidenced by Latour (2010: 70-106) and Zan (2003); In this instance, files are a physical reminder to lower court judges of the daily duties that remove the gloss from a prospective encounter with EU law or the ECJ. One first instance judge in Bari confessed that when she was first appointed, her docket comprised some 13,000 fascicoli. Such numbers become palpable when noticing how case files are stuffed into suitcases to facilitate transportation, stacked atop carts, or lined into barricades partially shielding judges from view.

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37 Elena Quadri, Regional Administrative Court of Lombardy, December 13, 2016 (in-person).
38 Margherita Leone, Tribunal of Rome, September 29, 2016 (in-person).
during oral arguments. Witnessing the ritual frenzy of oral arguments before judges in lower civil courts can be equally instructive. At the Tribunal of Naples - where, in 2014, the criminal divisions alone decided some 232,692 cases and faced a backlog of 122,321 proceedings (Tribunale di Napoli 2014: 41) - oral arguments constitute a stream of lawyers and clients - paperwork in hand - simultaneously attempting to solicit the judge's attention.41

The impact of these workload constraints - which are most pronounced in courts of first instance since some lawsuits are not appealed - is to encode a Foucaultian form of diffuse discipline (Foucault 1975) within everyday practice that resists encounters with 'lesser' known courts and fields of law. The default mindset aims to for the quantitative processing of lawsuits, rather than a creative 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.42 Interviewees stress this point through the language they use. Particularly within lower courts, judges speak of being "frustrated," "overwhelmed," and "crushed" by a "massacre-like" stream of lawsuits, which obstructs efforts to "deepen" EU law by "thinking higher." A binary opposition thus arises, between a heavy, everyday workload – symbolized by files whose weight can crush you - and an abstract notion of EU law floating higher, waiting to someday be deepened.

42 Maria Teresa Bonavia, Court of Appeal of Genoa, November 8, 2016 (in-person).
43 Giuseppe Buffone, Tribunal of Milan, December 14, 2016 (in-person).
44 Margherita Leone, Tribunal of Rome, September 29, 2016 (in-person).
45 Monica Velletti, Tribunal of Rome, October 7, 2016 (in-person).
46 Francesca Fiecconi, Court of Appeal of Milan, December 2, 2016 (in-person).
47 Giulia Turri, Tribunal of Milan, November 25, 2016 (in-person).
48 Bianca La Monica, Tribunal of Milan, December 7, 2016 (in-person).
Exacerbating the flow of lawsuits that discipline judges into avoiding contact with EU law is the career incentive - strongest for lower court judges - to quickly decide cases. Over the past two decades, legislative reforms aiming to bolster the "efficiency" of justice have increased the probability that judges will face penalties should they adjudicate cases slowly. As a longstanding Milanese judge explains, "we've had much pressure on the part of legislators... to contain the length of proceedings... also because our career can be impacted. We're not punished in a disciplinary way, but, if you're late, as soon as you request a promotion, every four years, it gets blocked, in terms of pay, in terms of advancement." Corroborates a lower court judge in Rome, "also vis-a-vis our hierarchical superiors, or even that we might be held disciplinarily responsible, for having decided cases with lots of delay... we all have this nightmare of letting the proceedings last too long."

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The economy of everyday judging: Workload pressures bear a strong impact on the everyday economy of judging, disincentivizing participation in EU legal training and encouraging a form of cost-benefit analysis that disfavors a dialogue with the ECJ.

With regards to participating in EU legal training, most lower court judges are resigned to the fact that they simply "don't have the time." For example, one first instance judge in Rome thinks it would be "very positive" to have "exchanges [on EU law]... [but] I've not been able to create this situation because of the excessive workload... I can't breathe because there's too much work, so I can't manage to live this reality." In short, "the workload is something that completely

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49 See Calvez 2012: 8; 16; Legge 24 marzo 2001, No. 89.
50 Francesca Fiecconi, Court of Appeal of Milan, December 2, 2016 (in-person).
51 Lilia Papoff, Tribunal of Rome, October 13, 2016 (in-person).
52 Monica Velletti, Tribunal of Rome, October 7, 2016 (in-person).
53 Bianca La Monica, Tribunal of Milan, December 7, 2016 (in-person).
frustrates the judge," agrees a judge at the Tribunal of Milan, "so many judges don't come [to EU training sessions] because on Monday [through] 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."\(^54\)

A second impact concerns the perceived attractiveness of soliciting the ECJ via the preliminary reference procedure. Workload pressures incentivize adopting a cost-benefit analysis whereby the opportunity cost of a referral is weighed as the number of days spent deciding an estimated number of more quotidian lawsuits. Most of the time, the scales are tipped in favor of addressing immediate needs, reinforcing a *habitus* of non-referral: "These references," notes a Milanese judge, "in the realm of the economy of judging, tend to, must be contained."\(^55\) A colleague at the Tribunal of 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."\(^56\) "Every week that I put everything down I don't write five judgments," highlights a judge of first instance in Rome, adding that to write a preliminary reference "you'd definitely need a week's worth of work."\(^57\) Similarly, for an administrative judge in Milan, a judge only refers when "the question jumps before your eyes" since workwise, a reference "is like writing ten judgments."\(^58\) "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."\(^59\) And a civil judge at the Tribunal of Rome is similarly candid:

\(^{54}\) Giuseppe Buffone, Tribunal of Milan, December 14, 2016 (in-person).
\(^{55}\) Francesca Fiecconi, Court of Appeal of Milan, December 2, 2016 (in-person).
\(^{56}\) Giorgio Flaim, Tribunal of Trento, January 26, 2017 (in-person).
\(^{57}\) Lilia Papoff, Tribunal of Rome, October 13, 2016 (in-person).
\(^{58}\) Elena Quadri, Regional Administrative Court of Lombardy, December 13, 2016 (in-person).
\(^{59}\) Giuseppe Buffone, Tribunal of Milan, December 14, 2016 (in-person).
"If I have an escape, I'll take it, and I'll take it gladly... Because referring means, well, not writing four judgments, you see?"\(^{60}\)

Yet a simple cost-benefit ratio does not do justice to the fact that lower court judges are not *used* to drafting preliminary references and to think in terms of EU law. And "if you don't apply these things...it's clear that your mastery of these problems erodes."\(^{61}\) Hence to submit a reference means breaking up an entrenched routine - to "put everything down" only when you feel "really, really obligated" to refer.\(^{62}\) One judge highlights the psychological reaction that can be caused by this rupture: "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 would already get the shivers... so let's not even talk about a question linking national law to international law!"\(^{63}\)

The breakup of everyday practice can prove so burdensome that some judges feel compelled to work on weekends or to take vacation days\(^{64}\) in order to write a preliminary reference. A first instance judge in Palermo shares how for his first referral to the ECJ, "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."

\(^{65}\) This angst of "everything piling up" is precisely why lower court judges usually relapse into searching for an "escape" from a dialogue with the ECJ. For those few judges determined to dialogue with the European Court, the only option is often to await the arrival of an

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\(^{60}\) Monica Velletti, Tribunal of Rome, October 7, 2016 (in-person).
\(^{61}\) Tania Hmeljak, Tribunal of Palermo, April 21, 2017 (in-person).
\(^{63}\) Ernesta Tarantino, Tribunal of Bari, March 20, 2017 (in-person).
\(^{64}\) Giorgio Flaim, Tribunal of Trento, January 26, 2017 (in-person).
\(^{65}\) Giovanni Tulumello, Regional Administrative Court of Sicily, April 5, 2017 (in-person).
experienced Eurolawyer and partially rely on their labor: As one Milanese judge confides, "if one of the parties doesn't request it... you don't sit there stimulating it."66

5.2 Cultural Resistance

The foregoing conclusions raise a final puzzle: Why do so many judges remain reticent to dialogue with the ECJ even when a Eurolawyer articulates why and how they might author a preliminary reference? "In asking them," one Eurolawyer in Rome emphasizes, "sometimes judges have preferred, how should I put it, to interpret [national] law in my favor rather than to refer to the Court!"67 And in Palermo, one lawyer notes how in a recent set of labor disputes, all of his requests for a preliminary reference were rejected, often without motivation.68 In many cases, there is more to this judicial resistance than workload constraints and insufficient training.

One potentially relevant dimension explored by Wind (2010) is a cultural resistance fostered when judges internalize the norms and ideology of a majoritarian political culture. But persuasive though Wind's analysis may be, one would not expect it to generalize to a fragmented constitutional order like Italy. And yet to put it bluntly, for many Italian judges becoming a European judge of first instance ready to dialogue with the ECJ is neither attractive nor a priority. This is particularly true for lower court judges. One first instance judge describes this diffuse perspective in this way: "I study what interests me, also because the reference procedure is only obligatory for courts of last instance, and not for me."69

66 Francesca Fiecon, Court of Appeal of Milan, December 2, 2016 (in-person).
67 Vincenzo Cannizzaro, Cannizzaro & Partners and University of Rome, June 17, 2015 (in-person).
69 Giuseppe Buffone, Tribunal of Milan, December 14, 2016 (in-person).
In the space created by this formally legitimate zone of discretion, a traditional self-conception of lower court judges as faithful appliers of Parliamentary statutes that only dialogue with their Constitutional Court can germinate. The contours of this cultural resistance are tied to the civil law conception of the judge as a faithful applier of the laws promulgated by Parliament who eschews personal, creative impulses to make law (Merryman and Perez-Perdomo (2007: 34-37). To support this claim, in this section I first underscore the reputational costs that threaten those judges who do empower themselves via EU law. I then provide interview evidence demonstrating that many lower court judges continue to favor a more limited role as national, civil law judges over a more powerful role as European judges of first instance.

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Three (iconoclastic) perspectives on cultural resistance: Studying the impact of something as fickle yet ubiquitous as judicial culture is extremely challenging. While no approach is fool-proof, one strategy is to tap the experience of those (few) judges who broke with said culture - oftentimes for motives in line with the JET - and trace any pushback they received.

In this light, the experience of three first instance judges stands out: Francesco Mariuzzo at the Regional Administrative Court of Lombardy, Michele Marchesiello at the Tribunal of Genoa, and Paolo Coppola at the Tribunal of Naples. Each of these judges availed themselves of EU law in line with the expectations of the JET. And each of these efforts was criticized by their colleagues, often limiting aspirations of becoming judges of last instance, and – in one case – provoking a threat of disciplinary sanction.

To begin, becoming an EU judge of first instance means "putting yourself in discussion," as one lower court judge put it.\textsuperscript{70} This is particularly true when the application of EU law results

\textsuperscript{70} Ernesta Tarantino, Tribunal of Bari, March 20, 2017 (in-person).
in the disapplication of national law, which translates into a perception of rebelling against the very State of which one is a part. For Francesco Mariuzzo, this was precisely the point: As a fiercely independent-minded judge who believed that the Italian administrative justice system was too proximate to public authorities, he began in the 1990s to refer questions to the ECJ in earnest whenever he strongly disagreed with the judgments of the Council of State. Mariuzzo describes this "inter-court competition" logic (Alter 2001) as follows: "There were many occasions to refer questions to the ECJ, because there were some judgments by the Council of State that did not persuade us. And every time we encountered these judgments... we began to send, with some frequency, our orders to the Luxembourg Court." Yet such rebellions at the service of a supranational legal order - Mariuzzo likens this to a "war ship… taking hits, a little here, a little there" - require that the Europeanist judge be willing to bear potential reputational and career-related costs. As he puts it, "what one needs is... to also be a little courageous, to do things a certain way and assume responsibility. And some don't want this responsibility... I can tell you that I didn't enjoy much sympathy at the Council of State, but I don't care at all!" Despite these claims, one of Mariuzzo's former colleagues suggests that the fact that his efforts limited his career advancement did cause some personal frustration.

Importantly, cultural resistance to European legal integration does not originate solely from conformity to (or reverence for) supreme courts like the Council of State. Rather, it is more broadly

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71 Such views were expressed by multiple interviewees: Diana Urania-Galetta, University of Milan, December 17, 2016 (in-person); Antonio Papi-Rossi, Studio Legale Amministrativisti Associati in Milan, November 22, 2016 (in-person); Alma Chiettini, ex-judge at the Regional Administrative Court of Trento, January 18, 2017 (in-person); Giuseppe Franco Ferrari, Bocconi University, November 24, 2016 (in-person).
72 Francesco Mariuzzo, Regional Administrative Court of Lombardy (retired), December 6, 2016 (in-person).
73 [written notes] Judge, Regional Administrative Court of Lombardy (in-person, date redacted).
encoded within the circumscribed role that civil law judges tend to allocate to themselves when applying the law. In Genoa, Michele Marchesiello broke from this tradition by cooperating with Genoese lawyers to punt many references to the ECJ as judge at the city court of first instance.\(^7^4\) In particular, he was convinced that "EU law was a great opportunity to lessen the distance to the common law judge... to not be a bureaucrat." Yet just as Mariuzzo emphasized that his rebelliousness was \textit{sui generis}, Marchesiello underscores that few of his colleagues are comfortable with the power afforded by assessing the conformity of national law with EU law. As a result, some of his own preliminary references and rulings invoking EU law were dismissed as insufficiently formal efforts to attract attention via "journalistic" judgments. "Our judiciary remains very functionalist," Marchesiello laments, "they're professionals in a way, but they're also state employees. And therefore this precludes that liberty, independence, that affirms itself very, very slowly. Judicial review, something I'm very jealous of... here taking that step is very difficult... this is a problem, because judges have difficulty of broadening their line of sight."\(^7^5\)

Few Italian judges relish an iconoclastic "broadening of the line of sight" more than Paolo Coppola at the Tribunal of Naples. Indeed, Coppola has submitted more than half of all preliminary references originating from the city, essentially because he disagreed with the established jurisprudence of the supreme Court of Cassation in labor matters and thought EU law offered greater protections to Italian workers.\(^7^6\) As a result, he is intimately aware of the cultural frames that render lower courts in a civil law judiciary "diffident" of a dialogue with the ECJ: "To diffuse

\(^7^4\) In addition to Marchesiello himself, this portrait comes from: Lorenza Calcagno, Tribunal of Genoa, November 8, 2016 (in-person); Paolo Canepa, Studio Legale Roppo-Canepa in Genoa, November 3, 2016 (in-person).
\(^7^5\) Michele Marchesiello, Tribunal of Genoa (retired), November 10, 2016 (in-person).
\(^7^6\) In addition to Coppola himself, this portrait comes from: Amos Andreoni, University of Rome, February 22, 2017 (in-person); Vincenzo De Michele, University of Foggia and Studio Legale De Michele Cammarino, March 25, 2017 (in-person).
this type of culture, and the mechanisms - the fear in applying it... it scares you, of course! Because it mutates the judicial order, because someone can challenge you, because you can be afraid of ending up in the newspapers, because they can be powerful situations." Like Mariuzzo, Coppola emphasizes that becoming a European judge of first instance can be easily perceived as a form of disobedience, thereby generating reputational costs. "Certainly [my references] bothered many people," he confesses, "certainly there is a big block... of diffidence against those who apply EU law in this manner." On one occasion, his recurrent referrals to the ECJ even prompted a direct "threat" of disciplinary sanction from the State legal service - a claim other interviewees confirmed.77 And much as Mariuzzo's controversial Europeanism caused him to shed any careerist aspirations, Coppola emphasizes that he "never submitted a request [to ascend to the Court of Cassation]."78

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From diffuse reticence to occasional rebellion: While the foregoing judges are unique in the degree to which they internalized the role of European judge, less iconoclastic judges tasked with training their colleagues on the matter tend to reach similar conclusions. That is, the general marginalization of EU law in the national judicial culture is a common lament. And in rare occasions, there is evidence that lower court judges can be as willing as their superiors to openly rebel against EU law and the authority of the ECJ.

The marginalization of EU law in national judicial culture - a "narrow vision" breeding "resistance towards the communitarian phenomenon" - was cited as a key motive for establishing

77 Lawyer and law professor, University of Rome (date redacted; in-person).
the first EU legal coursework for Italian judges in 1993.²⁹ Twenty-five years later, interviewees suggest that not much has changed. In Milan, the judge charged with EU training explains that lower court judges make "tons of references to the Constitutional Court, which they interpret as their own court, vis-a-vis the ECJ... there isn't this culture that EU law is something that concerns you."³⁰ In Rome, a colleague confides that "in our jurisdiction EU law and international law generally were marginalized and treated as subjects reserved for those with a penchant... for writing the interesting judgement, that which would be published... the value of EU law didn't permeate our conscience."³¹ And one judge who organized EU law courses at the high judiciary school confirms that "this training in EU law is considered a luxury" rather than a necessity.³²

Furthermore, in interviews some judges conveyed cultural viewpoints valorizing domestic legal traditions with correlative hints of tepid Euroscepticism. One lower court judge notes how "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."³³ And when asking a pair of formerly lower court judges in Bari about their reticence to appropriate the greater interpretive powers offered by EU law - including the power of disapplying national laws - they replied that "this is not our culture."³⁴ Other interviewees agree: For example, one Milanese administrative judge confides that "while one could disapply national law without referring, personally I don't want to do it. I apply the [national] law, unless the Court of Justice pronounces

⁷⁹ See: Bartolini and Guerrieri (2017: 413).
⁸⁰ Giuseppe Buffone, Tribunal of Milan, December 14, 2016 (in-person).
⁸¹ Roberto Conti, Court of Cassation, October 12, 2016 (in-person).
⁸² Raffaele Sabato, Court of Cassation, February 17, 2017 (in-person).
⁸³ Judge, Tribunal of Bari (in-person, date redacted).
⁸⁴ Two judges, Court of Appeal of Bari (in-person, date redacted).
itself. This out of a logic of respect for the national legislator. He wrote the law, surely he thought it over."\(^85\)

Finally, in rare occasions subtle judicial nationalism can boil over into outright rebellion. For example, when in 2013 a young Eurolawyer in Palermo sought a preliminary reference in a labor dispute, the first instance judge at the Tribunal of Termini Imerese was less than pleased.\(^86\) Not only did he reject the request, but he transformed his 14-page judgment into a manifesto against the internal validity of EU law. Affirming that "the laws stemming from the European Union do not have any legal direct effect in the domestic order," the lower court judge concluded that "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."\(^87\) Placing the cherry on the cake, the judge ordered the lawyer's clients - a group of part-time teachers - to refund the Ministry of Education's legal fees: To the tune of 10,000 euros ($13,328).\(^88\)

6. **Conclusions: Implications, Comparison, & Future Research**

By combining disaggregated preliminary reference data at the individual court level with hundreds of semi-structured interviews with lawyers and judges, it becomes clear that Weiler's (1991: 2426) statement that "lower national courts in particular made wide and enthusiastic use" of their dialogue with the ECJ is at the very least exaggerated. It is therefore unsurprising that scholars

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\(^85\) [written notes] Judge, Regional Administrative Court of Lombardy (in-person, date redacted).
\(^87\) See: Sentenza No. 847/2013, Tribunale di Termini Imerese (Rel. Razzonico), at pgs. 9-11.
\(^88\) Ibid, at pg. 14.
who refined Weiler's insights also tended to underestimate the enduring institutional constraints that dissuade judges from promoting European integration through law.\textsuperscript{89}

In truth, this article suggests that lower national courts face real, quotidian, and path-dependent institutional pressures to evade collaborating with the European Court. Even in Italy, where nearly eight out of ten referrals to the ECJ are submitted by lower courts, those few judges who are enthusiastic about dialoguing with their European counterparts underline the associated reputational costs. The only practices that can be described as "wide" are those that incentivize judges to inhabit fields of law over which they have mastery, to manage large quantities of judicial work by limiting breakups of routine, and to interpret their judicial review powers narrowly. Each of these mutually-reinforcing logics is an obstacle to encounters with EU law and the ECJ.

But what are the implications of such a finding, and does the evidence "disconfirm" the JET? Such a conclusion would be too strong. As recent scholarship in case study methods has shown (Gerring 2007), a "crucial case" can only "disconfirm" a hypothesis to the extent that said hypothesis makes a universal and deterministic causal claim. Ambitious though the works of Weiler (1991), Burley and Mattli (1993) and Alter (1996) may have been, to impute a universalist determinism to them would amount to building a straw man.

A more fruitful approach would be to qualify the explanatory power of the JET by articulating scope conditions. The first qualification is to stress how the thesis is a perceptive account of the effects of European integration on the power of national judges, but may be less robust than previously thought as a causal account of national judges' decision to support or resist European legal integration. Doubtless, the power to disapply national law that contravenes EU

\textsuperscript{89}As Alter (1996: 466) puts it, "lower courts found few costs and numerous benefits in making their own referrals to the ECJ and in applying EC law."
law, or to cite a preliminary ruling from the ECJ when breaking from the jurisprudence of a high court, constitutes an awesome broadening of ordinary national courts' judicial toolkit. Nevertheless, this article suggests that while judges who sought to empower themselves via a dialogue with the ECJ do exist, they were and remain the exception rather than the rule. Understanding why most judges, to this day, choose *not* to empower themselves via EU law is just as important as understanding why a few of them do.

In a sense, these findings support to the initial skepticism of the JET expressed by Stone Sweet and Brunell (1998b: 70-71). However, it deviates from their work by casting doubt on the claim that the judicial construction of Europe nonetheless constitutes a "self-sustaining logic of institutionalization" (Ibid: 72). For national judges – *especially* within lower courts – deviating from their traditional role as efficient, expert appliers of domestic law is not a costless process of institutional conversion, nor is it an obviously desirable transformation of their everyday practice. By drawing on historical institutionalist insights into how "change agents" must confront a pre-existing institutional constellation that constrains their efforts (Thelen and Mahoney 2010), it becomes clear that there is nothing automatically self-reinforcing about lower courts collaborating to promote European integration.

This conclusion can reorient scholars to study subtler yet more diffuse forms of resistance to transnational governance than the explicit rebellions of supreme courts (ex. Rasmussen 2007) or legislative-executive forms of non-codification (ex. Falkner et al. 2008; Martinsen 2015) that have garnered much important attention. Namely, by probing how institutional path-dependencies limit the degree to which European integration is embedded within the routines of local courts, researchers would uncover a privileged context for studying the various ways in which transnational governance is negotiated and resisted "far from its well-recognized, well-marked
official sites" (Sarat and Kearns 1995: 7). This matters because it is at the 'street level' – before courts of first instance – that most ordinary citizens have an opportunity to come into contact with the authority of transnational legal orders like the EU. To the extent that diffuse institutional constraints and entrenched habits dissuade lower courts from fully availing themselves of their new powers under EU law, the "on the ground" reach of Europe's legal authority stands to remain "contained" (Conant 2002).

**Figure 5:** Comparing preliminary references by court level in the six founding EU member states, 1961-2010.

A second conclusion would be that the JET should no longer be assumed to be a sufficient explanation of the causal origins of the judicial construction of Europe, even within the EU's founding member states. As previously noted, out of the six founding EU member states, Italy has by far the greatest and most enduring share of preliminary reference activity originating from lower
courts. Indeed, over the past two decades, references from high courts have approached or surpassed references from lower courts in all founding member states except Italy (see Fig. 5). Furthermore, in two founding member states - the Netherlands and Luxembourg - lower court references have never made up the plurality of reference activity. Thus even in the very contexts that inspired the JET, "reluctance" seems to usually win out over "enthusiasm" in relation to the ECJ. Future research could probe the generalizability of these findings: If diffuse habits resistant to an inter-judicial dialogue are so evident amongst Italian lower courts, then lower courts in other founding member states should also be reluctant to empower themselves by dialoguing with the European Court.

Finally, this analysis bears theoretical insights that span a much wider landscape than Italy or the EU. The EU has served as the prime example of what Hirschl (2007) calls a "juristocracy," or what has more broadly been termed the 'judicialization' of politics (Shapiro and Stone Sweet 2002; Hirschl 2008). The JET has played a central role in solidifying the image of Europe as a self-reinforcing "judicial construction" (Stone Sweet 2004), and it has served as a referent for how transnational legal orders outside of Europe could "transplant" the process of regional integration through law (Alter & Helfer 2017). While it would be incorrect to infer from the foregoing evidence that judicial politics do not underlie supranational governance in Europe, the centrality of the drive to power of national lower courts ought to be contextualized and qualified. "Ruthless egoism" does not do "the trick by itself," as Burley and Mattli (1993: 54) claim, nor is it relatively costless for judges to indulge their drive for self-empowerment, as Alter suggests (1996: 466). Seemingly inconsequential nitty-gritty tasks - like managing one's workload - can ossify into diffuse and institutionalized practices of enormous consequence to the actors responsible for negotiating transnational governance on the ground. And as international and supranational rules
are layered atop domestic institutions and spark a micro-politics of everyday practice, actors hitherto receiving less attention - like stubborn "Eurolawyers" (Vauchez 2015) who push judges to break out of their routines and avail themselves of transnational law - may oftentimes play a more central role than judges alone.

In short, re-contextualizing judges within a broader constellation of actors and webs of quotidian practice that resist institutional change stands to uncover both the practical limits of - and alternative pathways to - the judicial construction of transnational governance.
7. References


Wind, Marlene. 2010. “The Nordics, the EU and the Reluctance Towards Supranational Judicial