CHAPTER FIVE

THE FIRST EURO-LAWYERS AND THE INVENTION OF A REPERTOIRE

> *In the first cases, the lawyer's role was fundamental . . . [look at] the history of the construction of the key decisions of [the European Court of Justice in] Luxembourg. Where, a certain number of lawyers whom you could count on the fingers of one hand, in each member state . . . These were not the best lawyers of the bar, those active in the secretariat of the bar association, et cetera. No, these were insiders . . . this was the band, all the way into the beginning of the 1980s.*
>
> — Jean-Pierre Spitzer, lawyer & ex-clerk at the European Court[1]

5.1 EXTRATERRESTRIALS IN HISTORICAL CONTEXT

"Weird." "Storytellers." "Extraterrestrials."[2] As lawyers and political entrepreneurs, this is how this chapter's protagonists recall being first perceived.

It is not easy to peek behind the "messianism of European integration"[3] and travel back to "a moment in time when there was precisely no common sense about what Europe's polity was about and what its connection with the law ought to be."[4] But by tackling this challenge, we can retrace the birth of a politics of lawyers that fueled the judicial construction of Europe.

Let us set the stage in all its initial idleness. At the dawn of the 1960s in France, as in Italy and Germany, "it was sufficient

[1] Interview with Jean-Pierre Spitzer, Cabinet Saint Yves Avocats and ex-référendaire at the ECJ, September 20, 2017 (in-person).

[2] Interview with Paolo De Caterini, lawyer at Studio Cappelli-De Caterini, law professor at LUISS Guido Carli University, and ex-Commission civil servant, December 27, 2017 (in-person); Historical Archives of the European Union (HAEU). 2004. Histoire interne de la Commission europeenne 1958–1973, "Entretien avec Wilma VISCARDINI (25.02.2004)," at 6; Interview with Jean-Pierre Spitzer, September 20, 2017.

[3] Weiler, Joseph. 2012. "In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration." *Journal of European Integration* 34(7): 825–841.

[4] Vauchez, *Brokering Europe*, at 6.

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to push open the doors of the law schools to take measure" of European law's hollow reach within the member states: "No courses or working groups dedicated to Community law existed, no research or documentation centers, nor chairs, and even less so degree tracks in Community law."[5] Law professors invoking the supremacy and direct applicability of European law were "dismissed" by colleagues for "what they widely considered fictitious legal analyses."[6] In Germany, Hans-Peter Ipsen's Hamburg School first advocated for the supremacy of European law, but even its most prominent graduates (like Gert Nicolaysen) were so marginalized that they struggled to find academic appointments outside of Hamburg.[7] In Italy, former European Court of Justice (ECJ) judge Nicola Catalano's efforts to promote a federalist vision of European law became a "victim of [the] professors" whose vigorous opposition "isolated [it] in the public debate."[8] And in France, when ex-government minister Pierre-Henri Teitgen opened the first research center dedicated to European law at the University of Paris in 1963, faculty scorned the move, confidently teaching students that "Community law does not exist."[9] It was not just national governments and supreme courts that tended to resist a Eurofederalist agenda: even the law schools were "zealous guardians of national and international State sovereignty."[10]

This state of affairs meant that "practitioners held a *de facto* monopoly over the interpretation of Community law."[11] Lawyers founded transnational associations like AJE (Association des Juristes Européens) in 1954 and FIDE (Fédération International pour le Droit Européen) in 1961, cultivating financial support from the European Commission.[12] Lawyers founded the first European law journals, like

[5] Bailleux, Julie. 2012. "Penser l'Europe par le droit." PhD dissertation, Université Paris 1 Panthéon-Sorbonne, at 422.

[6] Boerger, Anne, and Morten Rasmussen. 2014. "Transforming European Law." *European Constitutional Law Review* 10(2): 199–225, at 208.

[7] Interview with Ernst-Joachim Mestmäcker, former director of the Max Planck Institute for International and Comparative law, January 26, 2018 (in-person).

[8] Vauchez, *Brokering Europe*, at 78; Boerger and Rasmussen, "Transforming European Law," at 208.

[9] Bailleux, "Penser l'Europe par le droit," at 462.

[10] Vauchez, *Brokering Europe*, at 77.

[11] Ibid.

[12] Rasmussen, Morten. 2012. "Rewriting the History of European Public Law." *American University International Law Review* 28: 1187–1222, at 1207; Byberg, Rebekka. 2017. "A Miscellaneous Network: The History of FIDE 1961–94." *American Journal of Legal History* 2017(57): 142–165.

the *Rivista di Diritto Europeo* in Italy (1961), the *Cahiers de droit européen* in France (1965), and *Europarecht* in Germany (1966).[13] As early as the late 1950s, law firms like Baker & McKenzie and Cleary Gottlieb opened offices in Brussels, with an eye to influencing policymaking at the European Commission.[14] In the words of one of the first Euro-lawyers, "we weren't trying to be protagonists – we just happened to be the only actors on the stage!"[15]

These political initiatives featuring academics, lawyers' associations, and incipient lobbying efforts certainly contributed to the creation of a transnational legal field.[16] But recent studies have also surfaced that these efforts had limited direct impact on the ground.[17] At best they constituted an inchoate patchwork of initiatives rather than a full-fledged transnational "legal complex," "jurist advocacy movement," or "litigation support structure."[18] On their own, they could not have spurred bureaucratically constrained judges interspersed throughout national judiciaries to hold states accountable to their treaty obligations and to partner with the ECJ to advance European law. Lawyers thus stood to matter most if they could weaponize lawsuits to make newly imagined possibilities concrete, to mobilize courts against their own governments. Doing so would mean not being "passive actors simply responding to externally imposed legal opportunities but instead play[ing] a role in creating their own legal opportunities."[19] To make the unthinkable thinkable and the exceptional less exceptional, they would have to dismantle walls: not physical barriers reified by border patrol, but ubiquitous knowledge deficits and habits embodied by courts and clients.[20]

[13] Boerger and Rasmussen, "Transforming European Law," at 213–214.
[14] Vauchez, *Brokering Europe*, at 63.
[15] Interview with Paolo De Caterini, December 27, 2017.
[16] Vauchez, *Brokering Europe*; Rasmussen, Morten. 2013. "Establishing a Constitutional Practice." In *Societal Actors in European Integration*, Jan-Henrik Meyer and W. Kaiser, eds. Basingstoke: Palgrave Macmillan; Bailleux, "Penser l'Europe par le droit"; Avril, "Costume Sous la Robe."
[17] Bernier, Alexandre. 2012. "Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950–70." *Contemporary European History* 21(3): 399–415; Byberg, "Miscellaneous Network"; Bernier, "France et le Droit Communautaire."
[18] On these three concepts, see, respectively: Halliday, et al. *Fighting for Political Freedom*; Alter, "Jurist Advocacy Movements"; Epp, *Rights Revolution*.
[19] Vanhala, "Legal Opportunity Structures," at 525.
[20] The struggle against these institutional obstacles is not unique to postwar Europe. For an exemplar from Latin America, see: González-Ocantos, *Shifting Legal Visions*.

In this chapter we meet the political entrepreneurs who tackled these resistances to court-driven change, cloaked in the sheepskin of rights-conscious clients and activist judges. "Keep hitting the wall, until it crumbles down" became a favorite motto of one of these Euro-lawyers in Hamburg.[21] Those who knew Italy's first Euro-lawyer similarly describe him as no "ordinary lawyer … [for] there was a wall initially, a reticence."[22] Part members of their local community and part insiders of an emergent network of European courts, the first Euro-lawyers worked this boundary position to their advantage. Relatively uncoordinated yet facing shared institutional obstacles, they invented a repertoire of strategic litigation that was transposable from place to place. By brokering connections with local import-export and agricultural associations, they sought out clients willing to deliberately break national laws violating European law, occasionally turning to friends and family if a "real" client was unavailable. By mobilizing their access to courts and expertise as insiders, they educated national judges via detailed memos serving as crash courses in European law. And they ghostwrote the referrals to the ECJ that judges were unable or reluctant to write themselves, enabling the European Court to deliver transformative judgments that could serve as cornerstones for future litigation. These pioneers thus mobilized what are often described as mere *attributes* of lawyering – social and institutional embeddedness; substantive and process expertise[23] – to proactively exercise their *agency*. They cultivated the seeds of a transnational legal consciousness, linking civil society and international institutions via national courts.

To substantiate these claims, I draw upon oral history interviews with first-generation Euro-lawyers alongside the younger colleagues who knew them and appropriated their repertoire for court-driven change. I complement these testimonies with novel secondary historical research and newspaper records, a geocoded dataset of the first national court cases referred to the ECJ, and dozens of previously restricted dossiers concerning these lawsuits. I begin in Sections 5.2 and 5.3 by reconstructing the identities and motives animating the first Euro-lawyers. In Sections 5.4 and 5.5, I then trace the litigation repertoire they

[21] Interview with Tobias Bender and Corina Kögel, Finanzgericht Hamburg, January 17, 2018 (in-person), referring to Klaus Landry.

[22] Interview with Luigi Daniele, University of Rome-Tor Vergata and ex-référendaire at the ECJ, September 27, 2016 (in-person), referring to Nicola Catalano.

[23] McGuire, "Repeat Players in the Supreme Court"; Kritzer, *Legal Advocacy*.

invented and the concealed ways it cajoled some national courts to turn to the ECJ and explore a more active policymaking role. Finally, in Section 5.6 I begin to identify the scope conditions of Euro-lawyering as a repertoire of institutional change. But first, we need to get a better sense of who these entrepreneurs were, and what they did. So we begin by traveling to a humble local court in the early 1970s.

5.2 "BRINGING KNOWLEDGE OF EUROPE TO THE PERIPHERY"

5.2.1 The Public Transcript

If the paper trail[24] of court documents is all you had to go by, you would have good reason to think that Mr. Mantero was out of his mind, and that Mr. Donà was the pettiest man in the world. For the official record before the *giudice conciliatore* (justice of the peace) of the northern Italian town of Rovigo on February 7, 1976 curiously reads as follows.

Mario Mantero was the ex-president of the Rovigo football club. In this capacity, he tasked Gaetano Donà – a frequent traveler who lived abroad in Belgium – with recruiting foreign football players. Mr. Donà did so by spending 31,000 lire (approximately $37) to publish an ad in a Belgian sports magazine (see Figure 5.1).[25]

Inquiries started rolling in, and one would think Mr. Mantero would have been delighted. Instead, the court records show that he refused to consider any applicants and to reimburse the expenses Mr. Donà had incurred to publish the ad. Had there been a misunderstanding? Not at all: Mr. Mantero did not deny that he had entrusted Mr. Donà to do exactly as he did. Instead, he argued that Mr. Donà had "acted prematurely," given that the Italian Football Federation's regulations "blocked" the hiring of foreign football players.[26]

It would seem that Mr. Donà had been sent down a rabbit hole. A bad joke or a careless oversight, perhaps, but in the end $37 was all that he had materially incurred. Life goes on. Not so, according

[24] Here, I borrow James Scott's distinction between official political action (what he terms the "public transcript") and that which remains concealed, subversive, or private – what he terms the "hidden transcript." See: Scott, *Domination and the Arts of Resistance*, at 4–5, 183–184.

[25] CJUE-1807, *dossier de procedure originale*, *affaire* 13/76, Gaetano Donà contro Mario Mantero. Historical Archives of the European Union (HAEU), at 5.

[26] Ibid., at 7.

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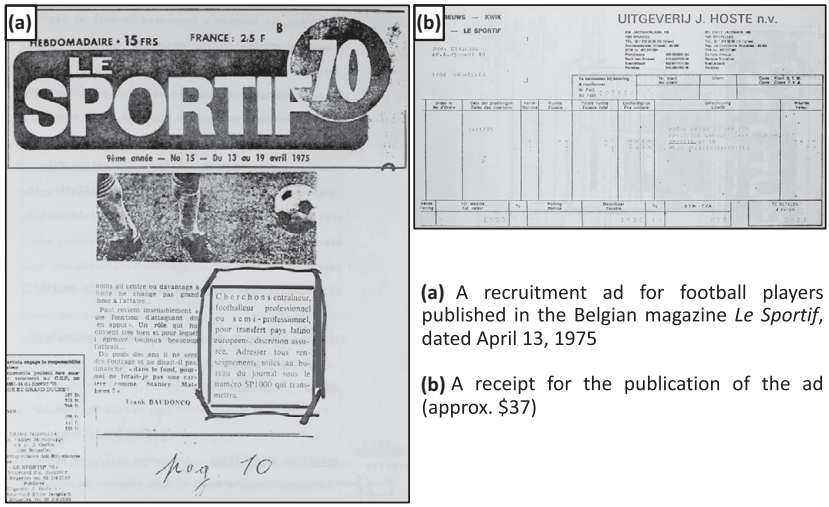

(a) A recruitment ad for football players published in the Belgian magazine *Le Sportif*, dated April 13, 1975

(b) A receipt for the publication of the ad (approx. $37)

Figure 5.1 Two puzzle pieces from the *Donà* v. *Mantero* case
Source: Historical Archives of the European Union (HAEU) CJUE 1807, affaire 13/76, Gaetano Donà contro Mario Mantero, at 22–24.

to the court records: Mr. Donà, in a melodramatic act of righteous indignation, sued. Before Rovigo's justice of the peace, he argued that this was not about the money: Mr. Donà had provided "useless hope to the interested Belgian players," thereby "compromising his personal credibility and prestige."[27]

But there was more: supposedly this was not just a dispute about national law. To Mr. Mantero's claims that he had acted "prematurely," Mr. Donà countered that the regulations of the Italian Football Federation banning foreign players were contrary to Articles 7, 48, and 59 of the Treaty of Rome. These articles, Mr. Donà noted, promote the free movement of workers within the European Community and guarantee nondiscrimination in employment on the basis of nationality.[28] Mr. Donà "regretted that [these] principles, in which he firmly believes, are held to be of so little value by the Italian Football Federation." In short, $37 were $37 too many for an expense derived from a repugnant law.

Unconvinced? Perhaps, Mr. Donà conceded; if so, Mr. Justice, why not ask a faraway court in Luxembourg to interpret the provisions of European law?[29]

[27] Ibid., at 12.
[28] Ibid., at 11–12.
[29] Ibid., at 11.

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At this point, one would think that Mr. Mantero would have begun waving his hands about to hold his ground: this is a domestic dispute, he could have argued, and Mr. Donà is merely trying to distract the honorable judge with foreign laws that do not apply. But in yet another curious act, Mr. Mantero did the opposite: he joined Mr. Donà in requesting a referral to the European Court. One can imagine the befuddled look on the judge's face upon receiving the parallel requests to solicit an international court over a $37 dispute.

And so the judge did, but this raises yet another curiosity: faced with soliciting a little-known court over a little-known set of rules, this part-time, local judge referred four syllogistically ordered and carefully crafted questions:

1. Do Articles 48 and 59 and perhaps Article 7 confer upon all nationals of any Member State of the Community the right to engage in their occupations anywhere in the Community either as employed persons or as independent persons providing services?
2. Do football players also enjoy the same right since their services are in the nature of a gainful occupation?
3. If so, does such a right prevail also with regard to rules issued by a national association which is competent to control the game of football on the territory of one Member State when such rules render the participation of players in matches dependent on their membership of the association itself, but reserve membership exclusively to players who are nationals of the State to which the association belongs?
4. If so, may such a right be directly invoked in the national courts and are the latter bound to protect it?[30]

This was a model referral from the European Court's perspective. Rather than vaguely citing "European Community law," the referring judge noted the precise legal provisions relevant to the dispute. He clearly identified the interpretive crux of the case, and he even helpfully suggested the path to take: "Since [football players'] services are in the nature of a gainful occupation," the clear implication was that European protections for the free movement of workers should apply.

The ECJ agreed. Within five months, it released a pathbreaking judgment applicable in all member states: "Rules or a national practice, even adopted by a sporting organization, which limit the right to take part in football matches as professional or semi-professional players

[30] Case 13/76, *Gaetano Donà and Mario Mantero* [1976], ECR 1333, at 1335.

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solely to the nationals of the State in question, are incompatible" with the Treaty of Rome, unless said matches are purely recreational. Furthermore, Articles 48 and 59 "seek to abolish any discrimination against a person providing a service by reason of his nationality or the fact that he resides in a Member State other than that in which the service is to be provided," and they "have a direct effect in the legal orders of the Member States and confer on individuals rights which national courts must protect."[31]

And so it was that a $37 dispute created a legal opportunity to liberalize Europe's football market, catalyzing a lengthy political battle and series of regulatory reforms. These would culminate with the ECJ's 1995 *Bosman* judgment, which banned any national restrictions on the number of foreign players and enabled transfers without the payment of a fee.[32] From the early 1980s to the present day, the percentage of foreign players in the "big-5" European leagues rose steadily from 9.1 percent to 46.7 percent.[33]

But let us not get ahead of ourselves: what of all those curiosities that produced this pathbreaking outcome in the first place? We might be left to marvel or malign how the most inconsequential of disputes could serve as fodder for activist judges. For instance, few scholars of EU law can resist citing how the ECJ's 1964 *Costa* v. *ENEL* judgment proclaiming the supremacy of European law originated from a $3 dispute over an unpaid electric bill.[34] Yet insofar as these cases fueled the judicial construction of Europe, judicial activism and rights-conscious litigants hardly deserve all the credit. The hidden story behind *Donà* v. *Mantero* suggests why.

5.2.2 The Hidden Transcript

The story begins with the affair's hitherto unmentioned choreographer: Wilma Viscardini. Viscardini was a trailblazer in more ways than one. In the mid-1950s, she was the first woman admitted to the Rovigo bar: "It almost became an event!" she remembers.[35] After meeting a university graduate with ties to the European Federalist Movement –

[31] Ibid., at 1342.
[32] Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL* v. *Jean-Marc Bosman* [1995], ECLI:EU:C:1995:463.
[33] Poli, Raffaele, Loïc Ravanel, and Roger Besson. 2016. "Foreign Players in Football Teams." *CIES Football Observatory Monthly Report* 12: 1–9, at 1.
[34] Or, precisely, 1925 lire; see: 6/64, *Costa* v. *ENEL*, ECR 587.
[35] HAEU, "Entretien avec Wilma VISCARDINI," at 3.

Gaetano Donà – Viscardini became impassioned by an obscure new treaty that had never been discussed in law school. She successfully applied to research the Treaty of Rome and the ECJ's fledgling case law at the Centre Universitaire du Droit Européen in Strasbourg, while Donà joined the Secretariat of the newly established European Commission.

It did not take long for Viscardini to set her sights on the Commission's Legal Service. After all, under Michel Gaudet's leadership, the service was developing the principles of direct effect and supremacy of European law later recognized by the ECJ in *Van Gend en Loos* and *Costa*.[36] "Mademoiselle, we have no need for secretaries," was Gaudet's initial reply to Viscardini.[37] Her persistence eventually paid off, and in the 1960s and early 1970s she represented the Commission in a number of foundational cases before the ECJ.[38] And it was while they were working at the Commission that Viscardini and Donà got married.

With time, however, the limits of their work inside the Brussels bubble became clear. "From the point of view of our Europeanist convictions," Viscardini recalls, "we had the feeling, at a certain moment, that our work would have been much more useful in Italy rather than in Europe within the Community … that European integration was a step that signaled the importance of bringing knowledge of Europe to the periphery, that it couldn't be bottled up at the vertices."[39] So in 1974, they returned to Italy to "demonstrate in the reality of things that European integration was not a mere project, that it already had a concrete impact in various sectors … that it didn't just concern States and institutions, but also individual citizens and their businesses."[40]

This was not going to be an easy task. Well into the 1970s and 1980s, "judges, lawyers, and law professors did not have, for the most part, the faintest idea what [European law] was about." On the flip side, clients involved in litigation usually "brought their problem to lawyers trained exclusively in national law, such that the possibility

[36] 26/62, *Van Gend & Loos*, ECR 1; 6/64, *Costa* v. *ENEL*, ECR 587. See: Bailleux, Julie. 2013. "Michel Gaudet, a Law Entrepreneur." *Common Market Law Review* 50: 359–368.

[37] HAEU, "Entretien avec Wilma VISCARDINI," at 4.

[38] Most prominently *International Fruit Company*: Joined Cases 51/71 to 54/71, *International Fruit Company NV and others* v. *Produktschap voor groenten en fruit* [1971], ECR 1107.

[39] HAEU, "Entretien avec Wilma VISCARDINI," at 6.

[40] Interview with Wilma Viscardini, Donà Viscardini Studio Legale and ex-lawyer at the Commission Legal Service, September 29, 2017 (via e-mail).

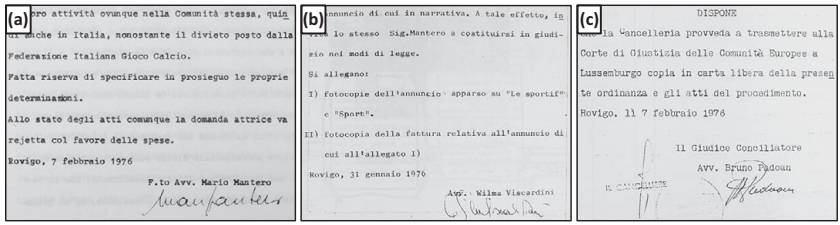
of invoking European law is not even under consideration."[41] Simply telling anyone who would listen about Europe seemed insufficient: as Viscardini and Donà embarked on a multiyear speaking tour "in schools, universities, clubs … they looked at us a bit like we were recounting fairytales."[42] It would take a sustained and proactive effort to transform this state of affairs.

Which brings us to football. Well before Silvio Berlusconi became the most renown Italian to harness football as a springboard for politics,[43] Viscardini and Donà recognized that football's mobilizational potential extended beyond the domain of athletics: "Our intent was to make people aware … that the principles of European law impacted the lives of all citizens no matter their area of work and well beyond what they could expect. Football seemed like an important sector to affirm the principle of the free movement of workers given that it was a very salient sector in public opinion." After speaking with the managers of various football clubs who "complained of the "autarchy" imposed by the Italian Football Federation," the "idea of 'constructing' a leading case to liberalize the football market" was born. There was just one problem: when Donà would share their idea with club managers, "nobody believed him."[44]

Yet what strangers lack in vision, friends and family can make up in trust. In many ways, *Donà* v. *Mantero* was a test lawsuit *costruita a tavolino* – "constructed tableside," as the Italian phrase goes. The lead role of plaintiff would be played by Donà himself. Since he would bear the risk of failure, it was important not to get carried away: a cheap ad buy in a Belgian magazine would be sufficient to trigger the dispute before a friendly local judge, yet minimal as a sunk cost should their efforts fail. As for the defendant, "we consulted and came to an agreement with our friend Mantero," who was himself a lawyer. Mantero would task Donà to do something prohibited by national law, get sued, and support Donà's request to solicit the ECJ. Finally, Viscardini conferred with the prospective referring judge, himself a trusting colleague, to test the waters:

> We set up the preconditions for a preliminary reference to the European Court. We spoke about it to the Justice who signaled that he was

[41] Ibid.
[42] HAEU, "Entretien avec Wilma VISCARDINI," at 6.
[43] Markovits, Andrei, and Lars Rensmann. 2013. *Gaming the World*. Princeton, NJ: Princeton University Press, at 9.
[44] Interview with Wilma Viscardini, September 29, 2017.


(a)
...ro attività ovunque nella Comunità stessa, quin...
...di anche in Italia, nonostante il divieto posto dalla
Federazione Italiana Gioco Calcio.
Fatta riserva di specificare in prosieguo le proprie
determinazioni.
Allo stato degli atti comunque la domanda attrice va
rejetta col favore delle spese.
Rovigo, 7 febbraio 1976
F.to Avv. Mario Mantero

(b)
...nnuncio di cui in narrativa. A tale effetto, in
...ne lo stesso Sig.Mantero a costituirsi in giudi-
zio nei modi di legge.
Si allegano:
I) fotocopie dell'annuncio apparso su "Le sportif"
e "Sport".
II) fotocopia della fattura relativa all'annuncio di
cui all'allegato 1)
Rovigo, 31 gennaio 1976
Avv. Wilma Viscardini

(c)
DISPONE
...la Cancelleria provveda a trasmettere alla
Corte di Giustizia delle Comunità Europee a
Lussemburgo copia in carta libera della prese
te ordinanza e gli atti del procedimento.
Rovigo, li 7 febbraio 1976
Il Giudice Conciliatore
Avv. Bruno Padoan

Figure 5.2 Three signatures, one author: the defendant's **(a)** & plaintiff's **(b)** briefs and judge's referral to the ECJ **(c)** in *Donà* v. *Mantero*
Source: HAEU CJUE 1807, affaire 13/76, Gaetano Donà contro Mario Mantero, at 8, 16, 21.

> willing to send a reference, and so it was. Obviously, given my specific competences and experience, I had to prepare everything myself, both the [parties'] briefs for the lawsuit before the Justice as well as the preliminary reference itself. This was all possible because Mantero and the Justice were both lawyers who knew me and my husband personally as Rovigo natives, and they placed their maximum trust in us.[45]

Once we reconstruct the hidden transcript of the lawsuit that would spark the gradual liberalization of Europe's football market, all curiosities disappear. And it becomes clear how a humble, semiprofessional judge with no training in European law managed to submit a path-breaking reference to the ECJ: the lawsuit had been ghostwritten by a seasoned Euro-lawyer instead (Figure 5.2).

5.2.3 A Modular Repertoire

Donà v. *Mantero* demonstrates that intercepting the concealed politics animating the judicial construction of Europe requires an archeology, that we do not take court decisions or official summaries of litigation at face value. But there is a postscript to this story: the case also exemplifies the invention of a repertoire of Euro-lawyering. It evidences a toolkit for court-driven change that is "modular:" transposable, reconfigurable, and diffusable from place to place.[46] Take Viscardini

[45] Ibid.

[46] On the concept of "modular" repertoires of social action, see: Tarrow, Sidney. 1993. "Modular Collective Action and the Rise of the Social Movement." *Politics & Society* 21: 647–670; Tilly, Charles. 1995. *Popular Contention in Great Britain 1758–1834*. Cambridge, MA: Harvard University Press; Wada, Takeshi. 2012. "Modularity and Transferability of Repertoires of Contention." *Social Problems* 59(4): 544–571.

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and Donà's son – Gabriele Donà, who is now one of Italy's leading Euro-lawyers and president of the European Lawyer's Union (UAE). He emphasizes that *Donà* v. *Mantero* represents "a classic lawsuit constructed tableside … no case serves as a better example" of how "everything rests upon the lawyer and his knowledge of EU law."

According to Donà, the lawyer's role is essential at two stages. First, there is the dispute's origin and the construction of the "facts of the case." Here, to "'construct' could mean to have the idea … but it could also mean to truly construct it … in my EU law casebook that I studied at the university … it would have been called a *procès bidon* – literally a vehicle, fabricated." Second, there is the art of cajoling the national judge into soliciting the ECJ. Here, lawyers "systematically provide the judge with a preliminary reference in brackets … we're not sure what type of a judge is before us. We don't know if the judge is EU oriented or not. We don't know if they've understood … we advise all our colleagues with whom we discuss preliminary references to do likewise. It's absolutely fundamental."[47]

Like mother, like son: in his own EU lawsuits, Donà leverages the same repertoire used by Viscardini in *Donà* v. *Mantero*. Consider a different lawsuit in a different issue area lodged in a different country some four decades later. In 1997, the Council of the European Union (EU) passed Regulation No. 894/97, banning the use of drift nets for catching bluefin tuna.[48] The goal was to protect dolphins from becoming tangled and killed in the nets. But some fishermen's associations thought that the ban was disproportionate: dolphins could be kept away with sonar devices without imposing a blanket ban on drift nets. One of these associations in France turned to Donà and Viscardini, and they got to work constructing a case. The strategy was simple: fisherman X (Mr. Bourgault) would use the banned drift net to catch tuna, and fisherman Y (Mr. Pilato) would sue him "for the loss that he suffered on account of the unfair competitive practice employed."[49] Donà recounts the affair's mischievous choreography thusly:

[47] Interview with Gabriele Donà, Donà Viscardini Studio Legale in Padova and President of the UAE, August 26, 2017 (via Skype).

[48] Council Regulation (EC) No. 894/97 of April 29, 1997, "laying down certain technical measures for the conservation of fishery resources," *Official Journal* 1997 L 132, at 1, as amended by Council Regulation (EC) No. 1239/98 of June 8, 1998, *Official Journal* 1998 L 171, at 1.

[49] Case C-109/07, *Pilato* v. *Bourgault* [2008], ECLI:EU:C:2008:274, at para. 16.

> But we asked ourselves: how can we construct the case? We did it in the same way we discussed [for *Donà v. Mantero*]: that is, to literally construct [it, such that] a professional fisherman would return to port with his fishing line and publicly display the fact that he had fished tuna! [laughter] And that it be evident that he had fished the tuna with the net that had been banned. One of his competitors, on the same dock, saw this and sued him for unfair competition … Obviously, all of this was constructed tableside. We did it on purpose – even the fisherman who sued was in on it! … The other defended himself saying: "Yes, I fished the tuna with the banned net, but I think the ban is illegitimate." And obviously we defended this fisherman and asked the court to refer the case to the ECJ.

Comparing the litigation strategies in *Pilato* v. *Bourgault* in 2008 to *Donà* v. *Mantero* in 1976, only two differences stand out. First, whereas Viscardini orchestrated the breaking of *national* law to validate a "higher" *European* law, Donà orchestrated the violation of EU *secondary* law (a regulation) to validate a "higher" principle of EU *primary* law (proportionality). Second, Donà's efforts failed on technical grounds: the ECJ ruled that the fishing tribunal did not constitute an independent "court" capable of submitting a reference. "Suing for Europe"[50] is "a lot of hard work,"[51] Donà admits. Two steps forward, one step back.

5.3 IDENTITIES AND MOTIVES

Wilma Viscardini was not alone. She is part of a small cohort of first-generation Euro-lawyers who blazed the way for subsequent practitioners. But who were they, and what motivated their political entrepreneurship?

Following scholars of European integration known as the "neofunctionalists," it can seem intuitive to attribute the instrumentalism of the now dominant European business lawyers to pioneers past. Yet, this would be historically inaccurate. A practitioner who "met many of the people who worked at that time" describes the 1960s and 1970s as "the age of the pioneers, an admirable age of people who believed in Europe, who were passionate."[52] But what did it mean to "believe in

[50] Kelemen, R. Daniel. 2006. "Suing for Europe." *Comparative Political Studies* 39(1): 101–127.
[51] Interview with Gabriele Donà, August 26, 2017.
[52] Interview with Charles-Henri Leger, Gide Loyrette Nouel in Paris, September 12, 2017 (in-person).

Europe?" Undoubtedly, the first Euro-lawyers perceived that they might eventually reap the economic benefits of their craft. But they cannot be characterized as "ruthless egoists" or crude utilitarians.[53] Surviving World War II (WWII) had inculcated in them a staunch commitment to fighting nationalist policies and moderating state power.[54] Therein lay the promise of building a transnational community forged through courts and law, a vision that burned most vigorously in those who began their careers at fledgling European institutions and then returned home. And all these lawyers embodied various forms of pleasure in agency: a drive to participate, an attraction to novelty, a mischievous rebelliousness.

In the shadow of the World War II, a vanguard of surviving lawyers saw the then-uncertain project of European integration as a deeply personal calling. All of the first-generation Euro-lawyers who became the most prolific solicitors of national court referrals to the ECJ were old enough to remember the War (see Figure 5.3 for the full list). Peter-Christian Müller-Graff, a law professor at the University of Heidelberg, was friends with several of these pioneers in Germany, and recalls their motives thusly:

> When you are a practicing lawyer, you always have to make your living, so you come to certain economic mandates … But when you ask me now, looking into the intrinsic motivations of these pioneers, to look into their soul … they all had the experience of WWII. They knew, that it was essential and necessary to have a new form of order in Europe … Those who experienced WWII all knew why you should never have war again. They were all imprinted by this experience.[55]

This conclusion echoes the memories of the surviving first-generation Euro-lawyers themselves. Robert Saint-Esteben, who became one of France's first European competition lawyers, "explain[s] why today, at a very old age vis-à-vis 1964, I've never abandoned EU law": before meeting Pierre-Henri Teitgen as a student at the University of Paris and joining the Commission in mid-1960s, Saint-Esteben grew up in

[53] Burley and Mattli, "Europe before the Court," at 54; Haas, *Uniting of Europe*, at xxxiv.

[54] On how this fits a broader pattern of "political lawyering," see: Halliday and Karpik, *Lawyers and the Rise of Western Political Liberalism*. Halliday et al., *Fighting for Political Freedom*, at 3–4.

[55] Interview with Peter-Christian Müller-Graff, professor at the University of Heidelberg and ex-intern at the Commission, November 28, 2017 (in-person, rough written transcript). Müller-Graff was speaking about Dietrich Ehle, Arved Deringer, Hans-Jürgen Rabe, Gert Meier, and Fritz Modest.

Country	Euro-lawyers	Born before WWII?	Worked at European Institution?	Member of European lawyers' association?	# Refs. to ECJ (Total)	# Refs. Pre-1980	# Cases argued before ECJ	Time span
Italy	Fausto Capelli and Giovanni Maria Ubertazzi (Milan)	Yes (both)	No	Yes (AIGE)	78	42	97	1970–2018
	Emilio Cappelli and Paolo De Caterini (Rome)	Yes (both)	Yes (Commission)	Yes (FIDE, AIGE)	25	9	35	1971–2014
	Wilma Viscardini (Padova)	Yes	Yes (Commission)	Yes (UAE)	19	3	35	1975–2015
	Nicola Catalano (Rome)	Yes	Yes (ECSC, ECJ)	Yes (FIDE, AIGE)	16	15	27	1968–1982
France	Lise and Roland Funck-Brentano (Paris)	Yes (both)	No	Yes (AJE, UAE)	15	4	26	1977–1997
	Marcel Véroone (Lille)	Yes	No	Yes (CCBE)	9	6	16	1974–1988
	Paul François Ryziger (Paris)	Yes	Yes (ESCS)	Yes (FIDE)	6	1	12	1962–1992
	Robert Collin (Paris)	Yes	No	Yes (AJE)	8	5	11	1964–1993
Germany	Fritz Modest, Jürgen Gündisch, Klaus Landry, Barbara Festge, Gabriele Rauschning (Hamburg)	Yes (all)	No	Yes (FIDE, UAE, DNRV)	140	65	163	1967–2014
	Dietrich Ehle (Cologne)	Yes	No	?	90	36	143	1962–2019
	Peter Wendt (Hamburg)	Yes	No	?	22	18	26	1965–1985
	Gert Meier (Cologne)	Yes	No	Yes (FIDE)	17	6	21	1973–2001

Figure 5.3 The leading first-generation Euro-lawyers in Italy, France, and Germany
Note: Beyond FIDE and AJE, association names are: AIGE, Associazione Italiana Giuristi Europei; DNRV, Deutsch-Niederländische Rechtsanwaltsvereinigung; UAE, Union des Avocats Européens; CCBE, Conseil des Barreaux Européens.

the Basque country. There, the wartime disruption of hospital services nearly cost him his life: "The Basque country has been divided for centuries by a state border … [so] the choice of overcoming borders was very profound for me … I was also born during the War, and in my infancy I lived the consequences of the War, its hardships. My own health failed, and my parents told me later that I was in grave danger during the occupation."[56] The "euphoric moment of the birth of EU law and the construction of Europe" has thus never left him,[57] just like a fellow Parisian pioneer, Lise Funck-Brentano, who "never ceased to dedicate her life for European integration" and to constructing "emblematic lawsuits" before the ECJ. Born in Germany in 1929 to a Jewish family, her commitment to uniting Europe through law was shaped by a childhood on the run between "exodus and exile, escaping deportation by one day before seeking refuge in Switzerland … from her Jewish roots and lived History she drew the courage to defend her resolutely European convictions such that the horror would never recur."[58]

In Hamburg, Fritz Modest survived not just World War II, but World War I as well.[59] The impact of these traumas was personified by a towering colleague at Modest's law firm: Jürgen Gündisch. Born in Dresden and raised in Budapest, Gündisch's brothers were both killed during the War. In December 1944, he escaped the Red Army's invasion of Hungary by fleeing to his grandmother's residence in Dresden, where they survived the Allies' air raids.[60] This experience clearly shaped his identity: Gündisch's family remembers how "with heart and soul he was a lawyer and a convinced European." Indeed, Gündisch closed his second book on European law by arguing that transnational "shared values" could broker unity as democratically legitimate as that of nation states.[61] This portrait is corroborated by

[56] Interview with Robert Saint-Esteben, Bredin Prat in Paris and former intern at the European Commission, November 13, 2017 (in-person).

[57] Ibid.

[58] Pantade, Philippe. 2020. "Lise Funck-Brentano, avocate spécialiste du droit européen, est morte." *Le Monde*, December 9.

[59] Interview with Klaus Landry, Graf Von Westphalen in Hamburg, January 9, 2018 (in-person).

[60] Gündisch, Konrad. 2009. "Dr. Jürgen Gündisch: Top-Jurist und engagierter Hamburger Bürger." *Seiebenbuerger.de*, March 16.

[61] Gündisch, Konrad. 2018. "Mit Leib und Seele Rechtsanwalt und überzeugter Europäer, im Herzen ein Siebenbürger Sachse: Nachruf auf Dr. Jürgen Gündisch." *Seiebenbuerger.de*, April 5. Gündisch's two books on European law are *Rechtsschutz in der Europäischen Gemeinschaft: ein Leitfaden für die Praxis* (Boorberg, 1994) and

Klaus Landry, one of Modest's mentees who would become the iconic figure of the successor firm, Graf Von Westphalen. "I remember the Second World War. And I remember bombing nights, so we have a different approach to Europe. When I am asked 'what are you?' I tend to say 'I'm European, and not German.' "[62] Landry's father had his textile factory expropriated during the War.[63] Hence he and his colleagues "are grateful for Europe, but I must be careful, because some people might say: 'Grandfather speaks always about the war!' But it's a fact that for us Europe was – it was a gift . . . Fritz Modest, who survived two world wars, was quite aware of that gift."[64]

Regardless of the degree to which surviving the War underlay their commitment to European integration, these first-generation Euro-lawyers were convinced Europeanists. A majority were active in FIDE or its national affiliate associations. Nicola Catalano drafted memos brainstorming FIDE's very creation with the head of the Commission Legal Service, Michel Gaudet.[65] Others, such as Giovanni Maria Ubertazzi, Paul-François Ryziger, Paolo De Caterini, and Lise Funck-Brentano co-founded or become presidents of FIDE's national branches.[66] In Germany, alongside the likes of Modest, Gündisch, and Landry we find Barbara Festge, a lifetime "fan of Europe"[67] and FIDE member who also served on the executive committee of the UAE;[68] Gert Meier, similarly active in FIDE and a self-described "liberal lawyer who brings cases for the expressed purpose of developing EC law";[69] and Dietrich Ehle, who was "of course [interested in] developing the law" given that he "had friends at the European Commission [with whom] we discussed this."[70] In Italy, we discover a "convinced European" in Wilma Viscardini,[71] we learn that Fausto Capelli

Rechtsetzung und Interessenvertretung in der Europäischen Union (Stuttgart, 1999), the latter co-authored with Petrus Mathijsen, himself a World War II veteran, Euro-lawyer in Brussels, and former Commission civil servant.

62 Interview with Klaus Landry, January 9, 2018.

63 Interview with Tobias Bender [cited] and Corina Kögel, January 17, 2018; Bender is an ex-lawyer at Graf Von Westphalen.

64 Interview with Klaus Landry, January 9, 2018.

65 Bailleux, "Penser l'Europe par le droit," at 347.

66 Ibid., at 353; Karen Alter interview with Lise Funck-Brentano, May 26, 1994.

67 Interview with Klaus Landry, January 9, 2018.

68 See: "Barbara Festge." Prabook, accessed July 12, 2018, at: https://prabook.com/web/barbara.festge/1349109.

69 Karen Alter interview with Gert Meier, April 26, 1993.

70 Interview with Dietrich Ehle, lawyer in Cologne, December 13, 2017 (via phone).

71 HAEU, "Entretien avec Wilma VISCARDINI," at 5.

believed that the "Europeanist ideal"[72] was "capable of vindicating in the most effective way the general interest of citizens,"[73] and we find that Paolo De Caterini felt called to EU law "for the idea, for its beauty," and for his "enthusiasm and interest in Europe."[74] In France, Funck-Brentano was "convinced in Europe, and in the fundamental role that law plays in uniting Europe,"[75] and Ryziger proved a "militant European" who corresponded regularly with Gaudet and hosted private dinners for ECJ and national judges to help smooth out their differences.[76]

The subset of Euro-lawyers who worked in Brussels or Luxembourg – like Catalano and Ryziger at the European Coal and Steel Community (ECSC) High Authority, and Cappelli, De Caterini, Viscardini, and Saint-Esteben at the Commission – held particularly intense Eurofederalist convictions. As Viscardini recalls, the nascent European institutions boasted "excellent jurists from diverse nationalities, and together we forged a new legal system: Community law!"[77] Two anecdotes illustrate the impact of their Brussels experience:

> One time, I was commuting to Paris … my work partner was French, and he and his wife needed to get back to France that night. So we left by car. At a certain point [on our return] we stopped to grab breakfast and we realized: he was married to a German since his days as part of the French occupation. So here was an Italian, a Frenchman, and a German, together in a car, traveling from Paris to Brussels, all civil servants at a European authority. We were like: "My goodness!" There was this atmosphere.[78]

> [Berthold] Goldman basically sent me to the European Commission for an internship [in the mid 1960s] … My internship director, I'm fond of recalling … Winfried Hauschild, had a prosthetic hand covered with a black glove. And when I drafted and presented the memos he requested … I thought to myself – I was 22 years old – … "This is incredible!

[72] Interview with Paolo Gori, professor and ex-référendaire at the ECJ, April 6, 2017 (via e-mail).
[73] Interview with Fausto Capelli, lawyer and Professor at the University of Parma, November 23, 2016 (in-person).
[74] Interview with Paolo De Caterini, December 27, 2017.
[75] Alter interview with Funck-Brentano, May 26, 1994.
[76] Bernier, "France et le Droit Communautaire," at 131, 148–149, 230.
[77] Interview with Wilma Viscardini, September 29, 2017.
[78] Interview with Paolo De Caterini, December 27, 2017.

> Here he is, in front of me, disabled during the War's eastern front. And the two us are now in the middle of constructing Europe."[79]

But nobody embodied a Eurofederalist spirit more intensely than Nicola Catalano. A "convinced Europeanist [who] fought for his ideas … [with] a very combative spirit," Catalano is usually noted as one of the ECJ's first judges, yet he did far more to advance European integration before his judicial tenure as a negotiator and after his tenure as a practicing lawyer.[80] Having served as legal advisor to the High Authority of the ECSC – sometimes defending it against his own government – in 1957 he was summoned by Paul-Henri Spaak to join a committee of jurists to draft the Treaty of Rome.[81] Besides his allegiance to the committee's faction that "championed supranationalism," Catalano spearheaded an incalculably consequential proposal. When the option of a US-style Supreme Court was rejected as a political nonstarter, Catalano drafted the plan for an analogue to the Italian Constitutional referral system: the preliminary reference procedure![82] It follows that upon returning to Rome in 1962 following four years as ECJ judge (when the Court hardly heard any cases), Catalano became a lawyer with a "missionary zeal"[83] for pushing national judges to begin availing themselves of this procedure to solicit the ECJ. He "openly disagreed" with members of the ECJ who recommended "that national courts avoi[d] using the [reference] system too much."[84] He expressed feeling "responsible for the institutional system of the Rome Treaty."[85] And he told colleagues that he was "possessed by the European idea, an idea that has shone like a flame through all his activity."[86]

One way to appreciate the convictions of those Euro-lawyers who have passed away is to read the combative editorials they published. When politicians, judges, or professors attacked the European Commu-

[79] Interview with Robert Saint-Esteben, November 13, 2017; See also: Avril, "Costume Sous la Robe," at 146–147.
[80] Interview with Paolo Gori, April 6, 2017.
[81] Boerger-De Smedt, "Negotiating the Foundations of European Law, 1950–57," at 350.
[82] Ibid., at 351–352.
[83] Vauchez, *Brokering Europe*, at 109.
[84] Rasmussen, Morten. 2014. "Revolutionizing European Law." *International Journal of Constitutional Law* 12: 136–163, at 146.
[85] Catalano, Nicola. 1965. *Zehn Jahre Rechtsprechung des Gerichtshofs der Europaischen Gemeinschaften*. Cologne: Institut für das Recht europaischen Gemeinschaften, at 42.
[86] Vauchez, *Brokering Europe*, at 55.

nity or the ECJ, some of them pushed back. For instance, in 1964 the Italian Constitutional Court refused to acknowledge the direct effect and supremacy of European law.[87] In turn, Catalano took to the newly minted *Common Market Law Review* and the prestigious *Il Foro Italiano* to convey "respectful but definitive disapproval." European integration was "a real and fundamental turning point in the history of our times . . . whether one wishes it or not," giving rise to a polity with "all the aspects of a structure of a federal nature."[88] Catalano then addressed the judges directly:

> It is time to conclude. The conclusions are rather bitter ones. It suffices to [note] the impressive brevity of the [Constitutional Court] judgment under discussion . . . to realise, once again, how much a limited knowledge of the relevant texts, and a lack of interest in them, risks transforming our widely proclaimed but vague enthusiasm for Europe into a mere verbal demonstration . . . Could the Constitutional Court change its attitude? This would be particularly desirable.[89]

Catalano's admonishments of Italian judges echo those directed at politicians and academics by his foreign counterparts. When in July 1965 French President Charles De Gaulle recalled France's permanent representative from the Council of Ministers (sparking the so-called empty chair crisis[90]), Paul-François Ryziger immediately published a seething editorial in *Le Monde*:

> Does French grandeur mean splendid isolation for our Head of State? . . . Those wishing upon the young people of France a destiny on the steps of the world, these people, who are the immense majority of Frenchmen, want the creation of a great European ensemble, which they already consider to be their homeland. This is why they cannot but stand up against the monstrous counter-truths accumulating today.[91]

Similarly, when influential French law professor Maurice Duverger published a *Le Monde* editorial in 1980 charging the ECJ with political activism (see Chapter 2), Lise Funck-Brentano rebuked the allegations in a pointed letter to the editor:

[87] *Costa* v. *Ente Nazionale per l'Energia Elettrica*, Italian Constitutional Court judgment No. 14/1964.

[88] Catalano, Nicola. 1964. "Annotation by M. Nicola Catalano." *Common Market Law Review* 2: 225–235, at 225, 228, 234.

[89] Ibid., at 234.

[90] See: Dinan, Desmond. 2005. *Ever Closer Union: An Introduction to European Integration*, 3rd ed. Boulder, CO: Lynne Rienner, at 50.

[91] Ryziger, Paul-François. 1965. "Europe et Grandeur Française." *Le Monde*, July 7.

> Isn't accusing the Court of being "biased" without citing any case illustrating this critique a sign of the very same "bias" for which the author charges the Court? … The Luxembourg Court's mission is to respect the rule of law as it interprets and applies the Treaty. When the Court is seized with a request for interpretation it cannot refuse to provide it, lest it commit a denial of justice.[92]

Funck-Brentano's rebuttal was not a one-shot. Rather, it was part of a tireless campaign to "defend [the EU's] institutions" and "diffuse [European] Community law amongst practitioners often disinclined to leave their national contexts."[93]

To be sure, some of Funck-Brentano's pioneering contemporaries did support limits on European integration (like Ehle[94]), although most remained unapologetically Eurofederalist (like Catalano). Yet all perceived European integration as an opportunity to exercise their agency. They tended to be curious of legal novelties and to be eager to challenge established rules. After all, in the 1960s it took "a very curious and adventurous spirit to take the time to read the Treaty of Rome"; this was the very "pioneer" spirit embodied by Robert Collin in Paris, a "great debater [and] a man of conviction who loved to persuade," and whose enduring interest in European law spilled beyond his clients' immediate concerns.[95] Collin's colleague, Ryziger, was likewise described by the French public administration as someone who "knew the inclinations of the ECJ very well and never ceased to push' national judges to exploit them."[96] As Saint-Esteben recalls, "we really had to fight! You see, us lawyers. That's why the role of lawyers was determinative … there was th[is] period of construction."[97]

In Germany, the portrait is no different. While Germany is today renown for its high levels of EU law litigation,[98] it initially proved a

[92] Funck-Brentano, Lise. 1980. "La prétendue 'partialité' de la Cour de Luxembourg." *Le Monde*, October 20.

[93] Pantade, Philippe. 2020. "Lise Funck-Brentano, avocate spécialiste du droit européen, est morte." *Le Monde*, December 9.

[94] See: Ehle, Dietrich. 1964. "Comment on *Costa v. ENEL*." *New Juristische Wochenschrif*, December 10: 2331–2333.

[95] Mitchell, Mary-Claude. 2017. "Hommage à Maître Robert Collin." *Association Française d'Etude de la Concurrence*, May 4; Avril, "Costume Sous la Robe," at 143.

[96] Bernier, "France et le Droit Communautaire," at 201.

[97] Interview with Robert Saint-Esteben, November 13, 2017.

[98] Börzel, "Participation through Law Enforcement," at 138–141.

hostile context for European legal mobilization.[99] The burden thus fell upon entrepreneurial lawyers eager to spearhead institutional change. Dietrich Ehle recalls how "it was interesting from the beginning to participate in developing the European law," for this "legal system was very new" and thus a few "lawyers specializing in EC law decided to raise cases to test the system."[100] Hamburg's Peter Wendt systematically "observed which law the Commission develops [to] then raise private cases reflecting similar legal concerns," and Fritz Modest was "a fighting man" who "started to fight against the State" by invoking Community law.[101] The comparable "activism [and] aggressiveness" of Gert Meier made him a "spearhead in tearing down these barriers [to a European common market]. Sometimes he couldn't convince the administration, and when he lost, he went to court!"[102] Meier's activism went so far as to prompt supreme court judges to "blackball him."[103]

Italy's pioneers were similarly motivated by innate participatory drives. Giovanni Maria Ubertazzi's "spontaneous intellectual curiosity always brought him to nurture new interests," enabling him to be "ahead of his time."[104] His partner in practice, Fausto Capelli, was equally drawn to EU law "because of its novelty" and was admired by colleagues for his "ruthlessness" and "spirit of initiative."[105] Having flirted with a political career, Capelli was repulsed by the electoral preoccupations of party politicians, and he concluded that he could better impact politics "with other means and objectives" as a lawyer.[106] He confides that "we engaged in legislative activity, if you will, because we forced the state to adapt its laws to European law … The lawsuits, let's say, were part of these initiatives."[107] A Milanese colleague, Bruno Nascimbene, expresses a similar sentiment: "In looking back [to

[99] Byberg, "Miscellaneous Network," at 148.
[100] Interview with Dietrich Ehle, December 13, 2017; Karen Alter interview with Dietrich Ehle, January 10, 1994.
[101] Alter interview with Meier, November 8, 1993; Interview with Klaus Landry, January 9, 2018.
[102] Alter interview with Meier, November 8, 1993; Interview with Peter-Christian Müller-Graff, November 28, 2017.
[103] Alter interview with Meier, November 8, 1993.
[104] Capelli, Fausto. 2005. "Giovanni Maria Ubertazzi (1919–2005)." *Diritto Comunitario e degli Scambi Internazionali* 4: 623–624.
[105] Interview with Fausto Capelli, November 23, 2016; Interview with Paolo De Caterini, December 27, 2017; Interview with Paolo Gori, April 6, 2017.
[106] Capelli, Fausto. 2020. *Un Percorso tra Etica e Trasparenza per Riformare la Democrazia in Italia*. Soveria Mannelli: Rubettino, at 30–32.
[107] Interview with Fausto Capelli, November 23, 2016.

the 1970s], there were a few [lawsuits] that were very ambitious and pretentious … I had posed [the reference requests] so as to be sure that if the judge made them his own, the ECJ would have been able … to propose those laws that were missing."[108] This pleasure in agency is confirmed by De Caterini:

> It was a magical moment … there were juridical problems where you basically had to invent everything! … You set the fuse, and it exploded, with big booms well into the 1980s! There was a sense that we could do the unthinkable! … We were captured by our interests, by the beauty of things, the beauty of novelty! That by doing this, we could sometimes bring down the whole closet! It wasn't about omnipotence, but about participating.[109]

To be sure, these individuals did not ignore self-interest altogether. They were also betting that EU law would become "an interesting field of activities for the future,"[110] and their reputation as specialists would literally pay off.

While at Modest's law firm Landry emphasizes that his "enthusiasm for Europe" was "always in the back of my mind, and it still is … of course on the other side, it was a business chance … it was clear that there would be a development of more European law."[111] Viscardini echoes this sentiment: "I've always been driven by idealist motives. It is nonetheless obvious that once I decided to open a law firm, I also perceived the opportunity of valorizing my experience in a field of law where there were very few competitors at the time."[112] One of the first Genoese Euro-lawyers similarly recalls "a cultural passion for European law … nevertheless having some business sense, I perceived that the effects of this body of law would come, and could also have some important consequences work-wise."[113] An evident example is the aftermath of the 1965 *Lütticke* case, where Peter Wendt successfully challenged the German turnover equalization tax on imported products. After failing to persuade the Commission to launch an infringement against the German customs authorities,

[108] Interview with Bruno Nascimbene, lawyer and professor at the University of Milan, November 22, 2016 (in-person).
[109] Interview with Paolo De Caterini, December 27, 2017.
[110] Interview with Dietrich Ehle, December 13, 2017.
[111] Interview with Klaus Landry, January 9, 2018.
[112] Interview with Wilma Viscardini, September 29, 2017.
[113] Interview with Giuseppe Giacomini, lawyer at Conte & Giacomini Studio Legale in Genoa, October 24, 2016 (in-person).

Wendt cajoled a lower fiscal court to refer the case to the ECJ.[114] As claims for reimbursements overwhelmed customs officials in the month following the ruling, "Wendt saw his victory as a chance to make a lot of money, and he very aggressively pursued more cases."[115]

The point is that these lawyers had convergent reasons to become first movers. But while "they discovered there was a new field of profitable law … at the same time, these people were quite convinced that it's a wonderful idea to integrate Europe."[116] For instance, in Italy Emilio Cappelli made it a point to convey that he could not be bought. Following his first successful solicitations of national court referrals to the ECJ, an agricultural association began sending him a yearly check for five or six million lire. Every year, Cappelli sent it back.[117] These were independent-minded and iconoclastic practitioners, after all, with deeply held commitments and sometimes difficult personalities.[118] They were not the types of people willing to passively conform as spokespersons for moneyed interests.

5.4 THE GHOSTWRITER'S REPERTOIRE

It is one thing to be among the first jurists to take the promise of European law seriously. It is quite another to put these commitments into practice. The first Euro-lawyers were not satisfied publishing articles or attending conferences. So they creatively repurposed their repertoire as practicing attorneys to become prolific catalysts of national court referrals to the ECJ.

As Chapter 2 outlined, to this day I was hard-pressed to locate national judges that had referred a single case to the ECJ over their career. In interviewing 134 judges, the most active of all had referred

[114] See: Case 57/65, *Lütticke* v. *Hauptzollamt Saarlouis* [1966], ECR 205; Schermers, Henry. 1974. "The Law as It Stands against Treaty Violations by States." In *Legal Issues of European Integration*, D. Gijlstra, Henry Schermers, and E. Völker, eds. Dordrecht: Springer, at 130–131.

[115] Alter interview with Meier, November 8, 1993.

[116] Interview with Peter Behrens and Thomas Bruha, January 25, 2018.

[117] Interview with Paolo De Caterini, December 27, 2017.

[118] Notorious for their inability to play well with others were Wendt, Catalano, and Cappelli, but in any case all the lawyers in Figure 5.3 (with the exception of Modest et al.) worked as solo-practitioners or in boutiques throughout their careers. On Catalano and Cappelli's difficult personalities, see: Interview with Paolo De Caterini, December 27, 2017; On Wendt, see: Alter interview with Meier, November 8, 1993; Interview with Klaus Landry, lawyer at Graf Von Westphalen in Hamburg, January 9, 2018 (in-person).

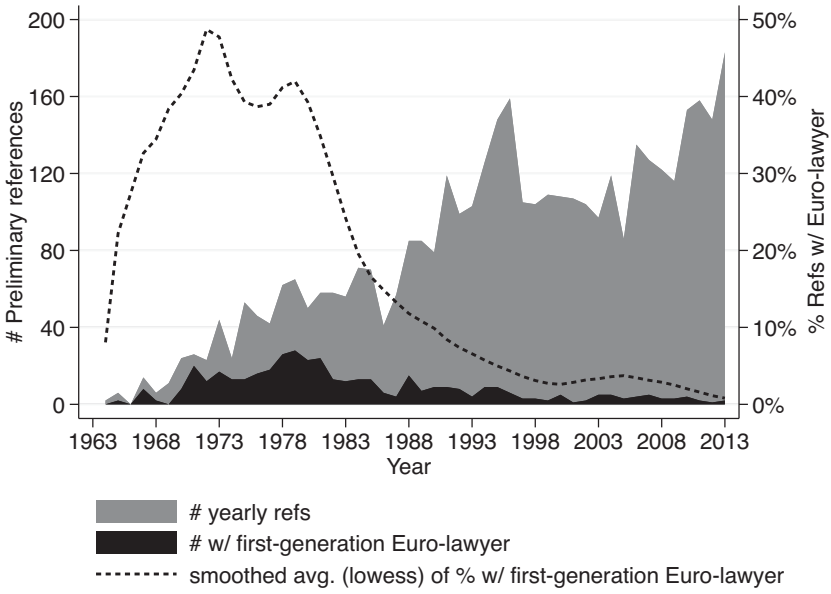

Figure 5.4 Referrals to the ECJ solicited by first-generation Euro-lawyers, 1964–2013
Notes: See Figure 5.3 for list of lawyers; smoothed avg. uses a lowess function (bandwidth = 0.2).

up to 10 cases to the ECJ.[119] By contrast, some of the political entrepreneurs we have just met were involved in dozens of preliminary references through 1981 alone. Those 12 teams of lawyers were behind at least 435 preliminary references to the ECJ (206 of which were lodged before 1981) and argued at least 598 cases in Luxembourg.[120] Figure 5.4 denotes that their maximal influence was through the 1970s, when they participated in at least 41.5 percent of cases punted to the ECJ by Italian, French, and German courts. I say "at least" because, despite my best efforts, I could not identify lawyers participating in a small share of cases, so these statistics almost certainly understate the pioneers' involvement. For instance, the first Euro-lawyers were behind 51 percent of the 407 cases from 1964 to 1980 containing lawyer information. And beyond the leading pioneers, "repeat-lawyers"[121]

[119] Interview with Michael Funke-Kaiser, November 30, 2017.
[120] The latter includes direct actions and infringements. These totals through 2020 are slightly lower than the column totals in Figure 5.3 because the Euro-lawyers overlapped in a few cases.
[121] McGuire, "Repeat Players in the Supreme Court."

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participated in soliciting 70 percent ($n = 286$) of referrals to the ECJ through 1980 with lawyer information.

It is not just the total number of references involving these Euro-lawyers that belies their influence. The first Euro-lawyers overwhelmingly exploited the preliminary reference procedure to advance European integration rather than to defend national sovereignty. Eighty percent of references to the ECJ where the plaintiff was represented by a first-generation Euro-lawyer solicited the ECJ's interpretation of European rules, while only 20% challenged their validity.

Another telltale sign of the first Euro-lawyers' impact is that they were often behind a critical subset of referrals: the first cases that national courts sent to Luxembourg. At least eighty-eight courts located in seventy-four French, Italian, and German cities dialogued with the ECJ for the first time when one of these pioneers showed up. If we graph the yearly share of these first-time referrals solicited by the first Euro-lawyers – as in Figure 5.5 – we can paint a familiar picture: the first Euro-lawyers were most influential in initiating a judicial dialogue with the ECJ in the 1960s and 1970s, when they were involved in soliciting 38 percent of all first-time referrals. Figure 5.6

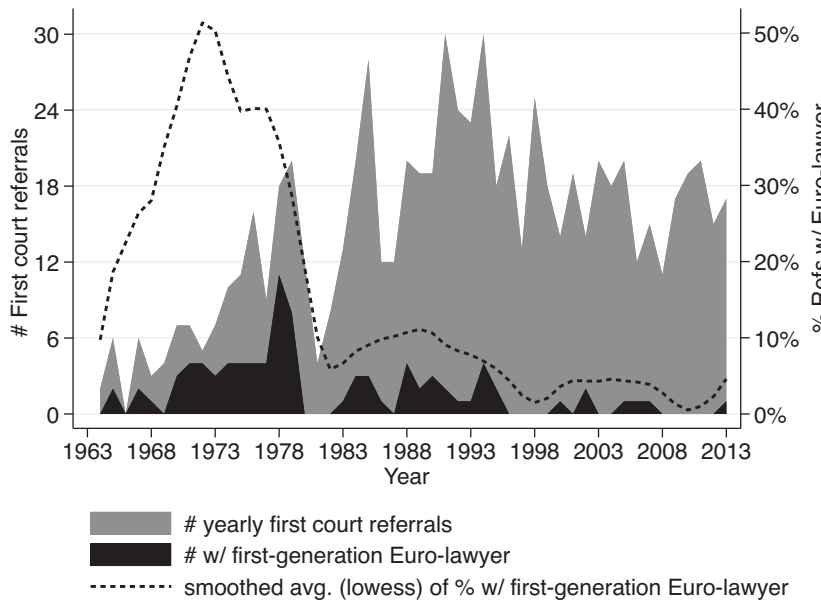

Figure 5.5 First time court referrals by first-generation Euro-lawyers, 1964–2013

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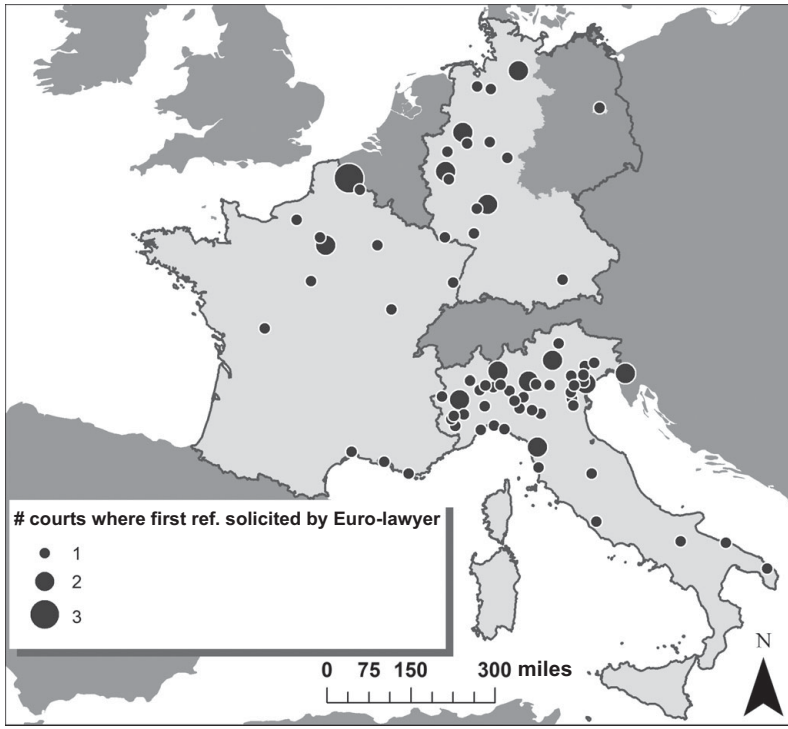

Figure 5.6 Sparking a judicial dialogue: courts ($n = 88$) whose first preliminary reference originated from a dispute lodged by a first-generation Euro-lawyer

maps the locations of these eighty-eight courts to visualize where the first Euro-lawyers were likely decisive catalysts of a process of transnational judicialization. What is more, almost half ($n = 41$) of these courts only referred a case again when one of these Euro-lawyers showed up again![122]

How were these lawyers repeatedly in the right place at the right time? The short answer is they made their own luck. In Section 5.2, we began to reveal the modular litigation repertoire they forged. Aimed at catalyzing preliminary references that would bulldoze national barriers to European integration, this repertoire consists of two elements: (1) the construction of lawsuits, and (2) the ghostwriting of judicial orders. Let us unpack each in turn.

[122] Of the ninety-seven cases these courts referred to the ECJ, several led to pathbreaking judgments: *Lütticke*, *Donà*, *Simmenthal*, and *Foglia*, among others discussed in this chapter.

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5.4.1 Step 1: Constructing Lawsuits

"The lawsuit would be constructed as much as possible. That's obvious."[123] These words from one of Italy's first Euro-lawyers were euphemistically echoed in many interviews with veteran practitioners. To be sure, a few scholars have noted that some of the ECJ's most pathbreaking judgments began as "test cases."[124] Those working at the European Court appear attuned to this open secret: in the words of Roger Grass, the ECJ's *greffier* in the 1990s and 2000s: "It's no doubt true … the *grands arrêts* – *Costa v. ENEL*, *Van Gend en Loos* – they're all … a bit constructed … but of course, of course!"[125] Yet these vague statements usually concern a few renown cases, generating the misleading impression that they are exceptional occurrences rather than symptomatic of a modular repertoire. And the question remains: what exactly does it mean to "construct" a lawsuit?

That the word "construction" evokes some trepidation – prompting the generous use of qualifiers, ambiguity, and euphemisms – should come as no surprise. The practice muddies the legitimating narrative of lawyers merely representing rights-conscious clients fighting for their legal entitlements. Certain constructions may conflict with the ethical codes of state bar associations or the Council of Bars and Law Societies of Europe (CCBE). For instance, publicizing one's legal services was forbidden in most EU member states until the late 1980s,[126] and some advertising remains prohibited by the German,[127] Italian,[128] and

[123] Interview with Paolo De Caterini, December 27, 2017.

[124] vis-à-vis the Dutch *Van Gend en Loos* case and the Belgian *Defrenne* cases, see: Alter, "Jurist Advocacy Movements"; Vauchez, Antoine. 2014. "Communities of International Litigators." In *The Oxford Handbook of International Adjudication*, Romano, Alter and Shany, eds. New York, NY: Oxford University Press.

[125] Interview with Roger Grass, September 29, 2017.

[126] Hill, Louise L. 1995. "Lawyer Publicity in the European Union." *The George Washington Journal of International law and Economics* 29(2): 381–451.

[127] See Section II, subsection 6 of CCBE Rules of Professional Practice, Available at: www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Germany_BORA_Rules_of_Professional_Practice.eps.

[128] See Articles 17 and 18 of Italian National Bar Council Code of Conduct, available at: www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Italy_Code_of_Conduct_for_Italian_Lawyers.eps.

French[129] bars. The same holds for conflicts of interest arising from assisting multiple clients in the same affair.[130] Italian lawyers are also subject to a blanket prohibition against the solicitation of clients. To ask a lawyer whether they constructed suits can thus be interpreted as querying if they committed a breach of ethics.

Consider the case of Lise Funck-Brentano who, as we have seen, was one of France's first Euro-lawyers. After earning her doctorate in Frankfurt,[131] she completed her traineeship in none other than Fritz Modest's law firm in Hamburg, where she witnessed its lawyers soliciting the first referrals to the ECJ. Upon opening her own office in Paris she maintained ties with her Hamburg colleagues to construct test cases. According to Christian Roth, the ex-president of the UAE and mentee of Funck-Brentano:

> This was our practice, in collaboration with a German law firm with which we were very close … Lise Funck-Brentano knew and completed her training … with this firm in Hamburg, it was the Modest, Gündisch, and Landry firm … [they] also developed European law. And we constructed free movement cases between our two firms, where we believed they would be blocked by customs barriers, by import quotas, and like this, we could eventually go before a court with a real case … where one of the parties would seek a substantial repayment from the other for a contract that could not be executed … and before the court we'd formulate a preliminary reference: "Why couldn't this contract be honored? Well, because of an administrative obstacle in turn contrary to the relevant [European] provisions on free movement." And like this we brought some cases together … such as the commercialization of margarine in Belgium! [in the *Walter Rau*[132] case].[133]

Indeed, the famous *Walter Rau* case was a deliberate effort to expand the ECJ's principle of mutual recognition enshrined in the 1979 *Cassis de Dijon* case (itself based on a test case constructed by Gert

[129] See Title II, Article 10 of the Conseil National des Barreaux's "Décision à caractère normatif No. 2005-003 portant adoption du règlement intérieur national (RIN) de la profession d'avocat," available at: www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/FR_France_CNB_RIN.eps.

[130] German code of conduct, Part II, Section I, subsection 3; French code of conduct, Title I, Article 4; Italian code of conduct, Article 24, section 5.

[131] See: "Lise Funck-Brentano." *Prabook*, accessed July 12, 2018, at: https://prabook.com/web/lise.funck-brentano/1137364.

[132] Case 261/81, *Walter Rau Lebensmittelwerke* v. *De Smedt PVBA* [1982], ECR 3961.

[133] Interview with Christian Roth, Roth Partners in Paris, September 25, 2017.

Meier – it is test cases all the way down!).[134] Belgium protected its agricultural industry in part via a 1935 law mandating that margarine be packaged in *cubes* (the manifest reason? to distinguish it from butter).[135] Believing that this practice violated the *Cassis* principle that a good legally produced and sold in one member state could only be excluded from another state's market for public health reasons, Jürgen Gündish counseled a German undertaking (Walter Rau) as it struck up a contract with a Belgian importer (De Smedt) for the shipment of margarine packaged in *cones*. The contract stated that the import would be honored so long as the margarine could be lawfully marketed in Belgium. When the Belgian Ministry made clear that it could not be, De Smedt revoked the import, Rau sued before the Hamburg lower regional court,[136] and Gündisch argued that the contract (and the Belgian law upon which it was based) violated Article 30 of the Rome Treaty and the *Cassis* decision. Unsurprisingly, the ECJ agreed.[137]

When I relayed this portrait to Klaus Landry, he confirmed that "for many years, there was a very close cooperation between Funck-Brentano and us. We were even personal friends." But he was reluctant to invoke the word "construction," illustrating the word's polyvalence and how the process worked in practice:

Klaus Landry: "I don't think there were so many constructed [cases]. There were a few, very few … I think we had more discussions about constructed cases than [were] realized."

Tommaso Pavone (TP): "… obviously the word 'constructed' can mean many things. One of the ways I noticed this happening in Italy … was [lawyers] would nurture connections with particular associations, especially agricultural associations … there would be discussions with a couple of lawyers who were very specialized, and they would collaborate with the agricultural association to find the client. And that is how the case would then make it to court …"

KL: "But that's not really constructed. What we did is: we asked agricultural organizations, state organizations, for their opinion. We said: 'We want, our

[134] 120/78 "Cassis de Dijon," ECR 649. For a political science analysis, see: Alter, Karen, and Sophie Meunier-Aitsahalia. 1994. "Judicial Politics in the European Community." *Comparative Political Studies* 26(4): 535–561.

[135] Law of 8 July 1935, Article 15.

[136] 261/81, *Walter Rau*, at 3963.

[137] The ECJ held that the Belgian law "hinder[s] the free movement of goods" and "constitutes a measure having an effect equivalent to a quantitative restriction": Ibid., at 3965–3966, 3975.

clients want, to do this or that. And we think that this is legal' … and when they said: 'Well, we think it's illegal,' then it gave us the chance to go to court."

TP: "So … you would initiate an export or something and then it would get blocked …"

KL: "Yeah. So they said, 'Well, you can't, you are not allowed to do this.' So this gave us the chance to attack this, to go to court. And that could give us the chance to go to the European Court of Justice. That's not 'constructed'."

TP: "It's still interesting because … there was a kind of intentional lawbreaking in one level because there was a higher level of law that sanctioned [it] …"

KL: "Yeah. Show the differences between the national law, and get the solution that the European law prevail … [and] if you want to have a decision on customs law, for instance, you can of course: where the import of the goods takes place, you have the competence of the [court]. If you want to have the Düsseldorf fiscal court, then you should import in the west of Germany…"

TP: " … so, actually, since the word 'constructed' is ambiguous, how would you define a constructed case?"

KL: "Constructed would be artificial … there's not really a case behind it."[138]

When Euro-lawyers brokered cases to serve as vehicles for referrals to the ECJ, they usually tried to ensure that real disputes would underlay them as much as possible. But to surface "real" disputes, Euro-lawyers often counseled clients to deliberately undertake actions forbidden under national law that, in their view, were permitted by EU law. By "construction," then, I mean *the lawyer's proactive involvement in triggering a conflict between national and European law, or converting a dispute seemingly governed only by national law into one also implicating European law*. Figure 5.7 places this form of agency along a spectrum, distinguishing it from passive representation and the fabrication of fictitious cases.

That many of the first test cases the ECJ hinged on triggering real disputes is corroborated by the experience of Robert Saint-Esteben in Paris:

[138] Interview with Klaus Landry, January 9, 2018. Constructing cases to facilitate forum-shopping was raised by other practitioners: "If that set of facts could happen either in northern or southern Germany, then you'd probably pick the situation – I mean, you wouldn't invent the situation, [rather] a case with real facts – but you would pick the dispute to go to a court that is known to be more interested in these European matters." See: Interview with Thomas Luebbig, Freshfields in Berlin, November 1, 2017 (in-person).

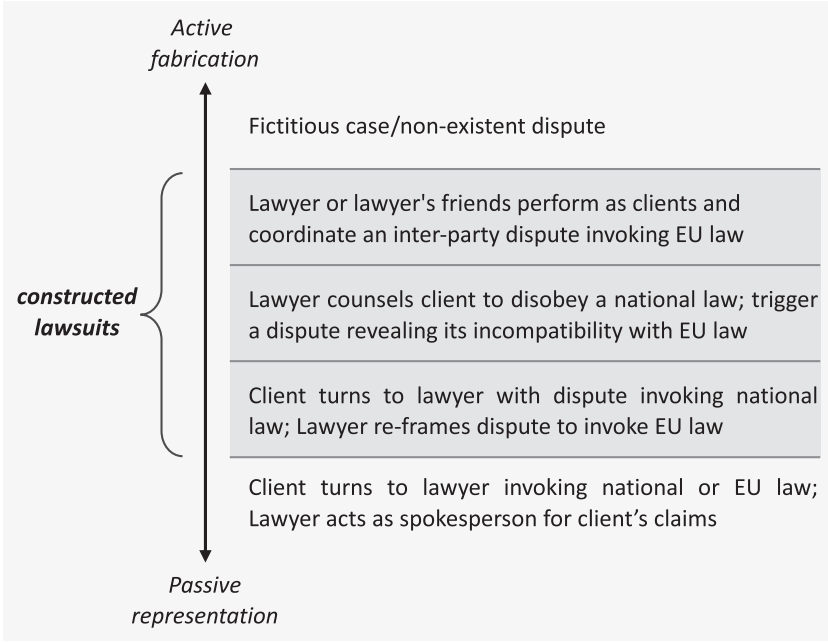

Figure 5.7 Conceptualizing "constructed" lawsuits and lawyers' role in disputes

> It's something that happened, but perhaps more subtly … for instance, to refuse to transact a deal so as to raise a question which will then be proposed … It's a way to tailor a dispute, I'd say. Not artificially, because there's a real dispute … to create a preliminary reference that may not have been posed. I know that it has happened to me, to be consulted and asked, "how could we seize the ECJ?" by labor unions, businesses … you'd then say, "we can only seize the ECJ if there is a dispute. So go and create the dispute!"[139]

Unlike the lawyer-as-spokesperson or go-between, lawyers-as-constructors and ghostwriters tend to become involved *before* a dispute emerges. One works backward: a problem is identified in theory (like the incompatibility of national and EU law), and then the "perfect" lawsuit is constructed to illuminate it. The messy or poorly documented disputes that tend to emerge organically are poor vehicles for strategic litigation: one needs an incontrovertible paper trail to induce national judges to invoke a set of laws they would otherwise ignore. Jean-Paul

[139] Interview with Robert Saint-Esteben, November 13, 2017.

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Montenot, a second-generation Euro-lawyer, highlights this with a personal anecdote:

> A client who had heard of [a previous EU suit] came to see me … [He] thought he knew it all … "I should have been allowed to import these phytosanitary products, here's what I would have been able to sell, voilà!" I told him, "we're going to lose, because it's hypothetical! … you constructed this dossier poorly! … if you had come to see me first … you would have requested an official authorization that would have been rejected" … you'd say, "'Mr. Judge, this product can be purchased in France for 150 euros/liter." And I ask my client, "give me the receipt." "Mr Judge, this same product should be able to be purchased [for less] in Spain or Italy." So I tell my client, "strike up a contract with a Spanish or Italian distributor." But since these products require official authorization, I tell my clients, "submit a request for authorization." And there the dossier is constructed … that's how you advance EU law.[140]

The foregoing strategy underlay many of the 140 preliminary references pioneered by Modest and partners in Hamburg and the 15 referrals by the Funck-Brentanos in Paris. And in Milan, Fausto Capelli and Giovanni Maria Ubertazzi constructed many of their combined seventy-eight references in the same way.

Following his university studies in the early 1960s, Capelli completed a traineeship in Germany and witnessed how the first Euro-lawyers were triggering European lawsuits before national judges. Crucially, he and Ubertazzi were also friends with Gian Galeazzo Stendardi,[141] a pugnacious law professor in Milan[142] who collaborated with another lawyer, Flaminio Costa, to broker the first (and most pathbreaking) Italian preliminary reference: *Costa* v. *ENEL* (1964).[143] They thus knew firsthand that *Costa* had been constructed: at Stendardi's suggestion, Costa protested the nationalization of *ENEL* – an energy company – by refusing to pay his electric bill, got sued, and Stendardi defended him by arguing that the nationalization

[140] Interview with Jean-Paul Montenot, DS Avocats in Paris, September 13, 2017 (in-person).

[141] Interview with Fausto Capelli, November 23, 2016.

[142] Like Capelli and Ubertazzi, Stendardi was also an ardent Europeanist. In the public hearing before the ECJ in *Costa*, he saluted the "supreme judiciary of the Community, our new great motherland." See: Arena, Amedeo. 2019. "From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of *Costa* v. *ENEL*." *European Journal of International Law* 30(3): 1017–1037, at 1028.

[143] 6/64, *Costa* v. *ENEL*, ECR 587.

contravened a supreme body of Community law. Even the choice to protest a tiny $3 bill was deliberate: the small claim allowed Stendardi to represent Costa before a fellow member of the Milan bar – a justice of the peace – rather than one of the city tribunal's professional judges. And "since there was no right to appeal under Italian law for claims worth less than 2000 lire," Stendardi could argue that the justice was "required to refer the case to the ECJ."[144] Capelli and Ubertazzi had a blueprint, and they used it.

They began to study and to network. On the one hand, Ubertazzi's connections within Italian academia and FIDE enabled him to organize numerous seminars and roundtables, to found Italy's second journal dedicated to European law in 1962 to publicize instances of national noncompliance,[145] and to serve on the board (and later as president) of a research center on European law in Milan that was cofounded by the likes of Walter Hallstein, the President of the European Commission, and Pierre Pescatore, one of the ECJ's most influential early judges.[146] On the other hand, Capelli tirelessly forged ties with industrial associations that could serve as reservoirs of prospective clients, particularly the national employer's association (Confindustria). When their research revealed a conflict between national and European law, "we spoke with the national association, and the national association identified the corporation that was open to lodging the proceedings … [the lawsuits] were all like this."

Scouting for a suitable client was essential to the lawsuit's construction: after all, persuading sectoral associations to sue their own state was not easy, for "the association feared exposing itself, because politically it could incur risks."[147] During oral arguments before the ECJ in the 1975 *Bresciani* case, Capelli justified what might be misconstrued as his "disproportionate aggressiveness" and "excessive lawyerly stubbornness" by emphasizing that "national associations … never sue their State with a light heart, for obvious reasons, given that they are in a permanent working relationship" with the public administration, so they only do so when they come to see "no other possibility

144 Arena, "From an Unpaid Electricity Bill," at 1022.

145 The journal is *Diritto Comunitario e degli Scambi Internazionali*. See: Interview with Fausto Capelli, November 23, 2016.

146 The research center was known as the CISDCE – Centro Internazionale di Studi e Documentazione sulle Comunità Europee. See: Capelli, *Un Percorso tra Etica e Trasparenza*, at 46–49.

147 Interview with Fausto Capelli, November 23, 2016.

to safeguard their rights."[148] This legitimated constructed lawsuits bordering on the "fictitious" to illuminate noncompliance and catalyze referrals to the ECJ:

> [T]he objective difficulties to be overcome in obtaining a reference to the Court of Justice … favored the creation of the proper conditions for the presentation of so-called "fictitious" proceedings (from the procedural standpoint) aimed at obtaining relatively quick reference to the Court of Justice through the introduction of a debate between private parties in an ordinary case in which the compatibility of a State law or an administrative measure by reference to Community law was generally put up for discussion.[149]

Capelli justified proactive legal mobilization as a fail-safe, a compensatory motor of European integration in the absence of government will.[150] One concrete example of this is the 1971 *Eunomia di Porro* case. Mussolini's fascist regime had passed a law in 1939 levying a progressive tax on the export of objects "of an artistic, historical, archeological or ethnographic interest."[151] In 1968 the European Commission had lodged an infringement proceeding against Italy for failing to rescind the law, given that it violated Article 30 of the Treaty of Rome.[152] But like a leitmotif in the history of European integration in Italy, the authorities had dragged their feet. So Capelli and Ubertazzi decided to hold their feet to the fire.

Having networked with an association of artists, Capelli recalls how they "had to apply this … tax for artistic products in order to export them to other EU member states … so the association [comes to us] and says: 'What can we do about it?' 'Well, first thing we do is we undertake an export, we await the application of the sanction, and we ask for a refund of the sanction. And then we go to the ECJ.' In the *Eunomia* case that's exactly what happened."[153] They found an art dealer – Casimiro Porro of Turin – willing to

[148] Capelli, Fausto. 1979. *Scritti di Diritto Comunitario Vol. II*. Broni: Tipolito Fraschini di G. Pironi, at 444; Case 87/75, *Conceria Daniele Bresciani* v. *Amministrazione Italiana delle Finanze* [1976], ECR 129.

[149] Capelli, Fausto. 1987. "The Experiences of the Parties in Italy." In *Article 177 EEC: Experiences and Problems*, Henry Schermers, Christiaan Timmermans, Alfred Kellermann, and J. Stewart Watson, eds. New York, NY: Elsevier, at 144.

[150] Capelli, *Scritti di Diritto Comunitario Vol. II*, at 444.

[151] Case 18/71, *Eunomia di Porro e. C.* v. *Ministry of Education of the Italian Republic* [1971], ECR 811, at 812.

[152] Case 7/68, *Commission* v. *Italy* [1968], ECR 424.

[153] Interview with Fausto Capelli, November 23, 2016.

serve as plaintiff. Mr. Porro shipped a nineteenth-century Austrian painting to Silvano Lodi, an Italian art collector residing in Munich. At the customhouse of Domodossola, the painting was charged a tax of 108,750 lire ($176). In turn, Mr. Porro sued the Ministry of Public Education for a reimbursement. As we will see, this provided Capelli and Ubertazzi with an opportunity to ghostwrite the Tribunal of Turin's first preliminary reference to the ECJ (and to win the case in Luxembourg).

This repertoire of lawsuit construction was deployed by other Euro-lawyers as well. In France, Ryziger and Funck-Brentano did not wait for clients to come to them, but rather "they mobilized a clientele … openly letting people know that they were capable" so they could launch lawsuits serving as a "motor" for national court referrals to the ECJ.[154] A leading practitioner who knew Collin, Funck-Brentano, and Ryziger confirms that it was thanks to their "legal imagination" that they "tried to bring cases before a judge which nobody … believe[d] at the moment," spurring "the construction of the *grands arrêts* of Luxembourg … I [likewise] set up some cases, so I can't talk about them, where I set it all up."[155]

In Germany, Ehle regularly met with sectoral associations "to decide which cases [should] be sorted out as a test case, and then it may be that Mr. Landry [was] the leading lawyer for the test case, or it may be another lawyer, including myself … then we exchange our submissions and discuss these." Most proactive was Meier, who had access to a wide network of import–export companies and agricultural producers as in-house counsel for Rewe supermarkets. His construction of the famous 1978 *Cassis de Dijon* case - for which he consulted Ehle, a personal friend – is part of a modular pattern of strategic litigation:[156] Meier "follow[ed] the lead of the Commission," seeing "which area the Commission develop[ed]" and, particularly, which cases the Commission dropped. Meier then "search[ed] out the cases himself" by working with the food industry.[157] Specifically, *Cassis* originated when a member of the Commission leaked to Meier that they had just "settled a case involving the French liqueur Anisette … [Meier] simply changed the type of liqueur to Cassis de Dijon and

[154] Interview with Guy Canivet, October 2, 2017.
[155] Interview with French lawyer, 2017 (in-person; date and time redacted).
[156] Interview with Dietrich Ehle, December 13, 2017.
[157] Alter interview with Meier, November 8, 1993.

brought his own test case."[158] Meier sometimes constructed cases to overturn supreme court decisions[159] and forge relationships with the few FIDE-affiliated judges, who began asking him "to find cases to address certain issues."[160]

Meier's efforts mimicked those of other Euro-lawyers, particularly Wendt's litigation strategy in the 1965 *Lütticke* case after he failed to persuade the Commission to launch an infringement against Germany. Wendt went so far as to send letters to his clients urging them to participate in his litigation campaigns, extending his outreach efforts in local magazines.[161] Cultivating clients enabled Euro-lawyers to legitimate their aggressive litigation efforts as they became familiar faces in Luxembourg: "If the Commission is not capable of imposing the observance of [European law] on behalf of member States," Capelli and Ubertazzi argued before the ECJ in 1975, then "it's logical that operators will perceive themselves free to defend themselves as best they can, first and foremost, by soliciting the Court of Justice."[162]

We thus see how a repertoire for strategic litigation diffused among a small cohort of pioneers, despite no transnational coordination strategy or master plan. Capelli and Ubertazzi borrowed from their German counterparts and from Stendardi's example in *Costa*; Meier borrowed from Wendt and his example in *Lütticke*; Funck-Brentano borrowed from Modest and colleagues, and so forth. As first-generation Euro-lawyers crossed paths with colleagues in court, associational meetings, restaurants, and European institutions, this modular template could be gradually picked up by younger practitioners. In Italy, we saw how this inter-generational transmission is personified by Wilma Viscardini's son, and in Chapter 7 we will unpack another exemplary case. One final example among many from Germany places this process in sharp relief.

Wienand Meilicke became interested in European law after obtaining law degrees in three countries and briefly working at a law firm in the United States.[163] Like most second-generation (and all first-

[158] Alter, "Jurist Advocacy Movements," at 15–16.
[159] Interview with Peter-Christian Müller-Graff, November 28, 2017.
[160] Alter interview with Meier, November 8, 1993.
[161] Ibid.; The magazines were *Der Betrieb* and *Außenwirtschaftsdienst des Betriebs-Beraters*.
[162] Capelli, *Scritti di Diritto Comunitario Vol. II*, at 444.
[163] Meilicke received his *licence en droit français*, his doctorate from the University of Bonn, and his LLM in from NYU. In New York, he practiced at Shearman & Sterling from 1973 to 1975.

generation) Euro-lawyers, he never studied EU law. Rather, he trained himself as a practitioner in Bonn. Meilicke shared a clear participatory drive with his predecessors: "Judges at the European Court of Justice … set up the infrastructure, but it's my generation which implemented it."[164] And like Wendt before him, in the 1980s Meilicke began publishing articles identifying national laws violating EU law. His first referral to the ECJ was constructed precisely to put these affirmations into practice.

The matter is rather technical: under German law, noncash contributions to a public limited company are subject to stricter publication and verification requirements than cash contributions.[165] But in a 1990 case litigated by Meilicke, the Federal Court of Justice held that some cash contributions were "disguised contributions in kind," if made before or after the company made a transaction to a subscriber discharging debts it owed. In such instances, companies not complying with the stricter requirements would be unable to discharge their debt.[166] As a result of the decision, Meilicke's client was unable to discharge some five million Deutsche Marks. Meilicke vehemently disagreed, publishing a book lambasting the Federal Court.[167] But after discovering that the case law arguably violated a 1976 European directive,[168] he took matters into his own hands. He identified a company – ADV/ORGA – that had discharged its debt exactly like his previous client. Intent on inviting the ECJ to overrule the Federal Court, Meilicke not only sued the company for the very behavior that he believed was legitimated by EU law; he also found an ingenious way to bring the case himself:

> [Reading] newspaper articles … in 1990 I discovered that Commerzbank had signed a capital increase by waiving [ADV/ORGA]'s debt by exactly the same method. So what I did is I purchased some shares of that company … I went to the next shareholders' meeting and asked for information [about] how they had exactly paid up the debt and repaid the Commerzbank loan. And then they didn't want to give that

[164] Interview with Wienand Meilicke, Meilicke Hoffman & Partner in Bonn, January 17, 2018 (via Skype).

[165] Case C-83/91, *Meilicke* v. *ADV-ORGA* [1992], ECR I-4871, at I-4921, paras. 3–5.

[166] Judgment of the Bundesgerichtshof of January 15, 1990, II ZR 164/88, DB 1990 at 311.

[167] Meilicke, Wienand. 1989. *Die "verschleierte" Sacheinlage*. Stuttgart: Schärfer Verlag.

[168] Council Directive 77/91/EEC of December 13, 1976 (*Official Journal* 1977 L 26, at 1).

> information, [because in Germany] it was a "disguised contribution." And then I went to a court [the Hannover regional court] and sued for the information, and told them: "Look, here's this decision from the German Bundesgerichtshof, the German Supreme Court, but there are so many articles saying it's wrong. Please submit [to the ECJ]." Then I got together with a lawyer … from Commerzbank … [who] said wonderful, we will both argue that this should get to European Court … I was quite optimistic that I would win.

The ECJ, however, thought that Meilicke had been too clever for his own good: "The Court wouldn't take the case because it said it was hypothetical, it was constructed."[169] Indeed, ECJ Advocate General Giuseppe Tesauro noted his discomfort that "the main action seemed to have been mounted by Mr. Meilicke purely in order to secure a ruling from the Court on the views put forward in his writings" and to overturn "the judgement of the *Bundesgerichtshof*."[170] Meilicke was disappointed but undeterred. He continued to solicit (and, as we will see, to ghostwrite) preliminary references from German lower courts in subsequent years. The most renown were the 2007 and 2011 *Meilicke* cases, which he again lodged himself to successfully challenge the denial of tax credits to shareholders of dividend-paying companies established in other member states, producing up to €10 billion in tax losses for the German state.[171] But this analysis also demonstrates that if Euro-lawyers are too brazen in constructing test cases – if the "hidden

[169] Interview with Wienand Meilicke, January 17, 2018; Case C-83/91, *Meilicke*, at I-4934.

[170] Arnull, Anthony. 1993. "Case C-83/91, *Wienand Meilicke* v. *ADV/ORGA FA Meyer* AG, Judgment of 16 July 1992." *Common Market Law Review* 30(3): 613–622, at 616–617.

[171] See: Case C-292/04, *Meilicke and Others* [2007], ECR I-1835; Case C-262/09, *Meilicke and Others* [2011], ECR I-5669. For a political analysis of these cases, see: Schmidt, Susanne K. 2018. *The European Court of Justice and the Policy Process: The Shadow of Case Law*. New York, NY: Oxford University Press, at 175–180. That Euro-lawyers sometimes take on the role of litigant is clear. For instance, a second-generation Euro-lawyer in France recounts the origins of a taxation-related reference he participated in constructing: "I had a dispute with the Social Security [administration] concerning some fairly special French taxes on general social contributions … Some colleagues in other law firms had consulted with me … It was serial litigation, and I had prepared the pleadings for the whole series for my colleagues, and when it was clear we had to go to the ECJ, my colleagues asked me to be the party to the suit. So we hired other lawyers to help us, and we went to the ECJ." See: Case C-103/06, *Derouin* [2008], ECR I-1853; Interview with Philippe Derouin, September 12, 2017.

transcript" is made public – their efforts risk backfiring. A case study of the canonical constructed EU lawsuit brings this message home.

5.4.2 The Perils of Taking Lawsuit Construction Too Far

Usually analyzed doctrinally,[172] what is truly notable in the famous *Foglia* v. *Novello* cases (1979 and 1980) is that they were pioneered by two first-generation Euro-lawyers we have already encountered, who got a bit carried away.

Emilio Cappelli and Paolo De Caterini first met in the mid-1960s in a pizzeria in Brussels while working at the European Commission. They had since become members of the Italian FIDE branch and opened a partnership in Rome. Their precise intent was to construct test cases to "dismantl[e] laws before the ECJ … We had crazy fun, crazy fun!" Like other Euro-lawyers, their strategy in their combined twenty-five preliminary reference cases was to forge relationships with national agricultural associations – particularly Coldiretti and Confiagricoltura – and provincial agricultural cooperatives. They would "book a hotel room," travel to small agricultural villages, "schmooze … visit with farmers," and scout the local *pretori* (small claims judges). In their division of labor, Cappelli would nurture relationships with the associations, and De Caterini would seek out clients: "I scouted all of Umbria to find someone willing to bring suit on tobacco matters," he recalls; "On grain matters, I scouted all of Puglia!" Their targeting of the humblest of lower courts was equally intentional. "All agricultural entrepreneurs feared the length of proceedings," so it was easier to convince them to play along at first instance (where proceedings would only last a few months). Further, many *pretori* were also practicing lawyers or members of the agricultural cooperatives, so they were more approachable. "We'd go to the honorary *pretori*, who knew people at the Confiagricoltura, or who perhaps held property of their own, and we'd explain things really well! … the local *pretore* … has the durum wheat growing outside his door! He gets it."[173]

All of this worked splendidly, producing seven (sometimes path-breaking) references to the European Court from local *pretori* through 1978 that left legal scholars stupefied at how the "initiative of vigilant individuals" was empowering the ECJ to "contro[l] the powers of

[172] See, for instance: Bebr, Gerhard. 1982. "The Possible Implications of *Foglia* v. *Novello II*." *Common Market Law Review* 19(3): 421–441.

[173] Interview with Paolo De Caterini, December 27, 2017.

Member States [and] make further rules on community matters."[174] Then Cappelli and De Caterini pushed their "trickery" too far in *Foglia* – "the maximum fantasy that we were able to put into practice." They committed the diplomatic *faux pas* of targeting the laws of a foreign state.

The mischief begins as it so often does in Europe: with wine. Under French law, domestic fortified wines like Vermouth were classified as "natural sweet wines" subject to a lower consumption tax, while equivalent wines from other states were classified as "liquor wines" subject to an import tax.[175] Cappelli and De Caterini believed that this constituted a discriminatory tax violating Article 95 of the Treaty of Rome. But when they approached French judges to see if they were willing to punt a case to Luxembourg, they got a cold reception: "We were cruder, we were foreigners, after all . . . so we said, 'Now we'll stick it to them!'"

They turned to a fellow lawyer in Rome whose secretary, Mariella Novello, had an aunt living in Menton, a small town on the French riviera just past the Italian border. "'Let's just ship over a case [of wine]. Who'll do it?' 'What about the secretary of so and so, could she? The one [working for] the counterparty's lawyer? Can he ship it?' 'Ah, yes, to Menton! Come on, come on! We'll make it!'"[176] Mrs. Novello struck up a contract with a wine trader based in Piedmont – Pasquale Foglia – to ship Vermouth to her aunt. Crucially, the contract contained a clause that Mrs. Novello would "not be liable for any duties which were claimed by the Italian or French authorities contrary to the [Community] provisions on the free movement of goods."[177] In turn, Mr. Foglia struck up his own contract with an international shipping company – Danzas SpA – containing the exact same clause. When the cases of Vermouth reached the French border, Danzas was charged an import tax, which Mr. Foglia then asked Mrs. Novello to pay. When

[174] Schermers, "Law as It Stands against Treaty Violations by States," at 133. Schermers here references the *Leonesio* case, which in truth was constructed by Cappelli and De Caterini who, as we will see, also ghostwrote the local *pretore*'s referral to the ECJ (see Figure 5.12). See: Case 93/71, *Leonesio* v. *Ministero dell'Agricoltura e Foreste* [1972], ECR 287.

[175] Case 104/79, *Foglia* v. *Novello I* [1980], ECR 746, at 749–750. The applicable French legislation originated from 1898, and had been last amended by Article 24 of the Finance Law No. 78–1239 approved on December 29, 1978 (*Journal Officiel de la République Française* No. 304 of December 30, 1978).

[176] Interview with Paolo De Caterini, December 27, 2017.

[177] 104/79, *Foglia* v. *Novello I*, at 758, para. 3.

she refused, Mr. Foglia sued before the local *pretore*, employing Cappelli and De Caterini to represent him, while Mrs. Novello turned to her own boss. The Euro-lawyers drafted a preliminary reference, and the judge used it to punt the case to Luxembourg.

The ECJ wanted nothing to do with this hot potato of a case. So they found a procedural means to dismiss it: given that "two private individuals who are in agreement . . . inserted a clause in their contract in order to induce the Italian court to give a ruling," the dispute was of "an artificial nature" and the ECJ lacked jurisdiction to resolve it.[178] But Cappelli and De Caterini were stubborn. They drafted a second reference for the *pretore* to submit to the ECJ, arguing that it was the exclusive competence of national courts to adjudicate questions of fact. De Caterini recalls what happened next:

> We constructed lawsuit number two, pissing everyone off! We were mean! Saying that in Italy there are no fake lawsuits, that a lawsuit is a lawsuit, etc. please respond! The French state summoned the son of [famed Italian lawyer] Carnelutti to defend it in Italian, it was really tense. There was a whole public in attendance, and when we entered we were greeted with applause! These were students.[179]

The ECJ judges were livid. They held that "the circumstance referred to by the Pretore, Bra, in his second order for reference does not appear to constitute a new fact which would justify the Court of Justice in making a fresh appraisal of its jurisdiction."[180] In response, the Euro-lawyers planned to punt the case to the supreme civil court[181] – the Court of Cassation – and have *it* submit a third reference that the ECJ could not refuse: "Now we'll send a heck of a reference to those assholes!" In the meantime, however, France abrogated its import tax, and Italy's national Vermouth producer – Martini & Rossi – contacted De Caterini and Cappelli urging them to drop their combative campaign. In subsequent conferences, the duo's most prestigious friend at the European Court – Pierre Pescatore – refused to greet them. In retrospect, De Caterini acknowledges that they had taken their agency too far: "The offense was the following: We attacked France . . . These rapports also mattered. We had offended the ECJ."[182]

[178] Ibid., at 759–760, paras. 10–12.
[179] Interview with Paolo De Caterini, December 27, 2017.
[180] Case 244/80, *Foglia* v. *Novello II* [1981], ECR 3047, at 3068, operative para. 4.
[181] Via a special procedure under Italian law known as the *ricorso per saltum*.
[182] Interview with Paolo De Caterini, December 27, 2017.

5.4.3 Step 2: Judicial Ghostwriting

Constructing test cases was only half the battle. Once in court, the first Euro-lawyers confronted judges who were often overworked, who ubiquitously lacked training in European law, and who disfavored what they took as quixotic solicitations of a faraway court "tucked away in the fairyland Duchy of Luxembourg."[183]

In Chapter 3, we unpacked how judges remain institutionally constrained and ill-equipped to enforce EU law. These barriers were exponentially more pronounced in 1960s and 1970s. The European Community was in its infancy, and even judges in big cities needed to be lobbied to participate in its construction. In Paris, Robert Saint-Esteben recalls why "the role of lawyers was determinative":

> I knew the era, the beginning. Which now appears far away, but you must understand that these were years following the birth of European law … I remember an anecdote from the time which [Pierre-Henri Teitgen] told me, which was very true, from the courts of Paris … One of the first times that a lawyer raised … a question under the Treaty of Rome in his pleading, the [commercial court] President interrupted him and said: "What treaty are you talking about?" "Well the Treaty of Rome that was signed in 1957 in Rome founding …" So we really had to fight! You see, us lawyers.[184]

In Milan, a cofounder of one of the first Italian firms to specialize in European law in the 1970s notes that "in the past it was virtually impossible" for national judges to invoke European law on their own; "it didn't happen because judges didn't study this topic, they didn't know it, they looked at you funny as you talked!"[185] In Munich, well into the 1980s some judges had "apparently never been confronted with European law" and had "no idea" how to apply it.[186] And in Hamburg, the first lower court judge to repeatedly dialogue with the ECJ in the 1970s lamented his colleagues' "ignorance" of EU law and deemed crucial lawyers' efforts to familiarize them with the preliminary reference procedure.[187]

[183] Stein, Eric. 1981. "Lawyers, Judges, and the Making of a Transnational Constitution." *American Journal of International Law* 75(1): 1–27, at 1.
[184] Interview with Robert Saint-Esteben, November 13, 2017.
[185] Interview with Roberto Jacchia, De Berti Jacchia Franchini Forlani Studio Legale in Milan, November 17, 2016 (in person).
[186] Interview with Peter Behrens and Thomas Bruha, January 25, 2018.
[187] Voss, Reimer. 1993. "The National Perception of the Court of First Instance and the European Court of Justice." *Common Market Law Review* 6: 1119–1134, at

The burden of embedding national judges within a fledgling transnational network of European courts thus rested upon the shoulders of practicing lawyers. "But of course," confides a former ECJ member, "judges weren't great specialists of European law, so they had lots of work and also a certain humility vis-à-vis EU law, inclining them to adopt the lawyer's reference. This is the reality."[188]

Yet simply "inclining" judges to solicit the ECJ once again understates matters. The first Euro-lawyers supplied more than mere "nudges"[189] or whisper passing suggestions in the ears of eager judges. Rather, they acted like shadow judicial clerks. By this, I mean that since the 1960s Euro-lawyers *consistently motivate and draft ready-made texts of preliminary references to the ECJ that are copied – sometimes verbatim – by national judges in their judicial orders*. In its increasingly rare form, lawyers may even dictate or type up the entire judicial order for the judge, whose only contribution is to sign it. Combined with constructing the "perfect" test case, the logic of ghostwriting is to cajole judges into deeming it necessary to solicit the ECJ, and to make this habit-disrupting act as easy and least labor-intensive as possible. Figure 5.8 places this form of agency on a conceptual continuum, highlighting the practices that substitute the lawyer for the judge as the bottom-up motor of the judicial construction of Europe.

I first became aware that only inexperienced lawyers trust judges to enforce European law and solicit the ECJ on their own accord in my conversations with veteran Italian practitioners. Wilma Viscardini recalls that "in my very first lawsuits, when I invoked a European law in court and asked for a preliminary reference, I had to provide a sort of crash course in European law … it's certainly important to this day to suggest to the judge the interpretive questions to submit to the Court … and sometimes to even draft the order of reference."[190] When I relayed these insights to Alberto Dal Ferro – a second-generation

1124; Voss, Reimer. 1986. "Erfahrungen und Probleme bei der Andwendung des Vorabentscheidungsverfahrens nacht Art. 177 EWGV." *Europarecht* 1: 95–111, at 97–98.

188 Interview with Roger Grass, September 29, 2017.

189 A nudge is "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options … the intervention must be easy and cheap to avoid." See: Thaler, Richard, and Cass Sunstein. 2009. *Nudge: Improving Decisions about Health, Wealth, and Outcomes*. New York, NY: Penguin Books, at 6.

190 Interview with Wilma Viscardini, September 29, 2017.

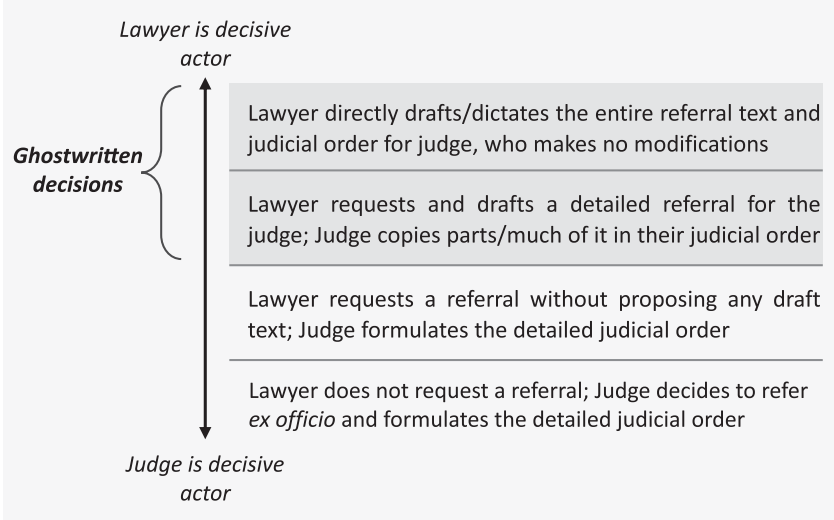

Figure 5.8 Conceptualizing lawyers' role in judicial decision-making

Euro-lawyer who brokered the pathbreaking 1991 *Francovich* case[191] by soliciting a referral from a local judge who did not even know where the ECJ was located – he was emphatic: "When I say: 'You must explain', it's absolutely necessary. It's an essential element. You must explain why EU law must prevail over national law, that the judge must disapply the latter … you must thus interpose a proposal for a preliminary reference: A, B, C, D, E, F, if necessary … in my experience it's essential."[192] Dal Ferro should know: he has since argued over 100 cases in Luxembourg.

Paolo De Caterini's experience is no different: "I remember our first lawsuit before the Tribunal of Brescia [in 1971]. The [judge] shot up! 'A Treaty? Sorry, but you should know that we don't apply Treaties! Why do you keep insisting on this Treaty?' And he was a notable jurist! From then on, every single memo we wrote would be preceded by two pages, where: 'In 1957, six states decided blah, blah, blah!'"[193] Although the judge did not solicit the ECJ in this instance, Cappelli and De Caterini's crash course cajoled one of the first rulings by an Italian

[191] In *Francovich*, the ECJ first held that EU member states could be held liable for damages to individuals suffered when the state fails to transpose EU law into national law. See: Joined cases C-6/90 and C-9/90, *Francovich*.
[192] Interview with Alberto Dal Ferro, March 6, 2017.
[193] Interview with Paolo De Caterini, December 27, 2017.

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court recognizing the supremacy and direct effect of European law, "based . . . entirely on the case law of the Court of Justice." In response, an enthusiastic member of the Commission Legal Service mused that Italian judges seemed to be "recognizing the specific characteristics of Community law" after "hesitat[ing] for a long time."[194]

This conclusion proved hopelessly premature. In interview after interview, even contemporary practitioners are adamant that without judicial ghostwriting, most national courts remain unlikely to invoke EU law and exceptionally unlikely to solicit the ECJ. And when they do, they are liable to make mistakes. While sometimes bordering on hubris, this view is usually ground in a pragmatic realism bordering on empathy. The best Euro-lawyers intuit the limited training and bureaucratic constraints afflicting their judicial interlocutors, particularly in lower courts. They know they must "present something that's pre-packaged . . . [to] reduce the risk of an erroneous formulation and stimulate the judge to make [the reference] because the workload is reduced."[195] They must "do the homework"[196] and "spoon-feed" courts.[197] Judges often do not know "where the [ECJ] is located,"[198] they do not "exactly understand what to ask,"[199] and they "fear . . . making a bad impression" by having their referrals declared inadmissible.[200] Since judges "almost never turn to the EU judge,"[201] ghostwriting referrals ready for copy and paste – "open parentheses, closed parentheses"[202] – remains a necessary staple of Euro-lawyering.

While the rule is that "you write [the judge] a draft" and "hope that he would copy yours,"[203] this outcome requires interpersonal finesse.

194 Maestripieri, Cesare. 1972. "The Application of Community Law in Italy in 1972." *Common Market Law Review* 10: 340–351, at 340. The case concerned the direct applicability of Council Regulation 1975/69 and Commission Regulation 2195/69.

195 Interview with Patrick Ferrari, Fieldfisher in Milan, December 13, 2016.

196 Interview with Riccardo Sciaudone, Grimaldi Studio Legale in Rome, September 19, 2016 (in-person).

197 Interview with Fabio Ferraro, law professor at the University of Naples and lawyer at De Berti Jacchia Franchini e Forlani in Naples, February 6, 2017 (in-person).

198 Interview with Vincenzo Cannizzaro, law professor at La Sapienza University of Roma and lawyer, Cannizzaro & Partners in Rome, June 17, 2015 (in-person).

199 Interview with Riccardo Sciaudone, September 19, 2016.

200 Interview with Fabio Ferraro, February 6, 2017.

201 Interview with Aristide Police, law professor at the University of Rome-Tor Vergata and lawyer at Clifford Chance in Rome, October 4, 2016 (in-person).

202 Interview with Cristoforo Osti, Chiomenti Studio Legale in Rome, September 29, 2016 (in-person).

203 Interview with Giuseppe Giacomini, October 24, 2016.

Particularly in years past, Euro-lawyers were liable to be perceived as snake oil salesmen. Hence in their interactions with judges, the goal of attacking the state's policies was best advanced via a strategically softer and collaborative predisposition. Viscardini recalls that some judges could be blindsighted by ready-made referrals, "risking to strike their susceptibility."[204] Capelli and Ubertazzi diffused these tensions by stressing how European law "was a novelty, and after all it was about going to the ECJ, it's not like we were convicting someone."[205] "Part of the game was explaining to the judge that this was serious stuff," echoes a Genoese pioneer, "but also really elegant and innovative."[206] Forging trust with more approachable first-instance judges was also key.[207] Viscardini wrote the entire reference in the 1976 *Donà* v. *Mantero* case because she knew the *pretore* and he "placed maximum trust" in her.[208] Bruno Nascimbene ghostwrote his first order of referral in the 1975 *Watson and Belmann* case[209] because the first-instance judges in Milan "were approximately my age, and we knew each other."[210]

Preparing the groundwork for ghostwriting was especially key when the first Euro-lawyers confronted semiprofessional judges in small, rural communities. The story of one preliminary reference is telling in this regard. In 1975, the small claims court of Bovino – a tiny village perched atop the sun-drenched hills of Puglia – audaciously referred a case to the ECJ challenging the Italian government's macroeconomic policy. As part of its anti-inflationary agenda, the Christian Democratic government had frozen the price of durum wheat, a key ingredient in dried pasta. Despite a "very significant increase" in world market prices for wheat, farmers were obliged to sell it "below the purchase price."[211] One of these – Mr. Russo – deemed this contrary to European law[212] and sued. Agreeably, the Justice referred the case to the ECJ, which declared the policy "incompatible with the common organization of

[204] Interview with Wilma Viscardini, September 29, 2017.
[205] Interview with Fausto Capelli, November 23, 2016.
[206] Interview with Giuseppe Giacomini, October 24, 2016.
[207] On the undertheorized role of trust in the judicial construction of Europe, see: Mayoral, Juan. 2017. "In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe." *Journal of Common Market Studies* 55(3): 551–568.
[208] Interview with Wilma Viscardini, September 29, 2017.
[209] Case 118/75, *Watson and Belmann* [1976], ECR 1185.
[210] Interview with Bruno Nascimbene, November 22, 2016.
[211] Case 60/75, *Russo* v. *AIMA* [1976], ECR 46, at paras. 2–3.
[212] Regulation No. 120/67 of the Council of June 13, 1967 on the common organization of the market in cereals (*Official Journal*, Special Edition 1967, at 33).

the markets" and directed the state to bear "the consequences" if "an individual producer has suffered damage."[213]

In truth, Mr. Russo was a member of an agricultural association (Confiagricoltura) with close ties to two Euro-lawyers we have already met: De Caterini and Cappelli. The duo had devised a strategy to challenge the government's anti-inflationary policy, and Mr. Russo agreed to serve as protagonist. But how to get a local part-time judge to refer the case to the ECJ? In a raspy voice punctuated by hearty chuckles, De Caterini recounts it all as if reading a playscript:

> It's a village atop of this [hill]. I travelled all night crossing train tracks to get there, where people were still in their bathing suits! There, there was a lawyer and *pretore* … who was a friend of Confiagricoltura! We were interested in one thing: speed. For if this guy … set[s] the hearing date correctly, the *avvocatura dello stato* [state legal service] won't be able to show up in time! They will raise so many objections that we'll be here all year!
>
> So we said: "Get ready, I'm on my way up!"
>
> The [judge] was up to speed on everything. I gave him the materials. "Yes, I'm fine with it." The preliminary reference, too! I mean, I was the one who wrote the preliminary references! It's obvious! I do it to this day. Trust them? No, no. I wrote the references myself! … After that, a huge problem arose! I said: "Look, we must mail this to the ECJ."
>
> "Mail this to the ECJ?!" So he called the chancellery.
>
> They replied: "No, we've never done this! We have to send this through the international affairs department of the Ministry of Foreign Affairs."
>
> And I said, "No, no, no! For goodness sake, not the Ministry of Foreign Affairs! Let's not be silly!"
>
> "So wait, how do we do it?"
>
> "Well, you take an envelope and a postage stamp!"
>
> "An envelope and a postage stamp? How – are you sure? You're not going to get me thrown in jail for this?" In the end he convinced himself, because this was the way, after all!
>
> … And after all of this: "Phew! We did it!"[214]

Suggestive of the affair's hurriedness to prevent the state legal service from opposing a referral to the ECJ is the fact that the judicial order was hastily handwritten[215] "as we dictated it," De Caterini confides.[216]

[213] 60/75, *Russo* v. *AIMA*, at operative parts (a) and (c).
[214] Interview with Paolo De Caterini, December 27, 2017.
[215] I confirmed this by obtaining the original file: CJUE-1715, *dossier de procedure originale, affaire* 60/75, Carmine Russo contro AIMA. HAEU, at 5–8.
[216] Interview with Paolo De Caterini, December 27, 2017.

De Caterini and Cappelli did not act as judicial ghostwriters once or twice. They did so systematically. For instance, in the landmark 1978 *Simmenthal* case,[217] the duo pounced upon a "fundamental error" of their opponents in the state legal service. Wanting to transplant the dispute from the small-town *pretore* of Susa to a more favorable forum, the state lawyer requested that the case be referred to the Italian Constitutional Court. After all, before 1984[218] the Constitutional Court clearly instructed judges to refer to it all matters concerning the validity Italian law under Community law such that it – and not the ECJ – could adjudicate the validity of national legislation. That is when the Euro-lawyers coyly approached the judge to cajole trouble: "'No, look. There's this problem, and it's intolerable, [the position] of the Constitutional Court.' So I wrote the preliminary reference for him … knowing full well that I was setting a bomb and even lighting the match!" In the key passage of De Caterini's ghostwritten reference, he asked the ECJ if Community law requires that "national measures which conflict with [European] provisions must be forthwith disregarded without waiting until those measures have been eliminated by … other constitutional authorities." The ECJ agreed, affirming that lower courts could submit references and disapply national legislation without awaiting directions from constitutional courts or parliaments.[219] In a conference in Luxembourg shortly after *Simmenthal*, the ECJ's Pierre Pescatore descended from the dais to appreciatively shake De Caterini's hand. "Everyone was looking at me like 'Who the heck is this guy!' … [Pescatore] really loved me, he'd tell me, because we all knew each other, the conferences were few, it was always the same people."[220]

The ghostwriting that produced the ECJ's pathbreaking *Simmenthal* ruling illustrates how judge-centric narratives can lead us astray. For instance, Alec Stone Sweet uses the case to highlight how "some Italian judges, apparently hoping to gain a measure of autonomy from the ICC [Italian Constitutional Court], worked to undermine [its] jurisprudence" by "request[ing] the ECJ to declare the ICC's … jurisprudence incompatible with the supremacy doctrine!"[221] Yet the

[217] 106/77, *Simmenthal*, ECR 629.
[218] See: Italian Constitutional Court, judgment No. 170 of June 8, 1984, *SpA Granital v. Amministrazione delle Finanze dello Stato*.
[219] 106/77, *Simmenthal*, *at* 632, 645–646.
[220] Interview with Paolo De Caterini, December 27, 2017.
[221] Stone, "Constitutional Dialogues in the European Community," at 10.

choreographers of this pugnacious campaign were not innately defiant judges, but mischievous lawyers who dexterously cajoled courts into playing their game.

5.4.4 "The Way to the Sentence Leads through the Pre-sentence"

Was judicial ghostwriting unique to Italy? In truth, the evidence suggests that French and German Euro-lawyers made use of the same repertoire for court-driven change for the same reasons, producing "pre-sentences," as one lawyer put it.[222]

In Paris, long-standing judges are the first to set the scene: "Before the 1980s," Guy Canivet recalls, "when European law was not well known, a certain number of law firms made it their trademark … Ryziger's law firm, Funck-Brentano's firm … and it's true that for judges like myself, who encountered these cases, they functioned as a motor."[223] Indeed, the first time the French Court of Cassation considered soliciting the ECJ in light of state noncompliance was in the 1966 *Promatex* case. Novel archival evidence reveals that the entrepreneurship of Paul-François Ryziger was key. Intent on having the ECJ strike down certain French custom barriers, the pioneering Euro-lawyer asked to "stay the proceedings until the ECJ pronounced itself on the affair. Ryziger went so far as to draft the preliminary questions such that the European judges could not avoid sanctioning the government law."[224] Writing in the 1980s, a colleague of Ryziger who solicited some of the first references from Paris' lower courts confided that because his interlocutors found it "difficult to perceive" EU law in cases "where all the parties are French," "the French judge will rarely apply Community law on his own initiative. He will also rarely draft a question himself *ex nihilo*. The role of the parties and of their counsel is therefore essential," particularly "if counsel drafts preliminary questions himself."[225]

Outside the halls of Paris' supreme courts, the absence of judicial training rendered first-instance judges even more dependent upon

[222] Interview with Rolf Gutmann, Guttmann, Pitterle, Zeller & Behl in Stuttgart, December 6, 2017 (via phone).

[223] Interview with Guy Canivet, October 2, 2017.

[224] Bernier, "France et le Droit Communautaire," at 129–130.

[225] Desmazières de Séchelles, Alain. 1987. "Experiences and Problems in Applying the Preliminary Proceedings of Article 177 of the Treaty of Rome, as Seen by a French Advocate." In *Article 177 EEC: Experiences and Problems*, Henry Schermers, Christiaan Timmermans, Alfred Kellermann, and J. Stewart Watson, eds. New York, NY: Elsevier, at 155–157.

lawyers' political entrepreneurship. In Lille, for instance, the first instance court president turned to Marcel Veroone – the region's first Euro-lawyer – to train judges on how to draft "preliminary references and to indicate how they should proceed when lawyers formulated these requests." That in the 1970s Veroone was the only lawyer in Lille to repeatedly request referrals from local courts meant that this training was as beneficial to him as for his judicial interlocutors. Even so, ghostwriting remained necessary. In an interview with me two years before his death, Veroone illustrated this by recalling a typically exasperated small-town judge, who pleaded that he ghostwrite the entire order of referral to the ECJ.[226]

Jean-Pierre Spitzer recounts first noticing French lawyers ghostwriting references while he clerked at the ECJ in the 1970s. "There was a case that's really important for specialists" he recalls, "[a] case where the lawyer was just fabulous. Fabulous! Because for the first time in the [European] Court's history, [a] judge who hadn't even gotten to the decision phase … decided to pose a ton [of] questions to the ECJ. And the lawyer who played this role! … I was blown away!"[227] When I interviewed the Euro-lawyer in question, they proudly showed me their faded personal copy of the original dossier, recounting how they "convinced the judge … that we needed to pose the question to the ECJ. Now, I'm not sure if I can tell you this because I don't know if the judge is still alive, but I'll tell you off the record." I followed the gesture to turn off the beeping device and switched to handwritten transcription: "The judge replied: 'You've convinced me, but I don't know how to do this. Write it for me.' "[228]

Having witnessed how the pioneers ghostwrote referrals, Spitzer put this repertoire to use upon returning to France to practice law. He is particularly proud of a 1985 tariff dispute,[229] where he cajoled the first instance judge in the tiny town of Béthune to solicit the ECJ for the first time:

> The whole Béthune bar was there at the end of my pleading. Everyone saying, "What is this, an extraterrestrial? I don't really understand what he's talking about, it's something bizarre." And the judge said, "counsel, you've convinced me, but I cannot answer your question." … I said,

[226] Interview with Marcel Veroone, ex-lawyer in Lille, September 4, 2018 (via phone).
[227] Interview with Jean-Pierre Spitzer, September 20, 2017.
[228] Interview with French lawyer, 2017 (in-person; date and name redacted).
[229] Case 385/85, *S.R. Industries* v. *Administration des douanes* [1986], ECR 2929.

> "in my view, national law is contrary to European law. You should therefore first solicit the ECJ … here is the question that you will pose." I had drafted it, because you had to do the work! I even drafted the motivations for him. I submitted a file, and said: "Here's the motivation, I don't request that you copy it, of course it's your discretion" – but he didn't change a thing. Because you had honest judges who said, "I don't know this at all, [and] this guy was a clerk [at the ECJ]" … The French authorities got worried that a judge from Béthune could refer to the ECJ! In a centralized state this is impossible![230]

Spitzer's experience is not unique. Other French second-generation Euro-lawyers affirm ghostwriting detailed orders of referral to the ECJ.[231] After all, judges "have a restrained sensibility vis-à-vis EU law" and "lack the habit, so they will be happy to have a ready-made thing."[232]

In Germany, oral histories point in the same direction. Consider the last person you would expect to credit the entrepreneurship of lawyers over judicial activism: Reimer Voss, a pugnacious judge at Hamburg's fiscal court. Voss repeatedly figures in Karen Alter's narrative of judicial empowerment,[233] and for good reason: he was the ECJ's most prolific lower court interlocutor in the 1970s. Yet in a 1987 article, Voss cautioned that:

> [L]arge areas of Community law either do not receive any attention at all from German judges … it is obvious that a preliminary ruling to the Court of Justice is frequently not sought. The conditions necessary for a reference to the Court of Justice may not be known … I would like to draw your attention to a particular phenomenon that seems to operate in other countries, too. What is so striking is that the same persons or companies frequently participate as plaintiffs in reference proceedings. In my experience one of the reasons for this is that the plaintiffs are advised by lawyers who are well-experienced in Community law and who suggest that the court make a reference to the Court of Justice.[234]

[230] Interview with Jean-Pierre Spitzer, Cabinet Saint Yves Avocats, September 20, 2017 (in-person).

[231] Interview with Philippe Derouin, September 12, 2017; Interview with Frédéric Manin, Altana Avocats in Paris, September 22, 2017 (in-person); Interview with Philippe Guibert, September 21, 2017.

[232] Interview with Eric Morgan de Rivery, September 12, 2017.

[233] Alter, "European Court's Political Power," at 464; Alter, *Establishing the Supremacy of European Law*, at 102.

[234] Voss, Reimer. 1987. "Experiences and Problems in Applying Article 177 of the EEC Treaty – From the Point of View of a German Judge." In *Article 177*

Even though no judge in Germany in the 1960s and 1970s was as eager to serve as motor of European integration, and even though he was less burdened by an onerous workload than other lower court judges, Voss confessed that "formulating the question for reference demands an especially high level of intellectual effort," hence it was crucial that "a small group of barristers familiar with European law" would "frequently urge us to make a reference."[235] It was undoubtedly Fritz Modest and the protagonists of this chapter that Voss had in mind.

To be sure, conversations with Euro-lawyers do suggest that particularly lower fiscal courts in Germany have occasionally been more open to efforts to Europeanize national law than their Italian and French counterparts, consistent with Chapter 4. Yet in line with Voss' experience, ghostwriting often remained necessary. As late as the 1980s, a first-generation Euro-lawyer in Cologne lamented how "the capacity of most national judges (courts) is limited and concentrated on their day-to-day work … [for] the number of judges (courts) sufficiently familiar with EEC law is rather small."[236] To this day, interviewees confirm that German judges care "to avoid the exposure if they ask the wrong questions," so they "normally try to get around" referring to Luxembourg.[237] Off-the-record, a first-generation Euro-lawyer relayed having to draft the entirety of one of their first orders of referral for a big city tax court whose judges did not know what European law was in the first place.[238] Recounting his participation in eighty-eight preliminary references since 1965, Dietrich Ehle shares that "still today I formulate the questions that should be referred … courts were not by themselves inclined the refer cases … I [can] convince the courts in 30–40 percent of all cases to refer."[239] At Fritz Modest's firm and its successor, lawyers "want to make it easier for the judge to make referrals … so what we normally do in our writs is to draft the questions … saying 'you could

EEC: Experiences and Problems, Henry Schermers, Christiaan Timmermans, Alfred Kellermann, and J. Stewart Watson, eds. New York, NY: Elsevier, at 57–58.

235 Ibid., at 66–67; Voss, "Erfahrungen und Probleme," at 97–98.

236 Deringer, Arved. 1987. "Some Comments by a German Advocate on Problems Concerning the Application of Article 177 EEC." In *Article 177 EEC: Experiences and Problems*, Henry Schermers, Christiaan Timmermans, Alfred Kellermann, and J. Stewart Watson, eds. New York, NY: Elsevier, at 210.

237 Interview with Manja Epping, Christian Frank, and Thomas Raab, Taylor Wessing in Munich, December 12, 2017 (in-person).

238 Interview with one of the first Euro-lawyers in Germany, name and date redacted (in-person).

239 Interview with Dietrich Ehle, December 13, 2017.

ask this, or that, or almost the last one' … in 50% [of cases] you would see big similarities between the proposals and the decision."[240]

An evocative aphorism capturing this practice of judicial ghost-writing is shared by Rolf Gutmann, a labor lawyer in Stuttgart who brokered over a dozen preliminary references since the early 1980s: "The way to the sentence leads through the pre-sentence."[241] Indeed, a local judge from whom Gutmann solicited the first-ever reference to the ECJ from the Stuttgart Administrative Court credits his discovery of European law to that 1981 encounter: "I was very happy that he did this work [drafting a preliminary reference] for us, because I didn't know anything about it, so I had to learn a lot."[242] Driven by his newfound European legal consciousness, the judge in question – Michael Funke-Kaiser – became the most prolific interlocutor of the ECJ that I met in my year and a half of fieldwork.[243]

Conversations with second-generation Euro-lawyers underscore how a "draft of the right questions is best practice" and can "actually [be] expected by the judges."[244] "You cannot trust the local judges [to] see the real problems, that they phrase it correctly, that they send it to the ECJ, you have to help them in that still today, especially in rural areas … you really have to encourage them." Hence the dictum: "Formulate the questions and the matters that should be referred as precisely as possible."[245] A practitioner in Berlin who has argued over three dozen cases before the ECJ agrees that since "it's not part of the daily diet" of most judges to collaborate with the ECJ, one must pique their interest – "to contribute to the development of EU law" – and lessen their workload: "if the parties already presented on this topic, you can actually copy, or use [it so] it's not really much work."[246] For example, in the 1990 *Meilicke* case described previously, the Euro-lawyer not only constructed the case; Meilicke also "had a very nice,

[240] Interview with Klaus Landry and Lothar Harings [quoted], Graf von Westphalen, January 9, 2018 (in-person).
[241] Interview with Rolf Gutmann, December 6, 2017.
[242] See: Case 65/81, *Reina* [1982], ECR 34.
[243] Funke-Kaiser estimates referring ten cases to the ECJ since his interactions with Gutmann: Interview with Michael Funke-Kaiser, November 30, 2017.
[244] Interview with Rene Grafunder and Jorg Karenfort, Denton's in Berlin, November 7, 2017; See also: Interview with Manja Epping, Christian Frank, and Thomas Raab, December 12, 2017.
[245] Interview with Jürgen Lüdicke and Bjorn Bodenwaldt, PwC in Hamburg, January 8, 2018 (in-person).
[246] Interview with Thomas Luebbig, November 1, 2017.

wonderful session where the [Hannover regional] court copied all my questions, submitted all my questions to the Court of Justice." Like his French and Italian counterparts, Meilicke acknowledges that his ghostwriting serves a political strategy. Pushing "lower court judges to present a case directly to the European Court of Justice, bypassing their national court of last resort … [creates] an incentive for national judges of last resort to present a case to the European Court of Justice themselves; for they do not like be shamed by a lower court judge."[247]

What are we to make of this oral history consensus? On the one hand, lawyers have reason to *underreport* their ghostwriting, as belied by those who only confided these actions off-the-record. In civil law countries wary of the lawyer-driven adversarial legalism of common law countries,[248] "the drafting of preliminary questions is considered to be essentially, if not exclusively, a judicial task,"[249] making ghostwriting "impossible to imagine."[250] Even some ECJ judges and Commission lawyers embraced this view. In a 1985 conference, ECJ judge Thijmen Koopmans cautioned that "the judge can not rely on the imaginative powers of the parties and their counsel. The question must find its place in the intellectual process the judge intends to use."[251] A representative of the Commission added that "it is for the national court to select and draft the questions," for lawyers would "draft them from a standpoint of partiality."[252]

On the other hand, some lawyers may be biased by the problem of "exaggerated roles … [since] all of us like to think that what we do has an impact."[253] This is particularly plausible in purposive interviews with key informants, since the first Euro-lawyers derived pleasure from

[247] Interview with Wienand Meilicke, January 17, 2018; January 31, 2018 (via e-mail).
[248] Kagan, "Should Europe Worry about Adversarial Legalism?"
[249] Schermers, "Introduction." In *Article 177 EEC: Experiences and Problems*. Henry Schermers, Christiaan Timmermans, Alfred Kellermann, and J. Stewart Watson, eds. New York, NY: Elsevier, at 12.
[250] Interview with Christian Roth, September 25, 2017.
[251] Koopmans, "Technique of the Preliminary Question," at 328.
[252] Bebr, Gerhard. 1987. "The Preliminary Proceedings of Article 177 EEC: Problems and Suggestions for Improvement." In *Article 177 EEC: Experiences and Problems*. Henry Schermers, Christiaan Timmermans, Alfred Kellermann, and J. Stewart Watson, eds. New York, NY: Elsevier, at 346.
[253] Berry, "Validity and Reliability Issues in Elite Interviewing," at 680–681; Tansey, "Process Tracing and Elite Interviewing," at 769.

exercising their agency. In such instances, the best way to corroborate lawyers' insights is to be "relentless in gathering diverse and relevant evidence" by triangulating oral histories.[254] Judges testifying to lawyers' influence, as we have seen, enables one form of triangulation. The 2015 opening of the ECJ's historical archives permits another.

5.5 ARCHIVAL ANATOMIES

From 2016 to 2018 I obtained access to the original dossiers for 108 of the preliminary references to the ECJ between 1964 and 1979 (24 percent of the 447 referrals over the period). Since all access requests were vetted by the European Court's staff (to decide whether to redact any pages), I had to be selective about which files I sought: I focused disproportionately on referrals by lower courts located in (or near) the field sites I visited wherein one of the first Euro-lawyers represented a party to the suit. Almost all of these documents were "opened" for the first time by my requests, and I obtained permission to reproduce excerpts. The *dossiers* are only as complete as the materials supplied by national courts, and most only supplied their final signed reference. As a result, most of these archival documents reproduce the "public transcript" and make it impossible to compare judicial decisions to lawyers' pleadings – this was the unfortunate case for all of the German dossiers. But in several instances the materials from French and Italian courts are more complete, allowing us to peek behind the curtain.

Let us begin with the 1971 *SAIL* case: the first referral to the ECJ by a southern Italian court, and a veritable masterclass in judicial ghostwriting. The reference spurred the ECJ to strike down two 1929 and 1938 national regulations[255] establishing state "milk centers." These held a monopoly on local milk production and distribution: milk could only be imported from elsewhere when local demand exceeded supply, and state officials (prefects) could determine the boundaries of the centers' market control. So when a farmer from a hillside town imported some cases of milk "within the boundary of the 'prohibited' urban area of Bari," he was reported by two city officials and criminal proceedings were lodged. The first instance judge (*pretore* of Bari)

[254] Bennett, Andrew, and Jeffrey Checkel. 2015. *Process Tracing: From Metaphor to Analytic Tool*. New York, NY: Cambridge University Press, at 21.

[255] Royal Decree No. 994 of May 9, 1929; Law No. 851 of June 16, 1938.

doubted that national law complied with Article 37 of the Rome Treaty. So he punted the case to the ECJ.[256]

This rendition parallels the ECJ's official record of an audacious judge coming to rescue of a vigilant farmer. But by now we should be able to smell the makings of a constructed case: an individual's defiant boundary crossing, a surprisingly knowledgeable local judge. Indeed, the case's ghostwriter is none other than Italy's first Euro-lawyer: Nicola Catalano. How did Catalano persuade the judge to take the unprecedented step of inviting the European Court to strike down Italian law? The original dossier demonstrates that he did it (at least in part) via a twenty-eight-page memo providing an introduction to European law, appealing to the judge's legal imperatives, and subsidizing almost all of his work.

Step 1: a crash course in European law and its bearing on the dispute. Notice (i) how Catalano uses cogent language, underlining, and adjectives like "certain," "definitive," and "total" to quell doubts and make his memo easy to skim, and (ii) renders these claims credible by subtly invoking his insider expertise as ex-ECJ judge and member of the Italian delegation in negotiations over the Rome Treaty:

> We could ask the Illustrious Pretore to refer to the Constitutional Court … but we prefer to base our defense upon the much more certain grounds of the monopoly's incompatibility … with the Treaty of Rome …
>
> The European Economic Community, is first of all based upon a customs union implying the definitive and total suppression – within a transition period happily expired on 31.12.1969 – of customs duties and quantitative restrictions … and all "measures having equivalent effect" to a quantitative restriction.
>
> In this vein art. 37 of the treaty "progressively adjusts any State monopolies of a commercial character in such a manner as will ensure the exclusion, at the date of the expiry of the transitional period, of all discrimination between the nationals of Members States in regard to conditions of supply or marketing of goods."
>
> The rationale of the foregoing provision is evident. The authors of the Treaty realized that the abolition of quantitative restrictions would be insufficient to eliminate discriminations brought by state monopolies of a commercial character … Any monopoly, especially a local one, is certainly incompatible if its sole objective and effect is to prevent market exchange …"

[256] Case 82/71, *SAIL*, ECR 120, at 120–121.

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Step 2: appealing to (i) the judge's sense of justice by casting national law in the poorest possible light and (ii) invoking the force of his obligations under European law. Catalano begins by admonishing the monopoly, variously characterizing it as outdated, a fascist legacy, a corrupt political machine, and a suicidal policy:

> … this anachronistic monopoly of the milk centers … this absurd monopoly … the corporative origins of this system during the full-fledged fascist regime … represent local centers of power with notable bearing for politics- or, more precisely, for local sub-politics … Despite perky financing … there is a very great gap between production costs (90 lire) and consumption price (150 lire) that is certainly unjustified…
>
> The vigorous opposition to the milk centers' monopoly by all agricultural associations proves that these arguments are no personal understanding … applying criminal sanctions to protect these very monopolies is in truth a suicidal violation, in that it conflicts with the agricultural, economic, and even public health interests of this Country.

Catalano then outlines the judge's obligation – his "imperative" and "binding" "requirement" – to recognize the primacy of European law over national law:

> We must now demonstrate the reach and imperative of Art. 37 EEC, even within the national legal order and particularly before national courts.
>
> It must first be recalled that, unlike traditional international law, the EEC Treaty not only contains obligations binding upon member states and laws that are directly applicable and operable without implementing legislation, but it forbids (art. 5, section 2) member states from adopting any laws which compromise the realization of the Treaty's objectives …
>
> This structure – which is a federal-type structure – is indeed characterized by the transfer of sovereignty and new powers to the Community … the Court of Justice … affirmed that contraventions of the foregoing provisions constitute violations of the rights of citizens, rights which national courts are required to protect … the national judge is required to disapply national law if it contrasts with the Community rule that must prevail.

Finally, step 3: cajoling the judge into soliciting the ECJ by agreeably laboring to ghostwrite the reference. To strengthen his proposal, Catalano highlights the novelty of the issues raised by the dispute, the risks and imprudence of deciding them directly, and the pragmatic reasons to ask the ECJ to pronounce itself:

> The authors of the Treaty recognized the difficulties of interpretation by national courts and the dangers of conflicting interpretations. In its wise arrangement, art. 177 attributed the competence of preliminary interpretation of Community law to the European Court of Justice …
>
> The Pretore charged [with the dispute] would certainly have the discretion to decide the question. However, in good conscience and while being fully convinced of his abilities – we believe that due to the delicate nature and the novelty of this very question, a judgment that eschews the light of the only specialized court in this domain could be deemed unwise … Reasons of opportunity, prudence, and procedural economy advise soliciting the Court of Justice right now …
>
> Given the novelty of the matter we believe it is opportune to clarify the competences of the Court of Justice and the national courts.
>
> The first reserves the competence to interpret Community law. But … it is up to the national court to resolve the dispute, on the basis of the Court of Justice's interpretation, which is binding … This logic must be applied in the current case …
>
> With this premise … we will permit ourselves to suggest the questions of interpretation to submit to the Court of Justice …

We need not reproduce the full text of Catalano's queries for the ECJ (see Figure 5.9 for excerpts). Suffice it to say that the local judge's version would fail any plagiarism test, and that Catalano achieved the desired outcome in Luxembourg. In many ways, Catalano was literally teaching the bench how to think and write like a European judge: the Euro-lawyer acknowledged as much in an article he penned in Italy's leading law review, *Il Foro Italiano*, wherein he called on national courts to mimic the reasoning and "style" of ECJ judgments.[257]

The most eye-popping archival evidence of ghostwriting consists of a Euro-lawyer's memo literally serving as the judicial order of referral itself. In 1975 Bruno Nascimbene had yet to become one of the most respected professors of EU law in Italy. An active member of the European Federalist Movement, at the time he was a twenty-seven year-old lawyer fresh out of law school, having written his thesis on the treaty-making power of the European Community. Then one day the husband of a university classmate – Alessandro Belmann – got hit with criminal charges. He had hosted a seventeen-year-old British woman – Lynn Watson – as a babysitter in his home without officially reporting her presence within the three-day period mandated by a 1931

[257] Catalano, Nicola. 1965. "Lo stile delle sentenze della Corte di giustizia delle Comunità europee." *Il Foro Italiano* 92(10): 141–148.

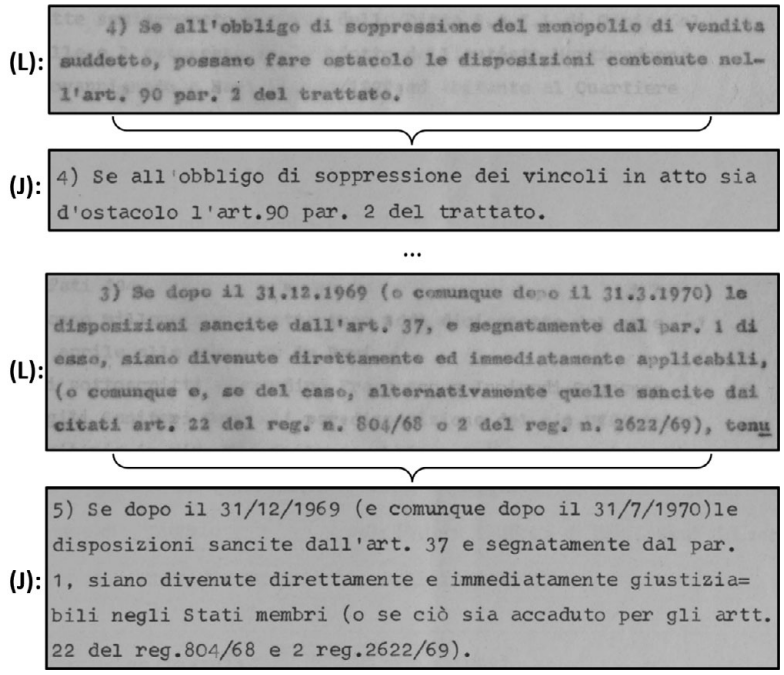

Figure 5.9 Excerpts of a ghostwritten reference: the Euro-lawyer's proposed draft **(L)** and judge's nearly identical official text **(J)** in the 1971 *SAIL* case
Source: HAEU CJUE-1277, affaire 82/71, Società Agricola Industria Latte SAIL, at 12, 44.

criminal law.[258] Ms. Watson faced up to three months of detention and the prospect of deportation, regardless of conviction.[259] Nascimbene was intent on transforming the dispute into a vehicle to push the ECJ to sanction the criminal law and affirm that protections for the free movement of workers in articles 48–66 of the Rome Treaty were directly applicable by national courts.

"I had to convince the judge," Nascimbene tells me. "I practiced frequently before the *Pretura*, and I don't hide the fact that its judges were approximately my age, and we knew each other … they trusted me … their sensibility for European law, I transmitted it to them, if I may say so. Not to brag, but I've realized this in frequenting them."

[258] Royal Decree No. 773 of June 18, 1931 ("Testo Unico Legge di Pubblica Sicurezza").
[259] Case C-188/75, *Watson and Belmann* [1976], ECR 1186, at 1188.

Watson and Belmann is a case in point: Nascimbene crafted a motivated memo capable of standing alone as an order of reference to the ECJ:

> We question that these laws' obligations are compatible with the foregoing rules of Community law … we deem it opportune – or, rather, necessary – that the illustrious Pretore, in light of Article 177 of the EEC Treaty endowing the Court of Justice with the competence to decide via a preliminary ruling … make use of this procedure, staying the proceeding underway until the Court has pronounced itself … The questions that the illustrious Mr. Pretore can submit to the Court could be indicated as follows: …

The judge was so convinced, the archives reveal (see Figure 5.10), that instead of writing a judicial order, he forwarded Nascimbene's memo and its five questions to the court chancellery, which referred *it* to Luxembourg! A few months later, the ECJ affirmed that, in response to Nascimbene's questions "which the *pretore* made his own" (how is that for a euphemism?), the Treaty's free movement protections were directly effective and restrictions could only be compatible if reasonable, proportionate, and forbearing from deportation.[260]

The original dossiers also contain direct evidence that other first-generation Euro-lawyers – including the Funck-Brentanos in France, and Capelli, Ubertazzi, Cappelli, and De Caterini in Italy – drafted preliminary references that were copied verbatim by local judges. Capelli and Ubertazzi even did so across borders – before Italian and French judges – confirming the modularity of this strategic repertoire. Such ghostwriting was often premised on walking judges through the As, Bs, and Cs of European law. In the 1978 *Union Latière Normande* case,[261] Lise and Roland Funck-Brentano did not merely motivate their proposed order of referral and draft the questions to be submitted to the ECJ. After all, they were before judges at the Commercial Court of Paris, infamous amongst Euro-lawyers for once querying what the Treaty of Rome was. To ensure that their interlocutors understood what they were talking about, the Funck-Brentanos held the judges by the hand. They provided annotated excerpts of the relevant provisions of the Rome Treaty, including Article 177 describing what the preliminary reference procedure is, and how it works (Figure 5.11). It worked in turn: the judges copied all five proposed questions and punted their first case to the ECJ.

[260] C-188/75, *Watson and Belmann*, ECR 1185, at 1187, 1199.
[261] Case 244/78, *Union laitière normande* v. *French Dairy Farmers* [1979], ECR 307.

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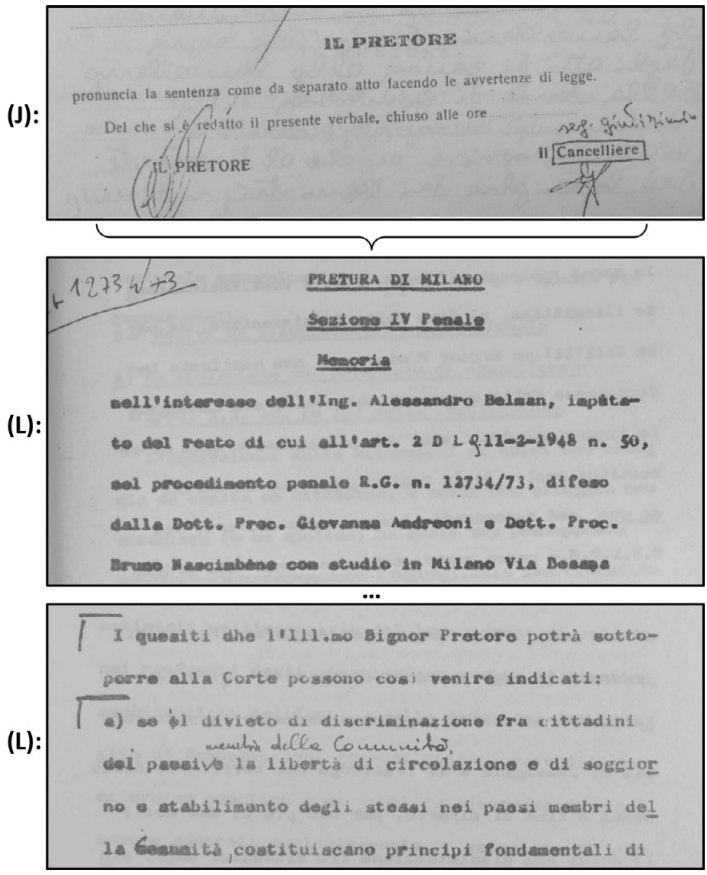

Figure 5.10 The judge's order **(J)** notes that the ruling is attached separately; The attachment **(L)** is the lawyer's memo in the "Watson and Belmann" case *Source:* HAEU CJUE-1780, affaire 118/75, Lynne Watson et Alessandro Belmann, at 7–8, 26.

Parallel occurrences are documented in the dossiers for over a dozen referrals by national courts. Excerpts of the ghostwritten judicial orders from six French and Italian courts are provided in Figure 5.12. One of these is the 1971 *Eunomia di Porro* case,[262] whose construction by Capelli and Uberazzi was described in the previous section. Knowing that the judges at the Tribunal of Turin had never referred a case to the ECJ, the Euro-lawyers typed up a comprehensive and motivated memo ready for cut and paste. Putting pen to paper, the judge scribbled

[262] 18/71, *Eunomia di Porro*, ECR 811.

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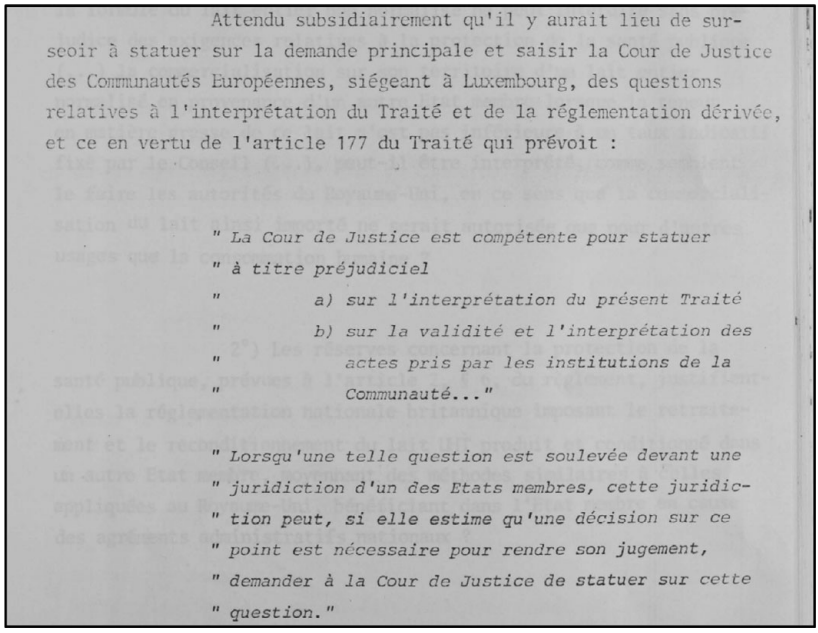

Attendu subsidiairement qu'il y aurait lieu de surseoir à statuer sur la demande principale et saisir la Cour de Justice des Communautés Européennes, siégeant à Luxembourg, des questions relatives à l'interprétation du Traité et de la réglementation dérivée, et ce en vertu de l'article 177 du Traité qui prévoit :

" La Cour de Justice est compétente pour statuer
" à titre préjudiciel
" a) sur l'interprétation du présent Traité
" b) sur la validité et l'interprétation des
" actes pris par les institutions de la
" Communauté..."

" Lorsqu'une telle question est soulevée devant une
" juridiction d'un des Etats membres, cette juridic-
" tion peut, si elle estime qu'une décision sur ce
" point est nécessaire pour rendre son jugement,
" demander à la Cour de Justice de statuer sur cette
" question."

Figure 5.11 Baby steps: Euro-lawyers providing the national judge with annotated excerpts of the Treaty of Rome in the "Union Latière Normande" case
Source: HAEU CJUE-2324, affaire 244/78, Union Latière Normande, at 27.

Ubertazzi and Capelli's questions verbatim in a one-page order, stapled it to the lawyers' memo, and asked the chancellery to mail the file to Luxembourg. Formalities aside, the reference was authored by the lawyers themselves.

Behind the scenes, the ECJ's own members recognized and largely celebrated the first Euro-lawyers' efforts – as we previously saw in the personal praise they garnered from Judge Pescatore (when they did not get too carried away). Indeed, one of the Court's first clerks recalls how "in various preliminary references submitted to the Court in the 1960s–1980s, [Capelli and Ubertazzi] played an important role not only in their juridical treatment before the Court, but even before in convincing the Italian judge to refer the questions; Many of which led to Court judgments that, by basically obligating the national judge to disapply domestic law, pushed the Italian state to modify or remove statutes."[263] And on April 22, 1981, Capelli received a thankful letter that he has cherished and kept in his safe ever since. It was authored

[263] Interview with Paolo Gori, April 6, 2017.

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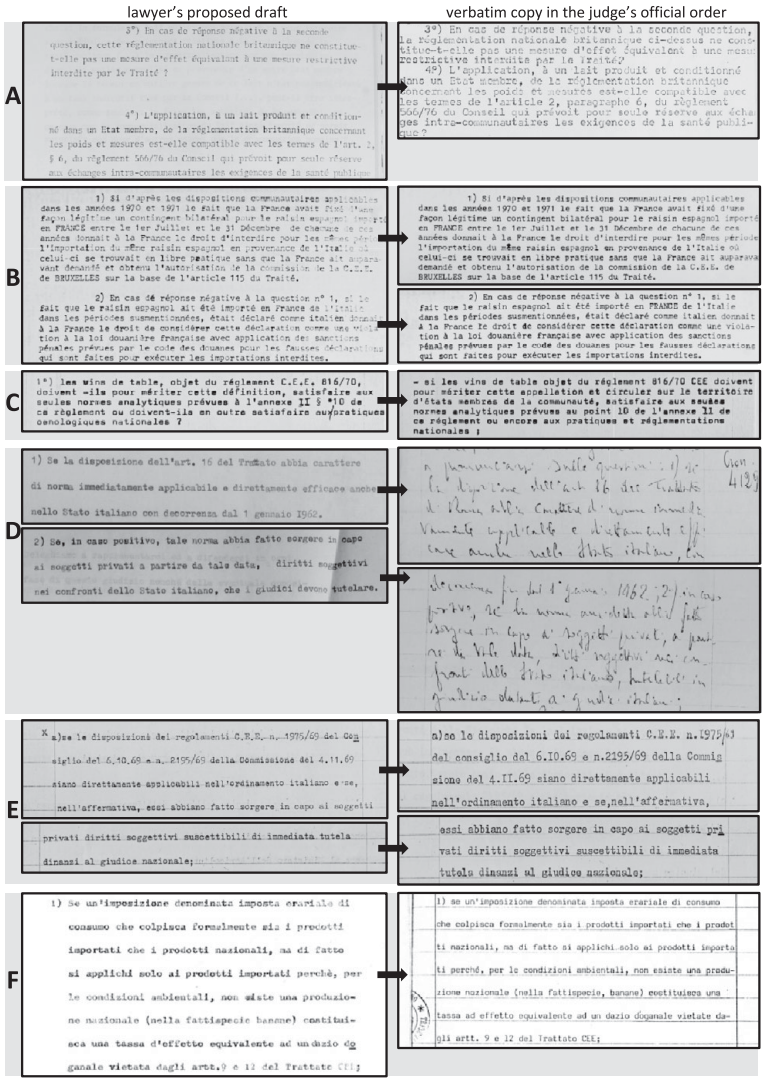

A: 244/78 - Union Laitière Normande
Euro-Lawyer(s): R. & L. Funck-Brentano
Court: Commercial Court of Paris

B: 179/78 - Rivoira
Euro-Lawyer(s): F. Capelli & G. M. Ubertazzi
Court: Tribunal de Grande Instance of Montpellier

C: Joined cases 10/75 to 14/75 - Lahaille
Euro-Lawyer(s): J. Imbach
Court: Court of Appeal of Aix

D: 18/71 - Eunomia di Porro E. C.
Euro-Lawyer(s): F. Capelli & G. M. Ubertazzi
Court: Tribunal of Turin

E: 93/71 - Leonesio
Euro-Lawyer(s): E. Cappelli & P. De Caterini
Court: Pretura of Lonato

F: 193/85 - Co-Frutta
Euro-Lawyer(s): W. Viscardini
Court: Tribunal of Milan

Figure 5.12 Copy and paste: excerpts of six ghostwritten referrals to the ECJ
Sources: From HAEU: CJUE-2324, affaire 244/78, at 7, 29; CJUE-2270, affaire 179/78, at 10–11; CJUE-1663-1664, affaires 10-14/75, at 62, 65; CJUE-1233, affaire 18/71, at 8–11; CJUE-1286, affaire 93/71, at 9–12; From the archives of Wilma Viscardini: Case 193/85.

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by one of the recently retired leaders of the European Court's federalist faction, Alberto Trabucchi: "Dearest Capelli, you are one of the few persons in Italy who understands the significance of Community law" and can testify to the "events that witnessed the "invention" of this legal order."[264]

The ECJ imposes a forty-year gag rule on its records, so the trail of original dossiers ends in 1980. Yet the ghostwriting proceeds. Wilma Viscardini provides a closing example via her personal records of the 1985 *Co-Frutta* case. The case concerned the validity of a national consumption tax on bananas, which in practice was only applicable to imports given that Italian banana production is, shall we say, negligible.[265] Viscardini recounts how she leveraged the ghostwriter's repertoire to construct the case and draft the Tribunal of Milan's preliminary reference to the ECJ:

> Another important "test" case was the one that allowed us to dismantle the consumption tax on bananas … Here too I had the opportunity to speak with an entrepreneur who lamented the tax's existence. I proposed that we ask for a refund on the tax payment after importing bananas that were freely circulating in other Member States … The client gave me a blank slate, so we lodged a proceeding that sparked a preliminary reference and a judgement by the [European] Court in case 193/85, which fully embraced my position … as you'll see, the questions referred by the Tribunal are exactly the same as those I had proposed in my closing pleading [see Figure 5.12].[266]

5.6 THE RADIATING EFFECT OF LAWYERS AND ITS LIMITS

Couched behind clients and judges that had yet to develop a European legal consciousness, the first Euro-lawyers invented a repertoire of lawsuit construction and judicial ghostwriting. They put this repertoire to use to mobilize civil society and national courts into punting noncompliance cases to the ECJ and expand the horizons of judicial review. Far from "not [being] politically motivated in bringing their

[264] Alberto Trabucchi to Fausto Capelli, April 22, 1981. Shared by Mr. Capelli from his archives.

[265] Case 193/85, *Co-Frutta* v. *Amministrazione delle finanze dello Stato* [1987], ECR 2085, at 2107.

[266] Interview with Wilma Viscardini, September 29, 2017.

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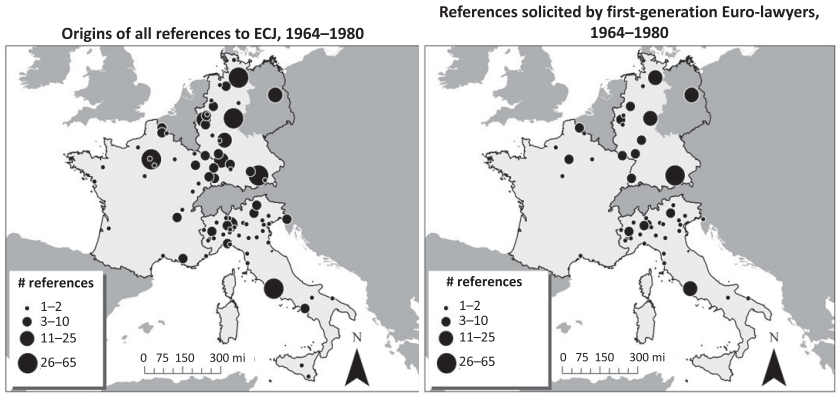

Figure 5.13 Referrals to the ECJ and the subset in cases solicited by the first Euro-lawyers, 1964–1980

actions," proceeding "willy-nilly,"[267] and riding a wave of surprisingly "vigilant" litigants,[268] Euro-lawyers played a decisive, labor-intensive, and very much intentional role in jump-starting the judicial construction of Europe.

Yet the same indicators that attest to the radiating effect of the first Euro-lawyers are also harbingers of the limits upon their repertoire of institutional change. Consider Figure 5.13, which maps the distribution of national court referrals to the ECJ during the 1960s and 1970s, visualizing these data as graduated point symbols. The figure compares the emergent geographies when the universe of all referrals ($n = 497$) is mapped versus the subset of references solicited by the first-generation Euro-lawyers ($n = 206$) listed in Figure 5.3. Two inferences readily stand out. First, geospatial data corroborate oral histories: the 1960s and 1970s truly were the age of the pioneers. The first Euro-lawyers not only participated in at least 41.5 percent of all preliminary references through 1980, but they influenced the emergent geography of national court referrals to the ECJ. Second, these maps highlight that French Euro-lawyers were less dominant (soliciting 19 of 98 referrals (19 percent)) than their colleagues in Germany (122 of 293 referrals (42 percent)) and Italy (65 of 106 referrals (61 percent)). Why?

[267] As Joseph Weiler presumes of lawyers and litigants' behavior: Weiler, "Transformation of Europe," at 2421.

[268] Schermers, "Law as It Stands against Treaty Violations by States," at 133.

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There is little doubt that cross-national variation in the first Euro-lawyers' impact is of a piece with France's more restrictive political and legal opportunity structures. In Chapter 4, we traced how the French judiciary – particularly the administrative courts – institutionalizes comparatively mightier forms of bureaucratic domination that have long dissuaded judges from soliciting the ECJ and Europeanizing domestic policy. Through the 1970s, these hierarchical judicial relations were exploited by successive Gaullist governments to protect national sovereignty and block French judges from serving as motors of European integration. Charles de Gaulle set a particularly infamous set of precedents in the 1960s by threatening to disband the Council of State if it ruled against favored government policies, lowering the judicial retirement age to force out dissident judges, and packing both the Council of State and the Constitutional Council with loyalists.[269] The Gaullists even subsequently introduced an amendment in the National Assembly that would have made judges' enforcement of European law supremacy illegal.[270] Only with the 1981 election of socialist François Mitterand to the presidency did the government cease supporting legal and judicial obstructions to European integration. But by that time, the age of the pioneers was coming to a close.

Yet there is one additional factor that has continued to limit the impact of French Euro-lawyers, and it lies in the more restrictive and hierarchical organization of the French bar. Not only has France had only half to a third as many lawyers per capita as Germany and Italy, respectively;[271] it is also unique in that a tiny number of practitioners (the cassation bar) have historically monopolized legal representation before the state's supreme courts.[272] To this day, unless a Euro-lawyer can persuade a member of this group of 100 or so elites to play ball, they cannot represent their client before either the Court of Cassation or the Council of State. And because cassation lawyers regularly practice before both jurisdictions, they tend to be generalists rather than EU

[269] Moeschel, Mathias. 2019. "How 'Liberal' Democracies Attack(ed) Judicial Independence." In *Judicial Power in a Globalized World*. Paulo Pinto de Albuquerque and Krzysztof Wojtyczek, eds. Cham: Springer. at 138; Stone, Alec. 1992. *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*. New York, NY: Oxford University Press, at 51.

[270] Bernier, "France et le Droit Communautaire," at 145; 244.

[271] Kelemen, "Suing for Europe," at 113.

[272] Karpik, Lucien. 1999. *French Lawyers: A Study in Collective Action, 1274–1994*. New York, NY: Oxford University Press, at 26–35.

specialists, whose interest lies in cultivating a favorable rapport with supreme court judges by not rocking the boat and limiting requests to solicit the ECJ.[273]

Consider the revealing experience of three of this chapter's protagonists. Given lower courts' reticence to enforce European law and solicit the ECJ, Lise and Roland Funck-Brentano struck up a collaboration with Paul-François Ryziger, the only Europeanist lawyer on the cassation bar. As a mentee of the Funck-Brentanos recalls, "Ryziger brought cases before the Court of Cassation that we fed him, such that he would then force the Court of Cassation to submit preliminary references."[274] While Ryziger relied on the fact that supreme courts are obligated to solicit the ECJ when doubting the compatibility of national and EU law,[275] his stubborn efforts did wear on supreme court judges. In the words of former Court of Cassation President Guy Canivet:

> The Funck-Brentanos and Ryziger, who as cassation lawyer collected the demands of all the [ordinary] lawyers who wanted to seize [the ECJ] … after having played the role of pioneers, they became enclosed in a practice – well, especially Ryziger – that was a bit sterile, always the same thing. Plus, by front-loading his activism in European matters, he provoked some skeptical reactions by judges.[276]

Yet the geographies captured in Figure 5.13 point to a deeper story still. For they also highlight stark *subnational* variation *within* Italy, France, and Germany. Such localized spatiotemporal patterns cannot be explained by legal opportunity structures varying at the national level. Unearthing how Euro-lawyering (and the judicial enforcement of EU law) evolves, and why it becomes rooted in some communities and not others, is the focus of Chapter 6.

[273] Interview with Hélène Farge, September 21, 2017; Interview with Louis Boré, lawyer in the Ordre des Avocats au Conseil d'État et à la Cour de Cassation, September 15, 2017 (in-person).
[274] Interview with Christian Roth, September 25, 2017.
[275] Bernier, "France et le Droit Communautaire," at 129.
[276] Interview with Guy Canivet, October 2, 2017.