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## **Bankruptcy and Morality in a Capitalist Market Economy**

### **The Case of Mid-19th Century France**

*Jürgen Finger, Paris*

In a draft for his ‘Théorie de l’unité universelle’ (1822/23), Charles Fourier (1772–1837) gave a colorful account of the reckless practices of commerce. He presented bankruptcy as the vice of merchants in what he called the ‘civilized’ era of human development: a free market economy. Insolvency was only a socially accepted façade for (fraudulent) bankruptcy.<sup>1</sup> The 1789 Revolution and its unsteady aftermath had shaped Fourier’s writings. Backed by suggestive anecdotes, resonating with both economic naiveté and anti-Semitic slurs he proposed an elaborate hierarchy of bankrupts.<sup>2</sup> The “utopian” socialist, as he was belittled later on, postulated the depravity and insubstantiality of a modern market economy, which

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<sup>1</sup> C. Fourier (1845) ‘Section ébauchée des trois unités externes (19e section du plan général)’ *La Phalange. Revue de la Science sociale, 1ère série in-8* vol. 14, no. 1, 3–42. A slightly truncated German translation of the draft was published by Friedrich Engels: F. Engels and C. Fourier (1970) ‘Ein Fragment Fouriers über den Handel’ in V. Adoratskij (ed.) *Die Lage der arbeitenden Klasse in England und andere Schriften von August 1844 bis Juni 1846*, vol. I/4 of Marx/Engels Gesamtausgabe (Glashütten Ts.: Auvermann), pp. 409–53. Fourier inserted the section only as a stab in: C. Fourier (1841), *Théorie de l’unité universelle*, section 4 of *Œuvres complètes*, 2nd ed. (Paris: Société pour la propagation et la réalisation de la théorie de Fourier), vol. 3/4, pp. 121–9.

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<sup>2</sup> See also C. Fourier (1841) *Théorie des quatre mouvements et des destinées générales*, section 1 of *Œuvres complètes* (Paris: Société pour la propagation et la réalisation de la théorie de Fourier), pp. 342–54.

lacked the social embeddedness of old-style retail and was precariously based on promissory notes and checkbook money.

Fourier was aware of the various reasons, motivations and mechanisms of bankruptcy: incapacity vs. cool calculation, forward planning vs. improvised withdrawal, singular event vs. chain insolvencies. However, he identified bankruptcy as a social crime and theft.<sup>3</sup> He even disparaged those insolvents with honorable intentions, eager to satisfy the claims of their creditors: They simply had not yet figured out that bankruptcy would be a regular way of enrichment in a market economy. Fourier's stance certainly was inconsistent: He blamed both the character of the merchant and the economic system: 'I have observed that bankruptcy is the only social crime that is epidemic, and that necessarily makes the reliable man [*l'homme probe* in the sense of the latin *vir probatus*] imitate the rogue.'<sup>4</sup> Despite his cutting critique of the merchant class, he did not see the point in moralizing the individual merchant, as civilization itself had forced him into such behavior.<sup>5</sup> He seems like a despaired moralist who bemoans the moral defects of market economy and is torn whether to blame the actors for it.

Morality as a regulative idea guiding the actions of economic stakeholders would only be reinstated in a future state of civilization, in an upcoming era of 'societary' concurrence, characterized by the renewed social embeddedness of a morally bounded economy. This clearly referred to small scale communities like his *Phalanstères*, an early-socialist and experimental heterotopia (M. Foucault).<sup>6</sup> Only then, the merchant class would submit to the

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<sup>3</sup> Ibid., p. 334.

<sup>4</sup> Fourier 'Section ébauchée' p. 42. All translations into English by the author.

<sup>5</sup> Fourier *Théorie des quatre mouvements* pp. 333–4. This corresponds to Fourier's drive theory, which saw wealth as the first source and precondition of human happiness and, thus, as a legitimate goal of human existence. Cf. L. von Stein (1921) *Die industrielle Gesellschaft. Der Sozialismus und Kommunismus in Frankreich von 1830 bis 1848, vol. 2 of: Geschichte der sozialen Bewegungen in Frankreich von 1789 bis auf unsere Tage* (München: Drei-Masken-Vlg.) pp. 281–91.

<sup>6</sup> A. Kwaschik (2017) 'Gesellschaftswissen als Zukunftshandeln. Soziale Epistemologie, genossenschaftliche Lebensformen und kommunale Praxis im frühen 19. Jahrhundert' *Francia*, vol. 44, 189–211, esp. 209–11. Fourier's idea of social and moral bounds, proper to both old-style retail and future 'societary' commerce, apparently is too narrow. He arbitrarily negates the possibility of moral and social relations in a market economy, as it has been analyzed in recent research by means of the term *embeddedness*: M. Granovetter (1985) 'Economic Action and Social Structure: The Problem of Embeddedness' *American Journal of Sociology*, vol. 91, 487–504; C. Dejung (2014), 'Einbettung' in C. Dejung, M. Dommann and D. Speich Chassé (eds) *Auf der Suche nach der Ökonomie: Historische Annäherungen* (Tübingen: Mohr Siebeck) pp. 47–71; J. Beckert (2009) 'The great transformation of embeddedness: Karl Polanyi and the New Economic Sociology' in C. M. Hann and K. Hart (eds) *Market and society: The great transformation today* (Cambridge: Cambridge Univ. Press) pp. 38–55.

interests of industrialists, farmers and land owners—as a writer of the 1820s he still omitted the working class—and would cease to be a ‘class of parasitic and unproductive agents’.<sup>7</sup>

Fourier provides us with central arguments of the 19<sup>th</sup> century debate on bankruptcy: Firstly, Debt represents a social relation between debtor and creditor. Secondly, Fourier’s rejection of the modern market economy and his desire for small scale alternatives implies a critique of impersonal, abstract or dematerialized economic action and its supposed lack of individual responsibility. Supra-regional and international product chains seemed to loosen creditor-debtor relations, as trade was less characterized by peer-to-peer commerce. Finally, debt and bankruptcy were always a question of morality. Not only the relations between individual stakeholders were moralized, also those with society and with an idealized merchant community. ‘Moralizing’ was meant to discourage stakeholders, debtors as well as creditors, from opportunistic behavior. The abstraction of the credit nexus, the problems of its moralization and of the instruments of moralization, and, what Fourier did not yet understand, the consequences of industrialization: these were the conflict zones in which the 19<sup>th</sup> century debate about bankruptcy evolved.

The present article will use the case of bankruptcy (in the wide sense of the term, as used in American English) as an indicator for these structural and discursive challenges to traditional ways of moralizing the economy of debt in the Age of capital.<sup>8</sup> Although bankruptcy was a rare and extreme situation in the life of an individual merchant, legislators and civil society of the 19<sup>th</sup> century always approached it as a question of principle, presumably affecting the functionality of trade and the national economy in general. How did moralizing discourses about bankruptcy evolve and how did they translate into the text and practice of commercial law? How did the discursive link between individual misconduct and common interest evolve, oscillating between public and private realm? What ensured the persuasiveness of moral arguments in public discourse, and why were the instruments of moralization questioned?

This analysis of the ways of ‘moralizing’ does not mean to search for evidence for the alleged dismal moral condition of the political economy. Instead, morality and moralizing are understood as analytical tools to better understand the transition from the French merchant economy to an industrialized and capital-intensive economy. Moral and morality, the act of

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<sup>7</sup> Fourier, *Théorie*, pp. 331–4.

<sup>8</sup> E. J. Hobsbawm (1996) *The Age of Capital 1848–1875* (New York: Vintage Books).

moralizing the behavior and character of others are based on customs and accepted standards of behavior (in the literal sense of the latin *mos/mores*). Such routines are moral by convention and by common practice, not by ethical deliberation and universal validity.<sup>9</sup>

The French Revolution of 1848 serves as a test probe for this analysis. After a short contextualization of the economic problems in revolutionary and republican France (I), the juridical basics of French bankruptcy law are introduced (II). The paper then investigates debates on bankruptcy from 1848 to 1850/51, which reflected the changing moral evaluation of creditor-debtor relations. The article will show that the inability to settle a debt, once a question of common interest, became a predominately private problem. This changed the need for moralization, the instruments of moralization and the legitimacy of these instruments (III). Bills, parliamentary discussions and grey literature as well as petitions to the legislators and to the Prince-Président Louis Napoléon Bonaparte, the later Napoléon III, can elucidate the political, juridical and economic assessment of bankruptcy. Beyond that, these sources are indicators for moral evaluations by stakeholders of French mid-19<sup>th</sup> century commerce.<sup>10</sup>

### *Belated Debates, Belated Reactions*

The 1840s saw a world ‘out of balance’, where huge economic, technical and social change did not go hand in hand with political and institutional consequences as the ‘economic cataclysm thus coincided with the visible corrosion of the old regimes’.<sup>11</sup> A European economic crisis fed the already endemic political discontent and rising prices for grain and potatoes since 1846/47 finally triggered the February Revolution. The subsistence crisis necessitated food imports, thus capital drained out of France. The capital market, already burdened by the unprecedented capital demands of railway corporations, was hit by a severe credit crisis. Since 1848 the pendulum deflected in the opposite direction. Subsequent good harvests and the general depression made corn prices collapse even under than the pre-crisis

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<sup>9</sup> Lemma ‘Moral, moralisch, Moralphilosophie’ (1984) in J. Ritter and K. Gründer (eds) *Historisches Wörterbuch der Philosophie*, vol. 6 (Basel: Schwabe), col. 149–168, esp. col. 149; K.-H. Ilting (1984) ‘Sitte, Sittlichkeit, Moral,’ in O. Brunner, W. Conze and R. Koselleck (eds) *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 5 (Stuttgart: E. Klett; G. Cotta) pp. 863–921, esp. 863–4; M. Fourcade and K. Healy (2007) ‘Moral Views of Market Society’ *Annual Review of Sociology*, vol. 33, no. 1, 14.1–14.27, doi:10.1146/annurev.soc.33.040406.131642.

<sup>10</sup> L. H. van Voss (2001) ‘Introduction: Petitions in Social History’ *International Review of Social History*, vol. 46, no. 9, 1–10, doi:10.1017/S002085900100030x.

<sup>11</sup> E. J. Hobsbawm (1996) *The Age of Revolution 1789–1848* (New York: Vintage Books), pp. 303, 307–8.

level, now generating major discontent in rural areas during the heyday of revolution.<sup>12</sup> The economic shock of 1846–1851 had launched the Revolution and eventually contributed to the failure of the Second Republic. This was the starting signal for Napoléon III-style Saint-Simonian industrialism including the promise of a new economic boom.<sup>13</sup>

The number of *faillites* generally grew during the whole 19<sup>th</sup> century and stabilized only during the Belle Époque, when France experienced a boom for almost two decades. This increase corresponded to the general multiplication of businesses during the century. Political and economic development did correlate, but in an irregular and indirect way.<sup>14</sup> Spikes of the bankruptcy statistics preceded or succeeded the revolutionary moments of 1830 and 1848 as well as the Franco-German war and the *Commune* uprising in 1870/71. In a context of growing supranational trade and investment, the London 1847 panic, the 1869 Black Friday and finally the Paris stock market crash in 1882 also had considerable influence. The news reporting of the time reflected the awareness of such interdependency: The *Moniteur universel*, for example, related a growing number of bankruptcies of British industrial companies and merchant banks engaged in overseas trade in 1847.<sup>15</sup> In the context of general crisis, even a report by the *Times* seemed noteworthy that there had not been any new bankruptcy at all on a given day.<sup>16</sup>

The number of bankruptcies regularly and significantly dropped after such moments of political and economic turbulence. The previous wave of bankruptcies had amounted to a market adjustment, so that the remaining businesses were deemed more stable. French governments also favored the viability of these surviving businesses by extending the terms of payment and by decreeing temporary rules for bankruptcy procedures for the violent transition phases of 1848, 1870, and again in 1919–22.<sup>17</sup> This schedule also applies to the

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<sup>12</sup> M. Agulhon (1993) *The Republican Experiment 1848–1852* (Cambridge: Cambridge Univ. Press) pp. 7–8, 35–6, 82–5; W. Fortescue (2005) *France and 1848: The End of Monarchy* (London, New York: Routledge), pp. 43–45; J. Sperber (1994) *The European Revolutions 1848–1851* (Cambridge: Cambridge Univ. Press), pp. 24–6, 105–7.

<sup>13</sup> Agulhon, *Republican Experiment*, pp. 35–45, 82–85, 178–83.

<sup>14</sup> For the following: L. Marco (1989) *La montée des faillites en France, XIXe–XXe siècles* (Paris: l'Harmattan), pp. 5–8, partially own calculations based on data pp. 165, 173.

<sup>15</sup> *Le Moniteur universel* 1847, 670, 2111, 2648, 2651, 2672, 2700, 2704, 2708, 2714, 2724, 2738, 2798, 2802.

<sup>16</sup> *Le Moniteur universel* 1847, 2724 (21 October 1847).

<sup>17</sup> J.-M. Thiveaud (1993) 'L'ordre primordial de la dette: Petite histoire panoramique de la faillite, des origines à nos jours' *Revue d'économie financière*, vol. 25, no. 2, 67–106, doi:10.3406/ecofi.1993.1989, esp. 89, 95; L. Thomas (1880) *Études sur la faillite: De la faillite dans le droit français et dans le droit étranger. Observations sur quelques points spéciaux de la législation française en matière de faillite* (Paris: Larose), pp. 16–7.

1848 revolution: After having reached an all-time high in 1847, the number of bankruptcies significantly decreased during the Republican years. Surprisingly, the monetary volume of the 1848/49 settlements was unusually high. With a ratio of assets and liabilities of 59 per cent in 1848 and 46 per cent in 1849, instead of usually about 25 to 35 per cent, procedures apparently had struck merchants who still disposed of considerable assets and who were all but overindebted.<sup>18</sup> The controversy about bankruptcy in the aftermath of the 1848 revolution came too late for most of the affected businesses. Yet, the discussion about inefficient procedures, deserving and undeserving bankrupts clearly addressed a relevant problem of the time.

### *Flaws of the 1807 Napoleonic Bankruptcy Law*

Already during the first French Revolution, economic troubles, scandals and the collapse of merchants proved the severe disorder of economy and society. Napoléon introduced a vast program of legal codifications to harmonize and modernize French law. Public order should be re-established, and morality be reintroduced into the economy. The *Code de commerce* of 1807 offered a comprehensive regulation of commercial activity by replacing the 1673 *Ordonnance sur le commerce*. Frequent cases of bankruptcy incited Napoléon to tighten the measures against bankrupts.<sup>19</sup>

The legitimacy of French bankruptcy law depended on the idea to combine private interest on the one hand, represented in the claims of the creditor against his debtor, and public welfare on the other hand. A government circular letter issued during the elaboration of the *Code de commerce* proves how individualizing moralization and reference to the common good went hand in hand, and how this union was usually emphasized with strong rhetoric:

In general, it is impossible to end the *malpractices* to which insolvencies give an opportunity without severe laws: but, as you know, there is *no trade without credit, no credit without guaranties*. Severe laws against *bad faith* are protecting *probity* and, by clearing the theater of business *usurped by adventurers*, they shall tend to bring back the *morality* that *honors trade, consolidates it and assures public trust* into it.

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<sup>18</sup> Marco, *Montée*, p. 165.

<sup>19</sup> Thiveaud, 'Ordre', 84–7. This is not the place to retrace the revisions of the *Code de commerce*, or to describe the institutional development of commercial courts: C. Saint-Alary-Houin (ed.) (2009) *Qu'en est-il du Code de commerce 200 ans après: État des lieux et projections* (Toulouse: Presses de l'Univ. des sciences sociales de Toulouse); C. Delplanque (ed.) (2008) *Bicentenaire du Code de commerce, 1807–2007* (Paris: Dalloz).

The argumentation was representative for the decades to come. It integrated the (personal) credit of the merchant, trust in an abstract *commerce* (thus favoring public credit and state financing) and, finally, public order and morality. As we will show, the specific mixture of the individual and collective level became problematic during the 19<sup>th</sup> century, in an era of growing individualism. Curiously, the moral rigor of the distinctly modern Napoleonic codifications was in stark contrast to the relative remissness of early modern merchant practices. The latter often were embedded in kin and peer networks allowing for amicable arrangements in case of over-indebtedness. As Natacha Coquery stated, the early modern ‘commercialist’ concept of bankruptcy was less rigorist and more pragmatic, more about stabilizing the relation instead of ending it and squeezing out the money by means of the law.<sup>20</sup>

French 19<sup>th</sup> century legislation distinguished the imbalance of assets and liabilities in a balance sheet, which caused a cessation of payments and insolvency (*faillite*), and cases of bankruptcy, which implicate criminal prosecution (*banqueroute*). The first had to be declared at the *Tribunal de commerce*, the commercial court, by submitting a balance of accounts (*dépôt de bilan*). The latter was punishable and covered acts of deceiving the creditors, be it by negligence, gambling, and excessive borrowing (*banqueroute simple*) or by fraud and in bad faith (*banqueroute frauduleuse*).<sup>21</sup> These dispositions as well as the *Code de commerce* in general only applied to merchants (*commerçants*). For all others, the state of *déconfiture* was defined by the *Code civil*.<sup>22</sup> Both forms of bankruptcy (in the narrow sense) regularly induced criminal charges as the debtor was suspected to harm the interests of all or of part of the creditors by abstracting assets or by conspiring with selected creditors. ‘Simple’ bankrupts

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<sup>20</sup> L. Fontaine (2008) *L'Économie morale. Pauvreté, crédit et confiance dans l'Europe préindustrielle* (Paris: Gallimard), pp. 281–296, esp. 288–98, 302–3; N. Coquery (2013) ‘Credit, trust and risk. Shopkeepers' bankruptcies in 18th-century Paris’ in T. M. Safley (ed.) *The History of Bankruptcy. Economic, social and cultural implications in early modern Europe* (London: Routledge), pp. 52–71, esp. 51–54, 61–66.

<sup>21</sup> For the following: *Code de commerce* ([Paris]: [1807]), 3<sup>rd</sup> book, titles 1 (especially 1<sup>st</sup> chapter) and 4, art. 437–48, 586–603. The general elements did not change much in the first half of the century, as a concise overview of the procedure in a report to the National Assembly shows: *Le Moniteur universel* 1850, 2244–5 (Report by Bravard-Veyrières). V. Dalloz (1830), *Jurisprudence des faillites, de la banqueroute, de la déconfiture, ou collection complète des arrêts rendus par les Cours de France et des Pays-Bas sur cette matière: Précédée de l'exposé des principes de la législation et de la doctrine des auteurs sur ces diverses matières* (Brüssel: H. Tarlier).

<sup>22</sup> The definition of a ‘merchant’ was tautologic, like in most commercial legislation: ‘Sont commerçants ceux qui exercent des actes de commerce [sic!], et en font leur profession habituelle’ (C. com., 1<sup>st</sup> book, art. 1). The state of *déconfiture* was not treated by civil law as systematically as *faillite* and *banqueroute* were in commercial law. Neither the *Code Civil* nor the *Code de procédure civile* had a special section. Its effects were mentioned i.a. in: (An XII=1804) *Code civile des Français [...] suivi des lois transitoires sur l'adoption, le divorce et les enfants naturels*, 2 vols (Paris: Journal du Palais), art. 1267, 1613, 1913, 2003, 2032.

faced imprisonment up to two years. Fraudulent bankrupts and their accomplices were to be punished by heavy labor in a *bagne*, a jail in seaports reminiscent of the former punishment on the *galères*. Only Napoléon III had replaced these with penitentiary camps in the colonies, now also called *bagne*.

As a preventive against fraudsters, the commercial court, after verification of the balance sheets, established the date of imbalance—referring to the immaterial fact that from a certain point there were more *passifs* than *actifs* in the accountancy books. This point in time not necessarily corresponded with the date of *dépôt de bilan*. Intermittent, potentially abusive transactions had to be reversed. Merchants who tried to save their company by avoiding a cessation of payments, bargaining, pleading for delay and restructuring debt ran into danger of filing insolvency too late. The merchant then could be accused of having dissimulated the imbalance and deceived new business partners.<sup>23</sup>

Each insolvent was threatened to be immediately imprisoned in a *maison d'arrêt pour dettes*, a debtors' prison, irrespective of the nature of the insolvency. Under the regulations of the commercial code, the court arrested the debtor, blocked his belongings by affixing seals (*scellés*), and nominated a syndic for the administration of the property as well as a *juge commissaire* (bankruptcy judge) for controlling the syndic.<sup>24</sup> In the meantime, the debtor's property rights were substantially undermined; his rights of disposal were transferred to the delegates of the court. A complete standstill of the business usually was the result. If there had not been a major imbalance in the first place, it would arise now.

However, the declaration of insolvency also protected the merchant, as an individual request for *contrainte par corps* (coercive arrest) could not be filed against a declared insolvent. The common interest of the creditors as a collectivity had priority. Curiously, demanding a *contrainte par corps* against a merchant could trigger an insolvency, which then helped the debtor to avoid coercive arrest. This, however, was only a Pyrrhus victory, as the imprisonment by order of the commercial judge was imminent.<sup>25</sup>

The *contrainte par corps*, not to be confounded with the automatic arrest of the insolvent, literally meant to get hold of the debtor's body in order to urge him to pay. It was the thematic

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<sup>23</sup> Thomas, *Études*, pp. 23–4.

<sup>24</sup> Dalloz, *Jurisprudence*, pp. 86–99; Thiveaud, 'Ordre', 86–7; C. com., art. 455, 568.

<sup>25</sup> R. T. Troplong (1847), *De la contrainte par corps en matière civile et de commerce: Commentaire du titre XVI, livre III, du Code civil* (Paris: C. Hingray), pp. 275–84, 297–300.



anchor par excellence for a moral and functional evaluation of bankruptcy law, even though the *contrainte* seemed to have concerned merchants only seldom. It seemed to have provided a false focal point for the discussion, as the idea to promote trade and *crédit publique* by arresting defaulting merchants did not correspond to the reality of business life.<sup>26</sup> For many creditors instead, automatic arrest and *contrainte* represented the ultimate guarantee of outstanding debts, a last resort. The debtor, in contrast, faced the debtors' prison as a temporary, however limited, form of civil death.

A 1838 revision of the so-called *Code des faillites*, the third book of the commercial code, took into account the insufficient results of the highly moralistic and complex dispositions of 1807. The goal was to accelerate and simplify procedures, to facilitate settlements and to clarify the rehabilitation procedure for those creditors who were cleared from the suspicion of fraudulent misconduct and had fulfilled all claims, even those claims waived by the creditors in an earlier settlement.<sup>27</sup> Even after a successful settlement, the status of *failli* did not change. Only the formal rehabilitation allowed a fresh start for the debtor, as he was reinstated into his full political rights like officiating as a jurymen or an officer of the National Guard, membership in the chamber of commerce, and, not least, access to the stock exchange. Only the rehabilitation procedure ended the symbolic and social exclusion of the defaulting debtor.<sup>28</sup> From the moralizing perspective formal rehabilitation was ambiguous: In the first place, moralization was bounded to an act of misconduct. When all liabilities were fulfilled, the reparation of this act was acknowledged and the need for moralization suspended. This relativized the significance of morality as a character feature.

Both institutions, *contrainte par corps* and formal rehabilitation, represented asynchronies in 19<sup>th</sup> century law. These relics of the early modern regime of commercial morality, paradoxically reinforced by the Napoleonic modernization of the commercial code, assimilated each cessation of payments to a crime against society and public weal. The *contrainte* violated the personal freedom of the debtor for the sake of enforcing private claims. A creditor could detain his debtor in a public prison—without any criminal charge, without the approval of a criminal judge, for a relatively long period, and at his own expense.

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<sup>26</sup> P.-C. Hautcœur (2008) 'La statistique et la lutte contre la contrainte par corps: L'apport de Jean-Baptiste Bayle-Mouillard' *Histoire et mesure*, vol. 23, no. 1, 167–89, <http://journals.openedition.org/histoiremesure/3093>, date accessed 1 February 2018, esp. par. 28–30.

<sup>27</sup> Thiveaud, 'Ordre', 87–9.

<sup>28</sup> C. com., art. 604–14.

In the age of codifications and of normative individualism, the *contrainte par corps* represented an undue mixing of private law, public law and the penal system. The *contrainte* became a systematic problem.<sup>29</sup> The traditional idea to moralize the debtor by getting hold of him and punishing him, faced a substantial backlash by the ethical reasoning of modern individualism and liberal ideas of the rule of law.

French legislators were aware of this confusion of realms. The *contrainte* was subject to the back and forth of French political history: Abolished for the first time by the Convention on 9 March 1793, it was reintroduced by the same Convention on 14 March 1795 (*loi du 24 ventôse, an V*). The Directory regime proceeded to refine the rules of its application (*loi du 15 germinal, an VI*=4 April 1798). Napoléon integrated the *contrainte* into his codifications of civil law, civil procedure, and commercial law without discarding the prior laws. Reformed and modernized in 1832, during the July Monarchy, the provisional government of 1848 abolished the *contrainte*. The *Assemblée* reintroduced it again on September 1 of the same year. Only in 1867, the *contrainte* was finally abolished in matters of private and commercial law. From then, coercive arrest could only be applied in matters of public interest (penal law, enforcement of fees and taxes etc.).<sup>30</sup>

#### *High Expectations and Legislative Detail Work*

The February Revolution provided an occasion to reflect on the nature both of bankruptcy and the bankrupt person. Although a general reform never seemed to be on the agenda, the *journées révolutionnaires* and the following two years seemed propitious for reforming the so-called *Code des faillites*. The success of these attempts to reform was limited: brought forward at the zenith of the Second Republic, and discussed at length, the time window for reform quickly closed.

Four contentious issues can be identified: the ranking of workers' wages in the bankruptcy procedure; short-term relief for merchants whose businesses were affected by revolutionary turmoil; the reform of settlement procedures and assignment agreements; finally, one bill addressed misconduct in insolvency procedures.

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<sup>29</sup> H. É. Say (1837), *Avant-propos à la discussion d'une nouvelle loi sur les faillites* (Paris: Guillaumin et Cie.), pp. 1–7, 52–7; J. Sgard (2013) 'Bankruptcy, fresh start and debt renegotiation in England and France (17th to 18th century)' in Safley (ed.) *The History of Bankruptcy*, pp. 223–35 esp. 223–4.

<sup>30</sup> Hautcœur, 'Statistique', par. 28–30; Troplong, *Contrainte*, p. 508.

(1) During the initial phase of the Republic, working class representatives introduced a bill to rank workers' wages (up to three months) among the privileged liabilities. Louis Marius Astouin (1822–55), a representative of the Bouches-du-Rhône, was a syndic of the influential load-carriers' corporation of Marseille harbor. In June 1848, the moderate democrat, who regularly sat in the Assemblée in worker's cloths, introduced the bill 'in the name of my brothers, the workers'. Astouin evoked the traditional differentiation of incomes from productive ('real') work and from capitalist speculation—a differentiation as popular in Christian theology as in early socialism. If workers did not participate in the employer's profits, why should they participate in a loss in the case of insolvency? Astouin also assumed that insolvency might have become a business model for merchants: Speaking of 'malheur' would have been mere facade for failed speculation at the expense of the workers.<sup>31</sup>

Astouin's bill met considerable opposition. Doubts were raised, if the proposition really would strengthen the position of workers, as employers might exercise 'moral' pressure on the workers to renounce wage payment during an economic downturn. Workers would have to rely on the legally protected but uncertain claim to a future insolvency estate. Moreover, such a privilege would produce high uncertainty for investors. Eventual arrears of wages from three months would result in considerable liabilities. The liberal position was clear: In the ongoing crisis, workers needed work; there was no work without credit; and the Astouin bill would restrict credit and hinder capital circulation.<sup>32</sup> To the liberals, now and then, being social (and moral) meant creating jobs.

Liberals also pointed out that workers (usually paid on a daily or weekly basis) who did not claim their wages simply became creditors of their employer. Advocates of the bill acknowledged this, but they put it into perspective and interpreted debt as a social relation: During an economic crisis—sort of a sellers' market for abundant human workforce—the self-interest of workers would guide them to continue working, as they would neither want to lose their workplace nor the money already owed by the employer: 'he [the worker] is chained to

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<sup>31</sup> *Le Moniteur universel* 1848, 1307 (8 June 1848, Astouin), 1722–3 (21 July 1848, Astouin); A. Robert and G. Cougny (1889), *Dictionnaire des parlementaires français: comprenant tous les membres des Assemblées françaises et tous les Ministres français depuis le 1er Mai 1789 jusqu'au 1er Mai 1889* (Paris: Bourloton), vol. 1, p. 103.

<sup>32</sup> *Le Moniteur universel* 1848, 1675 (report by Rouher, 15 July 1848), 1722–4 (21 July 1848, Levavasseur, Dabeaux, Bravard-Veyrières).

his master precisely because of the debt constituted by his salary, which has not been paid to him.’<sup>33</sup>

After the violent *Journées de Juin* (22–26 June 1848) and the anti-socialist backlash of the bourgeois Republic, the time window for such legislation was closed. The bill disappeared from the agenda without further notice. Nonetheless, the threat of insolvencies by large (industrial) companies added new, large-scale problems to the question of financially and morally bankrupt merchants. In 1848, the actors only started to understand the scope of these problems in future industrial capitalism. Only in 1889, wages were added to the list of privileged claims.<sup>34</sup>

(2) The second political intervention had a limited goal and better corresponded to the taste of the *Assemblée*’s majority: protecting businesses at the verge of bankruptcy.<sup>35</sup> The provisional government already had issued a decree on 20 March 1848, allowing the commercial courts to grant a general extension of the terms of credit up to three months.<sup>36</sup> After the *Journées de Juin*, a debate about further emergency measures began. The original idea to reform the procedures for *concordats amiables*, for amicable settlements, met considerable resistance. Finally, not less than seven different propositions with a substantial number of amendments were debated. According to unconfirmed numbers, often cited during the debate, about 6500 to 7000 cessations of payment were registered in Paris since 20 February 1848. However, it was contested, how many of them went back to the prerevolutionary crisis. The data given above suggests that insolvencies rather emanated from a structural crisis in 1846/47 than from the political events of 1848. Nonetheless: ‘Capital was frightened, it hid,’ as one representative stated. All his colleagues shared the analysis, but they did not agree on the ways, how credit and stability could be restored: by emergency measures of all kind or by relying on the existing system of guaranties in the commercial code.<sup>37</sup>

Even socialists like Victor Considérant (1808–93) adhered to the idea to promote commerce by granting debtors more room to manoeuvre. The social philosopher and promoter of Fourier’s Phalanstère movement pleaded to empower the debtors against their creditors to

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<sup>33</sup> *Le Moniteur universel* 1848, 1722–3 (Laboulie, Rouher).

<sup>34</sup> Thiveaud, ‘Ordre’, 93.

<sup>35</sup> *Le Moniteur universel* 1848, 1307 (8 June 1848), 1440 (20 June 1848), 1987 (report by Bravard-Bayrières).

<sup>36</sup> ‘Projet de moratoire des effets de commerce. Sursis aux déclarations de faillite’, Archives Nationales (AN), AN/F/12/6835/B, Dossier 1848.

<sup>37</sup> *Le Moniteur universel* 1848, 1985–9, 2046–52, 2061–5, 2077–82, 2105–11, the citation p. 1986.

grant tranquility and equity in French commerce.<sup>38</sup> In contrast, the conservative Pierre de Sainte-Beuve (1819–55), who already had supported the reintroduction of the *contrainte*, mocked his colleagues and suggested to insert an article into the original bill, stipulating that all ‘debtors are exempted from the duty to repay their debt.’<sup>39</sup> This sarcastic remark was representative for the general mood of the liberal and conservative majority and corresponded with the position of the Cavaignac government. During the third reading, Finance minister Michel Goudchaux (1797–1862) finally rejected the idea to facilitate *concordats amiables*, observing that the Republic should not be built on exceptional laws.<sup>40</sup>

After extensive debate, only a decree with limited scope was adopted on 22 August 1848, As a pure transitional measure all cessations of payment since the end of the July Monarchy on 24 February 1848 until the date of publication of the decree should provisionally not be considered *faillite*. The decree temporarily reversed the norm (every cessation is *faillite*). The commercial courts were authorized to omit from the arrest of the debtor, from the concomitant suspension of business and the affixing of the seals; debtors should be enabled to liquidate businesses themselves.<sup>41</sup>

French merchants were divided. One group pleaded for a utilitarian approach and was favorable to government intervention to avoid the collapse of businesses, unemployment and thus a danger for stability and public order. Not the fight against the rare cases of incapability and fraudulent behavior should define the primary target of the law, but protecting all merchants. For them, the revolution was an unforeseeable case of force majeure.<sup>42</sup> This utilitarian view could invoke modernizing arguments brought forward by liberal economists and statisticians like Jean-Baptiste Bayle-Mouillard and Horace E. Say, a liberal economist in the tradition of his father, Jean-Baptiste Say.<sup>43</sup>

A second group of merchants feared to lose the guarantees for their outstanding accounts. Instead of helping an allegedly small minority of *commerçants malheureux*, the decree would clear the way for unsound and fraudulent racketeers. This group was aware of the fact, that

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<sup>38</sup> *Le Moniteur universel* 1848, 2062–3.

<sup>39</sup> *Le Moniteur universel* 1848, 2080; Robert and Cougny, *Dictionnaire*, vol. 5, p. 249.

<sup>40</sup> *Le Moniteur universel* 1848, 2106.

<sup>41</sup> *Le Moniteur universel* 1848, 2155 (Décret relatif aux concordats amiables du 22 août 1848).

<sup>42</sup> ‘Notes of the *Délégués du Commerce de Paris* “Des vraies raisons de décider dans la question dite des Concordats Amiables”’, AN/F/12/6835/A; ‘Merchants of the City of Blanc (Indre) to the *Citoyens membres du Gouvernement Provisoire*’ (30 March 1848), AN/F/12/6835/B.

<sup>43</sup> Hautcœur, ‘Statistique,’ par. 15–7 ; Say, *Avant-propos*.

the utilitarian and the moral approach were partially incompatible: If the decision on the cessation of payment and the exact time of its declaration ceased to be a moral question, reinforced by the ‘salutary fear’ of incarceration, insolvency would become an object of speculation. In other words: it would become a business option for debtors.<sup>44</sup>

But both groups shared common reference points: They desired to re-establish trust within French commerce and to further the *crédit public*. And, although they drew different conclusions, both based their moral argument on the idea of commercial utility. The liberals, who partially had approved the emergency measures, later were reticent. The effects of the decree seemed to confirm the doubts of the conservatives. In hindsight, Pierre Bravard-Veyrières (1804–61), representative of the Puy-de-Dôme, professor at the Sorbonne law faculty and author of a manual on commercial law, gave a disillusioned report on the abuses of the law. For him, one could not speak of force majeure, if most merchants passed through the crisis ‘without bowing’. The legislation committee had been ‘touched by the misfortune of a certain number of notable merchants, and moved by a sentiment of merciful equity.’ Bravard-Veyrières sarcastically emotionalized the motives of his colleagues and countered them with reserved economic arguments. The law professor believed that the decree, amended in a rush, was inconsistent and an example of poor legislation. Yet, he was confident that the courts were able to distinguish deserving and undeserving insolvents.<sup>45</sup> Even a utilitarian liberal like Bravard-Veyrières thus had a specific idea of worthiness, a defaulting debtor had to prove.

Cases of allegedly ruthless merchants, who invoked the decree even after its formal period of validity, motivated Bravard-Veyrières to request a clarifying resolution. The decree seemed to have offered the possibility of judicial liquidation to those who allegedly had not merited it. The competent committee of the Assemblée, too, questioned the benefit of the measure ‘made for an exceptional and temporary situation’. It may have been ‘profitable’ for individual

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<sup>44</sup> ‘Observations présentées à l’Assemblée Nationale par le Comptoir National d’Escompte de Paris sur les projets de Décrets relatifs aux concordats amiables’; ‘Avis de M. Gautier, sous-gouverneur de la Banque [de France]’ (2 July 1848); ‘Lyon Chamber of commerce to the Minister for Agriculture and Commerce’ (10 June 1848); ‘Reims Chamber of commerce to the Minister for Agriculture and Commerce’ (16 June 1848); for the citation ‘crainte salutaire’: ‘Paris Chamber of commerce to the Minister for Agriculture and Commerce’ (16 June 1848), AN/F/12/6835/A.

<sup>45</sup> *Le Moniteur universel* 1848, 2583–4 (‘Observations sur l’application du décret du 22 août 1848, relatif aux concordats amiables, par M. Bravard-Veyrières’); Robert and Cougny, *Dictionnaire*, vol. 1, pp. 473–4.

*commerçants*, but not necessarily for the entire French commerce. Without further discussion, the *Assemblée* approved the resolution in autumn 1849.<sup>46</sup>

(3) The third topic concerned the simplification of the *concordats par abandon*, a special form of settlement, where the debtor assigned all or part of his property to the creditors, who then were responsible for the exploitation on their own—and at their own risk. This practice existed in a legal vacuum, but an increasing number of assignments was accepted by commercial courts—setting aside risks for creditors and overt procedural deficits. Bravard-Veyrières brought forward a bill to ensure the early information of all creditors about the settlements' details. The court's approval of such *concordats* should be published for the attention of those creditors, who had not participated or had not accepted the settlement.<sup>47</sup> The bill generally was welcomed, but finally, during the third reading, the topic first was delayed and then was taken off the agenda. Eugène-Émile Loyer (1807–80), an entrepreneur from Rouen, did not see any need for reform at all, and seems to have blocked the bill by procedural ruse.<sup>48</sup>

(4) A last bill by representatives Pierre Henri Sevaistre (1801–51) and Joseph de Laboulie (1800–67), did not address a systematic problem, but focused on specific forms of misconduct in bankruptcy procedures. The representatives pointed out institutional deficits at the commercial courts and unlawful acts of the syndics. This bill already stranded during the preliminary discussion in the assembly.<sup>49</sup> Laboulie's charges were serious: 'You have created a new class, a new industry at the commercial courts, called the bankruptcy syndicate'. The only interest of this *syndicat des faillites* would be to never finish any procedure.<sup>50</sup> The overt attack on commercial courts and syndics may have been a reason why this bill failed.

Numerous representatives participated in these debates, but some stood out. Compared to their overall political view, their opinion on bankruptcy was not self-evident. Astouin and his friends solely spoke for the interests of the workers and were barely interested in technical questions of commercial law. Bravard-Veyrières was described as politically conservative,

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<sup>46</sup> *Le Moniteur universel* 1849, 3424 (committee report on the bill of Bravard-Veyrières), 3463–4, 3521, 3606 (second committee report), 3643 (adoption without discussion); *Le Moniteur universel* 1850, 438 (excerpts from a booklet by Bravard-Veyrières).

<sup>47</sup> *Le Moniteur universel* 1850, 894–5 (committee report by Laboulie on the Bravard-Veyrières bill), 2244–5 (committee report by Bravard-Veyrières on his own bill).

<sup>48</sup> *Le Moniteur universel* 1850, 1200–1 (discussion), 3325 (second reading), 2244–5, 2259–60 (committee report by Bravard-Veyrières on his own bill); *Le Moniteur universel* 1851, 1397, and supplement III-IV (additional committee report by Bravard-Veyrières), 2167 (third reading).

<sup>49</sup> *Le Moniteur universel* 1850, 3688 (committee report); *Le Moniteur universel*, 1851, 145–7 (discussion).

<sup>50</sup> *Le Moniteur universel* 1851, 145–7 (discussion: Laboulie).

sitting on the right side of the house, but liberal in legal matters. His moderately modernizing reports and bills indicate to his distinctly modern grasp of the problem. In contrast, the conservative Laboulie and the small-town entrepreneur Sevaistre focused on institutionalized misconduct and displayed a moralizing and individualizing stance. Their bill against the syndics was the fruit of a non-partisan alliance: Sevaistre was the owner of a small spinning factory from Elbeuf (Seine-Inférieure). Former president of the local commercial court, he was thought to be an independent seated at the left of the assembly. The former Bourbonic legitimist Laboulie was an independent right-wing representative of the Bouches-du-Rhône. They all retreated from politics after Napoléon's coup, unlike Eugène-Émile Loyer who had fervently opposed the last two bills. Loyer, a former lawyer, represented the Seine-Inférieure and was director of a spinning factory, just like Sevaistre. But unlike Sevaistre, Loyer was a future Bonapartist magnate in the important port city of Rouen.<sup>51</sup>

Overall, the debates mostly were characterized by legal reflections, but always underpinned with anecdotic evidence and hypothetical cases. Particularly scandalous examples and allegedly all too common behavior were brought forward to illustrate grievances and abuse of the law. It was the same anecdotic modus that promoted the moralization of bankruptcy and the individualization of its reasons in books of fiction by realist and naturalist authors like Honoré de Balzac and Emile Zola. They used the doom of bankruptcy as a springboard to explore the decadence and decay of the French bourgeoisie and, in general, the shallowness of their time.<sup>52</sup>

Empirical knowledge in form of statistical information, was introduced only on rare occasions. Sevaistre communicated self-made statistical information about the outcome of procedures at an unnamed commercial court—most probably in Elbeuf, where he had been president. Bravard-Veyrières evaluated the effects of the 1848 decree within the circuit of the *Tribunal de commerce* of the Seine Department.<sup>53</sup> Statistical data on the *contrainte par corps* and its effects never seemed to have influenced the political and juridical discussion. Jean

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<sup>51</sup> Cf. footnotes 31, 39, 45; Robert and Cougny, *Dictionnaire*, vol. 3, pp. 484–5; vol. 4, p. 193; vol. 5, p. 311.

<sup>52</sup> The original title of Balzac's most pertinent novel on the subject is 'Histoire de la grandeur et de la décadence de César Birotteau, parfumeur, chevalier de la Légion d'honneur, adjoint au maire du deuxième arrondissement de Paris' (1837–1839). With Zola, the topic is omnipresent in his Rougon-Macquart series, e.g. in 'La Curée' (1871), 'L'Argent' (1891) and 'Le débâcle' (1892).

<sup>53</sup> *Le Moniteur universel* 1850, 438; *Le Moniteur universel* 1851, 145.



Baptiste Bayle-Mouillard's study *De l'emprisonnement pour dettes*, awarded a prize by the *Academie des sciences morales et politiques* in 1835, had only little effect.<sup>54</sup>

Openly moralizing, sometimes emotional rhetoric contrasted sharply with a measured and primarily technical style of argumentation. Sevaistre explicitly evoked the need for 'moralization of commerce' and the 'just and moralizing mindset' of Napoleonic bankruptcy law. His rhetoric was full of judgmental expressions: abuse, equity, extreme, fraud, good/bad faith, grave, honorable, illegitimate, incapable, justice, malheur, merit, scandalous. Quite contrary to the liberal jurist Bravard-Veyrières, who hardly ever evoked the 'malheur' of an otherwise honest merchant.<sup>55</sup> This often-cited 'misfortune' was a deeply moralistic term, in a certain sense even a romantic concept, which can best be illustrated with reference to the ship owner Pierre Morrell in Alexandre Dumas' 'Comte de Monte-Christo' (1844–46). The idea of *malheur* had also influenced French jurisprudence; sentences acknowledged the existence of bankrupts who were 'unfortunate but with good faith', victims of the 'too hazardous chances of commerce', struck by 'inevitable misfortune'.<sup>56</sup> Even creditors got moralized, when a settlement was not approved and when opaque tactics of some of them aimed at the arrest of the debtor—risking the dividend of the other creditors. The personal enemy, who tried to press home an advantage, and the malicious asset stripper, who extorted a preferential treatment, were frequent topoi of the debate.<sup>57</sup>

To a certain extent, all discussants still clung to the 'fantasy, if not always the reality, of personal, individual responsibility', as Rebecca Spang put it with reference to the 18<sup>th</sup> century.<sup>58</sup> This individualizing tone was compatible with classic economist's views (J.-B. Say, A. Smith). Apart from an early contribution by Jean de Sismondi, a new economic contextualization of bankruptcy emerged only in the second half of the 19<sup>th</sup> century. Economists like Karl Marx, Rudolf Hilferding, Werner Sombart, and Joseph Schumpeter

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<sup>54</sup> Hautceur, 'Statistique,' par. 19–34.

<sup>55</sup> *Le Moniteur universel* 1851, 145 (Sevaistre); *Le Moniteur universel* 1850, 894 (committee report by Laboulie on the Bravard-Veyrières bill); versus pp. 2244–5, 2259–60 (committee report by Bravard-Veyrières).

<sup>56</sup> Dalloz, *Jurisprudence*, pp. 1, 99.

<sup>57</sup> 'Minister of Justice to the Minister of Agriculture and Commerce' (12 April 1848), AN/F/12/6835/A. The minister is also evoking the idea of a 'reliable but unfortunate merchant'.

<sup>58</sup> R. L. Spang (2015) *Stuff and Money in the Time of the French Revolution* (Cambridge MA, London: Harvard Univ. Press) pp. 19–56.

began to understand bankruptcy as an adaptation crisis on the individual level, a purgatory in which small, undercapitalized and dispensable market actors were liquidated.<sup>59</sup>

Industrial growth irrevocably changed the game: Kinship networks of mutual assistance once had provided credit and were a last resort for merchants in trouble; additionally, they were effective barriers against opportunistic behavior by both debtors and creditors. Such networks began to lose their relevance as was already tangible in the 1848 debates. During the following decades it became evident: Industrialization and external financing for companies had a disruptive effect—especially after the liberalization of the *Sociétés anonymes* in 1863/67. The organizational structure of the companies changed, the sole proprietorship eroded and—in the medium-term—the entrepreneurial role was separated from ownership during the so-called managerial revolution. Organizing (joint) responsibility—including shared control, knowledge and motivation—became a problem, discussed until today under the keywords principal-agent problem and compliance. Finally, the integration of companies into the capital market increased the vulnerability of firms during economic crises of a new type in the second half of the 19<sup>th</sup> century.<sup>60</sup>

In 1848, the understanding of these changes obviously was limited. Even for liberal modernizers insolvency still was understood as a problem between businessmen; the merchant with unlimited liability continued to be the addressee of commercial law. The points of reference (economy, society, *crédit public*) remained abstract. Only seldom, like in the Astouin bill on workers' wages, the focus was shifted to the growing relevance of industrial labor.

Traditionally, the *failli* was legally (e.g. by syndics), symbolically (by the *scellés*), rhetorically (via the loss of reputation), and physically (by coercive arrest, expulsion from the stock exchange) excluded from the merchant community. Since the mid of the 19<sup>th</sup> century, this conception of moralization by exclusion was questioned. Not by a purely utilitarian argument:

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<sup>59</sup> Marco, *Montée*, pp. 23–30; J.-C. Martin (1980) 'Le commerçant, la faillite et l'historien' *Annales HSS*, vol. 35, no. 6, 1254–66, doi:10.3406/ahess.1980.282700, esp. 1265–6; L. Marco (1989) 'Faillites et crises économiques en France au XIX<sup>e</sup> siècle' *Annales HSS*, vol. 44, no. 2, 355–78, doi:10.3406/ahess.1989.283597, esp. 355–60. For the continuity since the 18th c.: J.-P. Hirsch (1973) 'Honneur et liberté du commerce: Sur le libéralisme des milieux du commerce de Lille et de Dunkerque à la veille des Etats Généraux de 1789' *Revue du Nord*, vol. 55, 333–46, doi:10.3406/rnord.1973.3200, esp. 340–4.

<sup>60</sup> Thomas, *Études*, p. 27; Martin, 'Commerçant'; W. Plumpe (2013) *Wirtschaftskrisen: Geschichte und Gegenwart* (München: C.H. Beck) pp. 26–54; Marco, 'Faillites', pp. 363–76; Sgard, 'Bankruptcy, fresh start and debt renegotiation', p. 229–30.

All discussants more or less shared a utilitarian perspective, they simply drew different conclusions from the situation. The true novelty was that the legitimacy of the moralizing instruments was at stake. The same Napoleonic commercial code, which had reinforced the moralizing features of bankruptcy law, also provided, together with other codifications of the time, the modernizing judicial and ethical framework that put the individual, his rights and freedoms at the center of attention. The evolution of bankruptcy law and of the moralizing discourse can be understood as a double transition from the close ties of early modern trade to a new moralism in the late 18th and early 19th century and, again, from the Napoleonic era to industrial capitalism. The reinforced moralization of bankrupts in the first half of the 19<sup>th</sup> century was a paradox feature of modernization.

During the *Second Empire* and the Third Republic, the debate about the 1807 commercial code, the shopkeepers' act (*code des boutiquiers*), as it often was disparaged, continued. Repeated petitions requested the reform of bankruptcy law and the abolition of the *contrainte par corps*. Only the style of petitions occasionally changed. Whereas the tone vis-à-vis the 1848 *citoyens représentants du peuple* was demanding, some years later, the style was deferential again, when merchants from 50 French cities pleaded for a reform. The petitioners simply cloaked the Republican style of their original address in an imperial overcoat: The signature lists, collected earlier, were bound into green leather, embossed with Napoléon III's gilded imperial monogram and with bees, a heraldic symbol of both Napoleonic Empires.<sup>61</sup>

### *Hedging the Ubiquity of Debt*

The German economist Lorenz von Stein (1815–90) was a fine connoisseur of French political ideologies of the 19<sup>th</sup> century in general and of French socialist thinkers like the above cited Charles Fourier. He believed that 'Fallissement' were a symptom of the social and economic development of a society. Speculation, the degree of entanglement by credit-debt relations and the capitalist orientation towards future profits would provoke more cases of bankruptcy. The growing demand for capital would make companies take considerable risk

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<sup>61</sup> 'Le Commerce à Napoléon III. Projet de Réforme du Code des faillites' [1853], AN/F/12/9419. Cf. for further petitions: 'Inmates of the Clichy debtors' prison to Napoléon III' (18 July 1859), AN/F/70/60; 'Droguerie Épicerie [...] Thiers-Chave, Marseille, to the Minister of Finance, Achille Fould' (14 January 1855), AN/F/70/68.

in order to be competitive. Von Stein deplored the deficits of moral and legal institutions, which were needed to frame the growing dependency on capital.<sup>62</sup>

In fact, these social institutions were highly-contested in 19<sup>th</sup> century France, especially the pre-modern features of the *Code de commerce*, and they provoked highly moralized questions: Were you a *failli* or a *banqueroutier*? Did you act negligently or in bad faith? Were your transactions risky, but regular? Was it bad luck or an unexpected economic downturn? Would you stay in prison, or did you merit a provisional release? Did you qualify for rehabilitation? Was it your fault, or was it fate?

The asynchrony of the traditional features of bankruptcy law in an epoch of liberal and individualist legislation, was fueled by the tension between the individual and social dimensions of bankruptcy, between individual and public realm. Even today, the basic lines of this conflict are still present in public debate. Some European commentators, for instance, responded with amazement, as the then presidential candidate Donald J. Trump displayed satisfaction about the fact, that he never had gone ‘bank bankrupt’. He had successfully used the dispositions of the American bankruptcy law, namely the chapter 11 procedures (U.S. Code, Title 11, chapter 11), reorganized his companies and liquidated loss-making activities, or as he put it: ‘I used the law four times and made a tremendous thing. I’m in business. I did a very good job.’<sup>63</sup> Apparently, the worst fears of some of the discussants of 1848 came true: Insolvency is a business option, even if in Europe public opinion still is reticent about that.

The example of bankruptcy helps to analyze the construction of economic morality at a crucial point of the life of a merchant. Unpaid debt refers to the relational character of both debt and morality, as all stakeholders were mutually bound together by means of the due money—both before and after filing bankruptcy. Debt, mostly in the form of trade credits, was and is omnipresent and essential for capitalism. Trade credits ensure liquidity and constitute the major part of the floating capital; they dematerialize transactions; their reproducibility and reciprocity stabilize the system of debt and contribute to its expansion.

Unpaid debt was a moral problem precisely because debt in general was an integral part of the economic system. This got evident in a time of economic and political crisis like the 1848

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<sup>62</sup> Von Stein, *Industrielle Gesellschaft*, pp. 29–30.

<sup>63</sup> CNN, Transcript of the GOP Presidential Debate. Aired 16 September 2015, 8:10–11:15p ET., <http://transcripts.cnn.com/TRANSCRIPTS/150916/se.02.html> (date accessed 1 February 2018).

Revolution, when creditors ran the risk to become defaulting debtors themselves.<sup>64</sup> This ambiguity may explain the eagerness to punish those who ‘failed’—in the moral as well as in the business sense.<sup>65</sup> If this was true, when debating about particular cases the system was always at issue. Moralizing bankruptcy meant to build a firewall between the collapsed *faillis* and a legitimate culture of debt. The traditional instruments for building this firewall—discursive, symbolic and physical exclusion—lost their force during the 19<sup>th</sup> century.

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<sup>64</sup> *Le Moniteur universel* 1848, 1987; for the omnipresence of the credit nexus cf. M. Schulte Beerbühl (2012) ‘Zwischen Selbstmord und Neuanfang. Das Schicksal von Bankrotteuren im London des 18. Jahrhundert’ in I. Köhler and R. Rossfeld (eds.) *Pleitiers und Bankrotteure. Geschichte des ökonomischen Scheiterns vom 18. bis 20. Jahrhundert* (Frankfurt am Main, New York: Campus) pp. 107–128, esp. 108–110.

<sup>65</sup> Coquery, ‘Credit, trust and risk’, pp. 65.