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Borderline institution

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Abstract

This paper introduces the concept of "borderline institution" to characterize an institution in which actors push upstream the boundary between the normal and the pathological and find downstream ways of systematically taking advantage of this push ex-post. This happens for example when actors make decisions based on predictions; and are simultaneously allowed by vertical concentration to manage conflicts generated by the consequences of these decisions when these predictions fail. A theory of how to identify a borderline institution based on this vertical concentration uses bankruptcy proceedings at the Commercial Court of Paris as an example, relying on Karl Polanyi's concept of double movement and Margaret Archer's concept of double morphogenesis. In this court, bankers as lay judges can control both credit-related predictions at the bank, and bankruptcy proceedings at the court. Enabling conditions for borderline institutional entrepreneurs as "vertical linchpins" in this multilevel context explain how they concentrate enough power to reach a position from which to drive such dynamics. The conclusion asks whether societies promote new borderline institutions to face contemporary and urgent existential challenges.

KEYWORDS
bankruptcy court, borderline institution, double morphogenesis, double movement, institutional capture, normalization of deviance, vertical concentration

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1 | INTRODUCTION

This paper introduces the concept of "borderline institution" (BI) to characterize, at the meso-social level of society, a public or private organization in which members redefine as "normal" behavior previously considered "deviant". This institution provides them with an opportunity to navigate the new normal and systematically take advantage of it. In other words when the organization pushes upstream the boundary between the normal and the pathological, and finds downstream ways of benefitting from this redefinition ex-post. This happens, for example, when members of an organization make decisions, such as investment decisions, based on predictions; and are simultaneously allowed to manage conflicts generated by the consequences of these decisions when these predictions fail, as when the investments are lost and losses are transferred to other parties. Often BIs harbor blurred situations of conflicts of interest because—although such conflicts are risky in terms of legitimacy—they are an efficient way for borderline institutional entrepreneurs to concentrate enough power to drive these dynamics. BIs can be found at the heart of Polanyi's (1944) double movement and Archer's (2013) double morphogenesis as contexts of contemporary institutional changes.

Building on this theory, the paper presents a case in point illustrating this concept and these dynamics. It follows, one the one hand, the way in which the Commercial Court of Paris (CCP) has participated in the local promotion of the global decriminalization of bankruptcy and in the trend of debtor-friendly proceedings. And on the other hand, the way in which, at the same time the institution allows lay judges from financial institutions to occupy positions and design procedural strategies helping their sector to organize the control of the credit chain from beginning to end, thus keeping super-privileges that the debtor-friendly trend has threatened. The conclusion asks what society could learn from the BIs' efficiency and resilience as it embarks in the current transitions. Which new organizations normalize pathological behavior? It speculates, for example, that contemporary Big Relational Tech platforms may drive similar BI dynamics by turning inside-out privacy (individual and institutional) norms, using analysis and anticipation of behavior to become a new political power both recommending and guiding new behaviors, while neutralizing oppositional solidarities (Wittek and Van de Bunt, 2004).

2 | BORDERLINE INSTITUTIONS NORMALIZING DEVIANCE AND NAVIGATING THE NEW NORMAL

BIs differ from institutions that are not borderline. To clarify the difference, it is useful to refer to the difference between the organizational and the institutional aspects of collective agency (Selznick, 1957; Zucker, 1987), even if these dimensions are in practice inextricably intertwined. If institutions are the rules of the game and organizations are the players of the game, then the player as an organized collective actor has boundaries determining who is a member and who is not. It has procedures and authority structures that embody, carry out, and implement the rules of the game. In this paper, the approach to BIs focuses mostly on the institutional part that changes, i.e. the production of new norms displacing the boundary between the normal and the pathological, ex-ante freezing anticipations to secure future alignments on the new normal, and defining who benefits from these alignments.

There is a potential dimension of BI in any institution, even if this potential may be limited and unexploited by its members. Blurring and pushing the boundaries between the normal and the pathological to normalize a form of deviance is part of institutional entrepreneurs' collective political work, often carried out collegially by actors who do not openly belong to the political class. The questions arising from this assessment are how to identify the BI, what society should learn from the BIs'

efficiency and resilience, and which existing BI should be allowed to carry on with normalizing pathological behavior as they have for centuries.

To reflect on such BIs it is useful to use the case of a radicalized form of autonomous regulation of business producing and carrying out a form of "anormative regulation" (Archer, 2016), i.e. regulation that undermines social normativity, here by systematically strengthening market forces. This BI is the consular French Commercial Court, specifically the Commercial Court of Paris (CCP) which was created in 1563. This court is judicial but unusually operated by judges who are voluntary, lay business people, coopted by an electoral body composed of the sitting judges and industry representatives at the sister institution, the local Chamber of Commerce. The CCP operates at the local level from within the state apparatus and relies on the latter's authority to handle commercial litigation and bankruptcies within the city. The lay judges presented here are not economic or political elites but remarkable borderline institutional entrepreneurs nevertheless. Sellers (1994) would no doubt count them among the "shock troops of capitalism", pushing the boundaries of normality in business by taking advantage of radical autonomy in terms of judicial decision-making and lobbying—a model different from Macaulay's (1963) and Granovetter's (2023) emphasis on business people's avoidance of official, formal courts.

In spite of the fact that any institution may have a BI dimension, this case study illustrates particularly clearly how a specific institution contributed to the redefinition of this boundary between the normal and the pathological as a form of gradual conversion (Mahoney & Thelen, 2009). Whereas perhaps historically unique as an organization representing business within the state apparatus, the institutional role played by the CCP might not be so special (McIntosh & Cates, 1997). The CCP as an ideal type BI, i.e. a combination of organization and institution that, if BIs are a matter of degree, is positioned at the extreme end because it embodies all key elements that one would attribute to a BI. In other words, the contribution of this paper is mainly about a neglected aspect of institutions, with CCP being an illustration, even if it is the case study of the CCP from which the phenomenon and characteristics of a BI were distilled.

The empirical focus is on the bankruptcy proceedings of this court because these proceedings take place at the end of the credit chain, which starts with anticipations and predictions. Credit and its promises are deployed under conditions of uncertainty in the economy. Insolvency can be a contingent, both a predictable and unpredictable disaster at the individual and collective levels. Such a credit system is also supposed to provide a basis for assessing the value of businesses that can be considered "healthy". Financial institutions argue for the elimination of "zombies" or unprofitable firms, and the redistribution of their liquidated assets to more profitable and efficient goals. Liquidation is often presented as a condition of innovation that strengthens the economy. Bankruptcy law has been gradually redefined as a policy instrument for "correcting" the adverse effects on markets of an unpredictable economic environment (such as the existence of business cycles) (Levratto, 2013). Historically, knowledge of the business cycle served to depersonalize insolvency and promote the idea that bankruptcies are an economic rather than a moral failure.

As an outcome of historical change, the emergence of the organized bankruptcy legal system has been an institutional change, a transformation in Western countries that have allowed for the development of dissimilar bankruptcy regimes in terms of the balance of power between debtors and creditors, as well as between creditors, and in terms of attitudes towards the liquidation or survival of businesses. The BI can provide, for example, the regulatory profits that financial institutions need in order to keep their share of control of productive restructurations. Indicators of this evolution are the spread of debtor-friendly (comparatively speaking) Chapter 11 and bailouts all over the world (Halliday & Carruthers, 2009); the ability for entrepreneurs to restart a business as long as creditors are convinced that assets are reallocated "efficiently" and that the entrepreneurs did not make the same mistakes

twice ('Doing Business', World Bank, 2002); the rhetorical celebration of priority given to employees in the name of protecting human capital, knowhow, or experience; the simultaneous reorganization of legal bankruptcy proceedings so as, in practice, to leave nothing to workers when assets of the bankrupt company are liquidated.

This history of the treatment of bankruptcies is a history of the normalization of deviance at the very heart of the business world, a normalization linked to the functioning of credit as a "total" social phenomenon, financial, economic, social and political. In this cultural and legal redefinition, bankruptcy was behavior initially considered pathological (and requiring criminal sanctions to moralize society), then normalized in a way that most often generalizes privatized profits and socializes losses. Over time, the notion of fault was challenged when an unfortunate entrepreneur was recognized as being in good faith. This process of normalization of deviance, as shown in the pioneering work of Durkheim (1895), Festinger et al. (1956), Garfinkel (1967), and Vaughan (1999), takes place based on assumptions about the confrontation with uncertainty and unpredictability. Here Polanyi's (1944) theory of historical double movements and Archer's (2013) theory of double morphogenesis help us understand the paradoxical and recursive mechanisms driving this institutional change.

It is from the perspective of general commodification of material goods and services that this evolution of disembedding and commodification of credit shadows Polanyi's *Great Transformation*. Polanyi (1944) argues that the historical *Great Transformation* corresponded to the joint development of the modern state and the modern market economies. The change to a market economy, as forced by this powerful modern state, was a process of disembedding of the economic sphere from local social relationships, institutions, and context. An imposition of a totalizing logic of market calculation undermined the basic prior social order by commodifying land, labor, and money (as "fictitious commodities") in the name of the universal assertion of market imperatives throughout society. This process of subjugation of society to the values and objectives of the market in turn triggered a spontaneous reaction of self-defensive social protection on the part of society resisting the social dislocation imposed by this unrestrained "self-regulating" free market. This mitigation is thus the result of a "double movement" of disembedding and re-embedding. Pressure on governments to moderate the destructive work of the market and to safeguard social reproduction took the form of labor law, unemployment insurance, pensions, and social security (Block & Somers, 2014). But also of institutions allowing businesses to both obtain freedom and protection (Hirsch, 1991). Hollingworth and Boyer (1997) recognize in this general perspective the two competing principles of the dynamics of social organization and development of capitalism.

Archer's (2013) concept of double morphogenesis further helps specify the recursive complexity of such a double movement. Archer's morphogenesis refers to one possible form taken by the transformation of social order by processes that amplify deviations from a given state through positive feedback. Modernity gives way to untrammeled morphogenesis and its generative mechanism, namely variety producing yet more variety. Her morphogenetic approach identifies the ingredients of any explanation of social change, namely structure, culture, and agency, their respective causal powers, and the generic form of their interrelation (Porpora, 2013, p. 26). In this framework, actors succeed in introducing coevolving structural and/or cultural transformations while being themselves transformed and transforming other agents in the self-same process. In a period dominated by morphogenesis in many areas of life, a habit becomes decreasingly appropriate as a guide to action. Reflexivity about ourselves in relation to our circumstances intensifies. We shape society whilst it reshapes us and our roles as we go about changing it, individually and collectively, a recursive process that Archer terms the 'double morphogenesis'.

As such, BIs create morphogenetic change in society (Archer, 1995) not only by institutionalizing new norms but also by exploiting downstream contingent, unpredicted or unpredictable consequences

of this normalization. This upstream/downstream vertical concentration, a form of temporal alignment, requires from BIs longevity and sometimes the capacity to regenerate themselves to adapt their visions and projects to new functions and goals, and by so doing to further accumulate power. In that sense, BIs display the organizational dimension of morphogenetic social change (Al-Amoudi & Lazega, 2019).

In the case of the CCP, the historical process of depersonalization and decriminalization of insolvency—bankruptcies being increasingly seen as an economic rather than a moral failure—is part of a process taking place globally and combining both double movement and double morphogenesis. This raises the question of which kind of agency should be attributed to the CCP as a BI institution. The CCP is merely one of many institutions that became permeated by a global change in beliefs about the moral meaning of debt. But beyond being embarked in this institutional change, there is a special role that a BI such as the CCP played in fostering this kind of change for the businesses in Paris and elsewhere. Indeed as an agent of morphogenetic change, the CCP operated in two steps. First by blurring old norms and institutionalizing new norms, and exploiting downstream consequences of this normalization; and second by allowing powerful players of the first step to bring up defensive new strategies only for themselves (and not for the rest of society). The movement separated or disembedded the emerging/developing market economy from society; and at the same time, it allowed some actors in society to protect themselves more efficiently against the destructive forces of this market economy as pushed to contemporary extremes (Granovetter, 1985; Uzzi, 1999). Thus, in this case in point, a second feedback cycle branches out of the first. By capturing the CCP, financial institutions, for example, find ways of protecting themselves against changes that they have themselves triggered. As this BI combines double movement and double morphogenesis, it rides the wave of a broader trend of institutional change towards commodification and de-moralization of debt, as shown by following Polanyi and other historians (see below). But it also harbors one of the subsequent root causes of new changes introducing recursive transformations, as shown by following Archer.

3 | DIRTY WORK OF BANKRUPTCY: A CASE OF BORDERLINE INSTITUTION

The CCP, our case in point, is an institution that, since it was created in 1563,[1] has indeed actively contributed in France to Polanyi's double movement. The CCP is significantly larger than other similar courts in France. Alone it handles 12% of all commercial litigation in France (not including arbitration). In 2002 it ruled on 101,201 cases. It is also different in terms of the variety of economic sectors its judges come from, and the economic importance of the parties (large companies with their headquarters in Paris). Most judges no longer work as entrepreneurs in the traditional sense, but are instead senior managers or former senior managers of large companies. The court is dominated by bankers with a law degree (Lazega & Mounier, 2003). The diversity of judges' experiences forms a kind of ‘competence capital’ that the institution seeks to make use of by way of a ‘consulting culture’ in which judges seek advice from each other intensively.

Business needs credit intensively, and failure of credit, here examined from the perspective of bankruptcy proceedings, illustrates some of the core social and political dynamics of capitalism. A short and simplified analytical framework may be useful to shed light on productive restructuring under a capitalist regime. At the root of this productive restructuring is the lesson common to many institutionalist approaches: a viable socio-economic regime presupposes the conjunction and often the complementarity of different arrangements and coordination procedures. Firstly, competition driven by markets delivers a powerful mechanism for reallocating resources, but its short-termism

risks destroying skills and capital that could have been redeployed through restructuring and not bankruptcy. Secondly, banks are important entities in this regime because their management of credit affects economic dynamics, both in phases of expansion, through their contribution to the financing of investment, and in phases of recession, when risks of loan default increase. Thirdly, especially when banks fail, the state can be the defender of medium- to long-term economic objectives and the general interest in response to the demands of a society that is not limited to the economic sphere. The state intervenes (or not) to prevent a lack of liquidity from turning into an open banking crisis. For example in 2020, state-guaranteed loans and various support measures for companies acted as a buffer against such a collapse triggered by the Covid-19 crisis. Coordination between these actors was introduced to attempt to manage the exit of the crisis. Finally, courts intervene in the management of bankruptcies that cannot be avoided by coordination between banks and the state.

In France, bankruptcies, also called "collective procedures", are an exclusive competence of the commercial courts. Bankruptcies are situations in which companies and company directors can no longer repay their debts. The complex management of such business bankruptcies, for example preventions, liquidations, or reorganizations (continuation of current ownership and management or transfer to new ownership and management) is part of this exclusive competence.[2] It is the commercial judges who rule on bankruptcy proceedings, determining the moment when a company leaves the world of the market economy to enter the world of litigation that organizes the legal expropriation of the owners and the eventual distribution of the assets—if there are any left—among the creditors. Commercial judges have the power to distinguish between a temporary situation of insufficient liquidity and a situation of insolvency. They define the date of cessation of payment and control—in theory—the way the law is applied. These cases are examined and dealt with by a *juge commissaire* [bankruptcy judge] in a closed chamber, the chamber of collective procedures. The customary bodies of bankruptcy law that are given essential authority are the *juge commissaire*, responsible for ensuring that the proceedings run smoothly; the administrator, responsible for supervising or assisting the debtors in their management; and the authorized fiduciary representative, responsible for defending the interests of the creditors, the latter being subject to the traditional rule of the suspension of individual lawsuits and having to undergo the equally classic verification of claims.

Theoretically, the objective of bankruptcy laws is to achieve a level playing field for creditors in terms of losses in the event of the debtor's insolvency. The aim is to avoid a race between the creditors for the assets of the debtor on a "first-come-first-served" basis. Once the situation of cessation of payment has been recorded by the court, entrepreneurs and companies may be subject to sanctions that hit defaulting debtors who violate credit requirements. But the law cannot prevent creditors competing for the repayment of their loans from entering the collective proceedings by trying to prevent other creditors from doing better (i.e., from using their own funds to pay other creditors), from seeing their hand (how much the company owes and to whom, a difficult analysis when the loans have confidentiality clauses) and from forcing them to make the first concessions in possible future restructurings. In these situations, where everyone is looking for clues that can be used in non-transparent negotiations, power games are as present as financial information and the legal framework.

Indeed courts are not static institutions making a-temporal and purely rational decisions (Heydebrand & Seron, 1990; Wheeler et al., 1987). They are contested terrain, the prizes or objects of broader economic competition, and conflicts that occur outside courthouses (Flemming, 1998). This is especially the case in courts in which judges are themselves lay business people elected by their local business community. The CCP is a specialized (for commercial litigation and bankruptcy), closed (its administration is provided by a private business), 450 years-old institution of 'autonomous regulation of markets': fast, cheap, pragmatic, precedent-based justice with special 'practical' procedure. Its president wrote the French Commercial Code in 1807. This institution almost pays for itself,

easing public sector funding constraints, and promises local economic development. Among its lay, voluntary judges, business people elected/coopted by their peers, 50% have a law degree, 45% are retired (2000-2005 average figures), and the others are paid by their employers or own their company. Most have a high education level. Judges coming from the financial industry (bankers, asset managers, insurers) represent 37% of all judges, a clear over-representation in the local economy. Indeed bankers, especially with a law degree, dominate the court. Litigious sectors such as the building sector and services sector send in 10% of judges each. A small percentage of cases (approximately 5%) decided by this court is challenged by the parties at the commercial chambers of the Court of Appeal, in which judges are civil servants.

It matters in this case that the CCP is dominated by bankers with a law degree. The financial sector wants to control the chain of credit from beginning to end (most often liquidation), leverage resources and push its vision of financially lucrative economic development, eliminate zombie enterprises, and sometimes healthy (but not lucrative "enough") enterprises too. Lay judges coming from industry more often want to preserve the continuity of the activity, including competences, and by extension social peace. The bankruptcy system can also be used as a strategic tool by corporate executives (Morgan, 2009; Morgan & Nasir, 2021) and as a financial mechanism to siphon and redistribute assets in an undesirable and sometimes even criminal direction. In the United States, for example, "strategic bankruptcy" based on Chapter 11 has been used to cancel labor agreements with unions. In Europe, "bankruptcies of convenience" allow companies that file for bankruptcy to write off debts to continue their business in a new company.

Banks do not just structure their influence over bankruptcy proceedings to protect themselves and their balance sheets. They also engage sometimes in criminal strategies to bankrupt firms to change their balance sheets, particularly when they find themselves in need of deleveraging. Liquidation of healthy companies can help them meet requirements such as leverage levels and capital adequacy ratios. In Great Britain, for example, banks' less-than-ethical approaches to SMEs were investigated after 2012 when it was revealed that an entire department's job in one such institution was to target SMEs that were heavily leveraged and ensure that they went into bankruptcy to hold their assets and sell them on to hedge funds in different sovereign authorities with no comeback.[3] In France, banks themselves were saved by their relays and antennas at the court after going bankrupt during the early 1990's real estate crisis (Alphandéry et al., 2009). These end-of-pipe credit controls bring existential, managerial, and regulatory profits to the financial sector. The question of entrepreneurial practices of invisibilized siphoning of these assets upstream of the procedure is a criminal matter and remains outside the scope of this paper. It should be noted, however, that banks also practice the bankruptcy of viable SMEs to invest assets in more profitable sectors. Employees, taxpayers, suppliers, and subcontractors whose claims are not super-privileged bear the costs.

On the edge of criminal law, these collective procedures manage the disasters that the liquidation of a company represents for entrepreneurs, employees, creditors, suppliers and subcontractors, public authorities, and taxpayers. They represent the hidden and unconcealable face of capitalism and its systemic propensity to liquidate assets to use them elsewhere, for more lucrative, or more quickly lucrative projects. In this context, many of the consular judges interviewed at the CCP see the work of bankruptcy in collective procedures as the "dirty work" of the court (Blum, 2022). Not just because of all the pain inflicted on everyone but because they do not feel in control of the proceedings. Ideologically, however, most judges nevertheless trust competition and creative destruction. They refer to classical economic theory and never fail to point out that artificial maintenance of firms unnecessarily freezes resources that would be more efficiently used in new enterprises that respond to the challenges of the period (digitization, biomedical research, health care). The market should therefore be left to arbitrate between continuing to operate, going bankrupt, or restructuring. The classical economic

theory considers that in economies where the principle of competition prevails, there is a process of creation of new firms, an adaptation of their organization, their products, and their production techniques, and finally the disappearance of all those that no longer find customers or are unable to generate a sufficient flow of profit. Following Schumpeter (1911), it considers that it is innovation that sets the economy in motion and deepens it; from then on, competition is based on product differentiation and not only on the price of standardized products. Therefore judges see the abandonment of obsolete activities and the bankruptcy of companies that cannot adapt as an essential component of the dynamics of contemporary economies regardless of social costs. Schumpeterian "creative destruction" ideology is thus dominant: Don't feed the zombies, they use resources that could be invested in (more) innovative projects.

Indeed this representation is not just academic, since business leaders, politicians, and consular judges of the commercial courts subscribe to it. A survey of the latter reveals a clear Schumpeterian perception of the determinant role of bankruptcies, the blocking of which would be detrimental. As one judge in a chamber of collective proceedings put it: "*For me, social order is the whole of competition. If I push the reasoning to the end, a company that is no longer viable must be liquidated. If companies in difficulty are killed, there are no more companies that are sick! In the jungle, in the savannah, there are no sick animals, sick animals are dead. So there is no problem of sick animals, they are dead!*".[4]

Another judge affirms that the best defense of employment is to stop companies that cannot compete: "*I am not at all sensitive to the question of the number of jobs "saved"* [by bankruptcy proceedings]*, I know that it is often a consideration, but I think that the company does not save jobs, it is the market that saves jobs. In other words, you cannot isolate a company from its competitive environment to assess the impact of a continuation plan on employment. It makes no sense to look at employment in a company, it is meaningless. If anything, considering maintaining employment for a company, which can lead to a continuation plan, destroys employment on a general level*." This explicit convergence between theorists and practitioners and their shared confidence in the Schumpeterian mechanism points to the fact that credit failures are both expected and unpredictable.

By construction, the financial sector—the main creditor of the economy—has vital stakes in this field and therefore plays an equally important role in it. The work of managing collective procedures is an important dimension of the political work of consular judges. As Hirsch (1991) shows, this work condenses and points to some of the deepest contradictions of the market economy, for example, companies' demand for both freedom and protection. It also gives rise to the most virulent discourses of the public and some regulators.[5] Credit failures can represent one of the most violent faces of the market economy, for entrepreneurs, employees, creditors, and, at the same time, consular judges. The more pain bankruptcies inflict on workers, the more bankruptcy judges are suspected of corruption.

4 | NORMALIZATION OF THE DEBTOR'S DEVIANCE AS A HISTORICAL TREND

However, a historical process stands in the way of mechanical Schumpeterian liquidation. Historians of capitalism show that bankruptcy as a capitalist institution is constructed in parallel to the increasing sophistication and complexification of credit systems. The history of credit, as summarized by Levratto (2013; Hautcoeur & Levratto, 2017), shows that in pre- or proto-bureaucratic societies, credit relationships involved complex networks of personal obligations (Graeber, 2011; Mauss, 1923) supported by individual reputations within business communities (Greif, 1989; Muldrew, 1998). Whether in a personalized relational setting within complex socioeconomic networks or more

impersonal institutions, credit, and debt establish a creditor-debtor relationship that is a power relationship historically situated in a political and legal context, to the point of becoming the basis of class conflict in cities (Gratzer & Stiefel, 2008; Swedberg, 2003; Weber, 1920).

In particular, the history of bankruptcy in Europe shows that the treatment of insolvable debtors (an entrepreneur's failure to honor commitments) went from reduction to slavery in the Roman Empire, to torture and death in boiling water throughout the Middle Ages, to prison for debt in the 19th century (where the debtors were not only socially disgraced but tortured to “confess” where they had stashed the money instead of reimbursing it). As Balzac's novel *César Birotteau* stages it, the forced sale of the debtor's assets was, until very recently, accompanied by shame and social degradation for the bankrupt entrepreneurs who betrayed the trust of their creditors and represented “a threat to prosperity”. In the course of history, the debtor has been less and less subject to social opprobrium. The nineteenth century was, according to Mann (2002), characterized by “a redefinition of insolvency, from sin to risk, from moral failure to economic failure”. Hirsch (1991) argues that it is because of this difficulty in managing credit failures that the French business world gave itself a separate Commercial Code in 1807, and thus its own normative space.

Over the last two centuries, behavior considered to be criminal—defaulting on one's debt—was thus transformed into quasi-normal practice within the context of bankruptcy as a capitalist institution and its increasingly sophisticated credit systems. Bankruptcy law was to become an instrument acquired by politics to correct the harmful effects on markets of an unfavorable and unpredictable economic environment. From this perspective, bankruptcy law becomes a policy instrument to stimulate growth—in particular by managing the effects (on markets) of an unfavorable and unpredictable economic environment (such as the existence of economic cycles). Part of this process, at least in France, established theoretical protection of the workers and taxpayers, and in recent decades, relatively debtor-friendly developments such as the widespread use of Chapter 11-like protections in the face of tax, employment, and regional policy interests. It is possible for entrepreneurs to recreate a business as long as creditors are convinced that assets are reallocated “efficiently” and that entrepreneurs have not made the same mistakes twice (“Doing Business”, World Bank, 2002). Priority given to employees in the name of protecting human capital/know-how is often celebrated, and more or less paid for by social welfare; but the parallel reorganization of bankruptcy legal proceedings leaves nothing for employees when the assets of the bankrupt company are liquidated (Brunet, 2008).

5 | CREDITORS’ DAMAGE CONTROLS: FOOTHOLDS TO NAVIGATE THE NEW NORMAL

This pro-debtor evolution and protections of “super-privileged” parties tend to obstruct Schumpeterian liquidation and private finance's interests. From the perspective of finance, bankruptcies are failure of credit that represent both avoidable mistakes by entrepreneurs or unavoidable and unpredictable contingencies produced by the economy, i.e. the downward phase of a traditional business cycle in which expansion, reversal, recession, and recovery follow each other, once overinvestment has been cleared and corporate profitability restored. Therefore when a company finds itself before bankruptcy judges, it is usually because its bank has decided to stop supporting it. Banks assess the creditworthiness of the firm based on several factors, including the legal structure, the age of the firm, the credit rating of the firm, the revenues of the firm, the personal credit scores of the entrepreneurs, and the social network of the entrepreneur; even the relationship between the entrepreneur and the bank manager can be a decisive factor in the application for financing (Uzzi, 1999). In France, a cat-and-mouse game between the entrepreneur and the bank manager revolves around the fact that the

jurisprudence of the *Cour de cassation* (the highest French court) allows entrepreneurs to sue their banks for both “abusive support” (too much interference in the indebted company's management, making it co-responsible) and “abusive breach of credit” (brutal termination of a contract that does not give enough time to the debtor to turn things around and find new creditors). Knowing this, entrepreneurs try to involve the banks just a little too much in their business so that they can sue them, and their deep pockets, if the business fails. This game alone creates a strong micro-economic incentive for banks to be present in court and to send representatives from their sector who will know how to recognize these entrepreneurial strategies in insolvency chambers and how to possibly favor financial creditors during negotiations.

This incentive for banks to be present in court also stimulated their representatives to propose successful reformulations and restructurations of bankruptcy proceedings themselves,[6] especially to figure out how to get preferential treatment (i.e. be paid before the others, including workers and the State) even without super-privileges. For the financial sector, the issue of vertical concentration of the credit chain as well as control of collective procedures is therefore central. Consistent with the definition of BIs, bankers at this court both try to predict bankruptcies in their office at the bank, and to control the effects of these predictions and bankruptcies in specialized chambers at the court, either by ratifying the predictions or by providing innovative solutions when needed.

As a consequence, in France, five legal bankruptcy procedures have been developed since 1967: Outright liquidation (95% cases); prevention (friendly but monitored by a judge, leading to a settlement with creditors, for example, moratoria); Chapter 11-like “Sauvegarde” [safeguard] (in 2005), which requires the active participation of the banker and offers banks guarantees that improve their rank in the procedure if they lend additional funds to the company in difficulty during the period of observation, or have lent money twice in the past (Brunet, 2008); Recovery (continuation); or Recovery (sale, handover, transfer to the new owner). The presidency of the court lobbied for the 2005 new bankruptcy law so actively that several amendments bore the name of its president.

Judges from the financial sector who sit in these bankruptcy chambers can thus base their decisions on the mathematical optimization models that they use at their desks at the bank (factoring in the analyses of the company's accounts, its refinancing capacities, the forecasts related to its sector, the reduction functions in the models of its debt service, the needs of the bank itself in terms of deleveraging, the possible share of assets that could be recouped during the judicial procedure (O'Neil, 2016)). Finance thus imposes the vertical concentration of credit and the criteria for its management, down to defaults at the end of the chain. For many judges from the financial industry, this is not questionable at all since they see their industry as the “bloodstream of the economy”.

5.1 | Positional advantage: Bankers in judicial bankruptcy chambers

Thus, this very specific domination and capture by the financial sector in bankruptcy collective proceedings stems from two ways of acquiring multilevel positional advantage. The first is its systematic over-representation in the specialized and closed chambers of collective proceedings, resulting in the invisibilization of vertical concentration. The second is the lobbying by its judges, particularly concerning changes in insolvency law.

At the CCP, there are three categories of chambers: general litigation, specialized litigation, and bankruptcy collective proceedings chambers. To measure the systematic over-representation of financiers in the specialized bankruptcy chambers, the court's hearing tables, which provide data on the composition of the chambers year after year between 1990 and 2005, were very useful. From these data, it is possible to reconstruct the internal paths of judges from one chamber to another, year after

year, and to combine these paths with the socio-demographic profiles of the same judges. In 2000, for example, in the three bankruptcy chambers proper, the proportion of judges who were bankers (compared to judges from other sectors, such as industry, services, construction, etc.) is 3 out of 8; 5 out of 12; and 4 out of 7. In the Chamber of Opposition to injunctions of the bankruptcy judge (an internal "Court of Appeal" for parties unhappy with the decision of the bankruptcy judges in the first three chambers), 5 out of 7 judges were bankers. All chambers are thus in a position to mitigate the effects on banks of the normalization of bankruptcy, i.e. to ratify the optimized decisions made upstream by the banks themselves. This vertical multipositionality is the crux of the meeting between predictions and enforcement of these predictions; and recursively as threats enforced as predictions. The parameters that they use for their loan decisions at the bank can become the epirstemic footholds, backstops, and ratchets of their navigation of the pitfalls of credit in the bankruptcy chambers of the court.[7]

With systematic instrumentalization of the court and vertical concentration of the credit chain, the most stable consular judges in these chambers were "vertical linchpins", that is to say, members active at several levels at the same time, i.e. one of the structural characteristics of successful institutional entrepreneurs (Lazega, 2020). The normalization of this vertical concentration, and of the conflicts of interest that it systematically induces, are thus one of the main features of the CCP as a BI.

5.2 | Procedural mazes: Dominating by complexifying the articulation between organization and institution

The second strategy used by the financial sector to navigate the new normal is to lobby for changes in the Commercial code. This is made easier by the fact the CCP is already a polynormative regulatory sandbox, politicizing commercial justice in systematic ways (Lazega & Mounier, 2012). As this normalization of deviance and this relatively debtor-friendly development takes place, the main creditor of the economy uses its increased access to the law to work on defining and redefining, organizing and periodically reorganizing, the collective proceedings themselves. For example, a new law (26 July 2005) tried to improve the chances of saving a company in difficulty by relying on the active participation of the banker. And, to overcome the reluctance of the latter to lend to a company already in difficulty, the legislator adopts several highly incentivizing procedural measures. With the CCP presidency at the helm of an active lobbying campaign proposing amendments to the law, the financial industry obtains from the legislator privileges that law professors suspect of "excessive generosity and indulgence" (Brunet, 2009). The objective is to protect creditors from the general evolution of the law towards helping debtors, i.e. not to lose control of credit failures, of bankruptcy as an institutionalized tool for redistributing assets, so that they can be reinvested based on own criteria. In this complex maze of old and new procedures, employees and the state are "forgotten" and practically lose their theoretical super-privileged rank (Brunet, 2009).

As a consequence, at each period, a new maze of procedures instrumentalizes the judicial institution and helps the financial industry rebalance discreetly the effects of the normalization of credit failures, i.e. to navigate the new normal. This institutional entrepreneurship as political work underlines the importance of meso-level BIs in the regulation of capitalism and its crises. Their role in the resolution of these crises is illuminated by the power plays between the parties present at the commercial courts. While the ideology of the consular judges may vary between those who favor a Schumpeterian line in favor of systematic liquidations and those who favor a line that is more sympathetic to the need to preserve businesses, skills, and jobs, the place of judges from the banking sector is important in ensuring that its point of view prevails in these bodies. Procedural complexity excludes dissenting

and challenging stakeholders who would not agree with the regulatory solutions and compromises hammered out as "weak culture" (Schultz & Breiger, 2010). The executive branch and regulatory bodies prefer to turn a blind eye to this specific BI rather than lose the lever of economic policy that private finance represents, especially in times of crisis.

6 | BORDERLINE INSTITUTIONAL ENTREPRENEURS' ENABLING CONDITIONS

Thus pushing the boundaries of normality helps control both contingencies and the consequences of these contingencies from within the court and the state apparatus. In his classic work on what he calls 'precarious norms', Selznick (1957) provides an early combination of organizational, structural (stable patterns of interdependencies) and institutional (valued norms for behavior) perspectives in sociology. As in Archer's (Brock et al., 2016) framework, this institutional school brings together structure, culture, and agency (both individual and collective action) at a high level of generality. A precarious norm is one that is essential to the viability of the collectivity but in which most members may have no direct stake. In this illustration of the entanglement of structure and culture, a norm is therefore precarious because it is always in danger of losing active support by organized interest groups and well-connected institutional leaders that help preserve it as a priority norm against all competing norms.

From this perspective, the CCP case of judicial entrepreneurship, combined with political lobbying, is made more effective from within the state apparatus itself, even at the first level, using this straddling position to cross the boundaries not only between the public and the private but of the division of powers (judicial responsibilities and legislative lobbying). Indeed, redefining the boundaries between the pathological and the normal requires what Lawrence et al. (2009) would call, in their review of the literature on institutional entrepreneurship and work, enabling conditions. One generally overlooked enabling condition is the sufficient power that institutional entrepreneurs can concentrate by accumulating conflicts of interest in positions of high-status inconsistency, i.e. by occupying high levels of socially and culturally heterogeneous and inconsistent dimensions of status (Lazega, 2001, 2018). Such positions of conflicts of interest are in many ways uncomfortable, illegitimate, and risky, but can also have a high payoff in terms of achievement when accompanied by social skills such as the ability to use the rhetoric of sacrifice -as lay consular judges present, for example, their voluntary work, particularly dirty bankruptcy work. Indeed, they present their loss of status with/to the public as a personal 'sacrifice' of status for the common good. But this loss is very relative, if not altogether false when the 'sacrifice' jeopardizes one dimension of status without jeopardizing the other high and uncorrelated dimension of status.

These dimensions of status include endogenous dimensions derived from centrality in various networks within organizations promoting institutional change (Lazega, 2018, 2020). Although it is beyond the scope of this paper, and as also illustrated by the CCP case (Lazega et al., 2012), there is something remarkable in the way relational infrastructures are mobilized in the political and regulatory work of BIs. Other network-related enabling conditions include operating as members of collegial oligarchies and as cross-level vertical linchpins, i.e. simultaneously at different strata in the organization or in the field. Years, often decades, of common, half-private, and discrete collaboration protected by such enabling conditions create proximities, personalized relationships, and fragile structural equilibria where mutual critique decreases over time. Working in a collegial regime of personalized relationships reduces the capacity to challenge others' normative choices, and to disagree. Members use their personalized relationships because they facilitate innovative discussion over time—even when these are not necessarily quiet relationships.

Control of these relational infrastructures as enabling conditions then gives borderline institutional entrepreneurs a structural position that enables them to guide the negotiation of sufficient levels of agreement and normative alignments that are more or less long-lasting (Lazega et al., 2012). This does not assume a 'railway-based' conception of norms (Favereau, 1995) because relational infrastructures and normative choices coevolve. Understanding how such a coevolution in BIs works requires combining social and organizational network analyses with qualitative analyses of how actors select and interpret norms and conventions in their political work. In this spirit, identifying BI entrepreneurs' enabling conditions is well within the scope of studies of 'institutional work' (Glückler, Suddaby & Lenz, 2018; Lawrence et al., 2009), political work (In Boyer & Saillard, 2002; Favereau & Lazega, 2002; Lahille, 2020; Smith, 2016), and regulatory processes.

7 | BORDERLINE INSTITUTIONS OF CONTEMPORARY TRANSITIONS?

In sum, bankruptcy as politically "dirty" work illustrates both the vertical concentration characterizing BIs as well as a politicization of the judicial system. Bankers as BI entrepreneurs can use vertical concentration to be at the same time employees of their bank, using black box models for credit decisions, consular judges collectively reinforcing these decisions in bankruptcy chambers, promoting the collective pragmatism of finance in their jurisdictional work, and activist lobbying in the legislative framework. Fine-tuning their own predictive odds calculations with their experience of bankruptcy proceedings further concentrates their power over credit chains, from beginning to end. Their knowledge, expertise and capacity to define the problems and solutions are increasingly deemed appropriate for decision-making in bankruptcy cases, and become embedded in society. The CCP as a BI thus dovetails with the Polanyian double movement of the *Great Transformation* and Archer's double morphogenesis through the recursive institutionalization of new norms in the market economy. The example used above shows that successful lobbying for the creation of a maze of bankruptcy procedures allows the main creditors (repeat players) to diversify and manage the temporality of proceedings, and thus to keep a favorable rank among creditors during liquidations or recoveries.

Indeed, two linked ("coinciding" in Archer's sense) morphogenetic mechanisms are at work in these BIs. The first mechanism is a cultural normalization of deviance, blurring and pushing the limits of normality through legal changes. A twin mechanism counterbalances the first in a quasi-dialectic way: in reaction against this cultural-legal normalization of deviance, powerful actors, who both contribute to this normalization and stand to lose from it, lobby successfully for damage control to manage the consequences for them of this "favorable" treatment of the "deviant" (the debtor). To do this, these powerful actors build control of the courts ("judicial entrepreneurship") that will define the outcome of the ensuing normative crisis that they initiated ex-ante. Upstream normalizing of deviance and downstream control of the consequences is a form of dynamic stabilization. By freezing these anticipations into alignments, this process reflects a built-in problem of conflicts of interest and institutional capture.

There is no surprise in the fact that capitalism finds institutional arrangements that will protect its capacity to accumulate. But this identification of the BI leads to the question of which existing BIs should be allowed to carry on with normalizing pathological behavior and what citizens should learn from BIs' efficiency and resilience in the face of new uncertainties, failing predictions, and struggles for control in the current transitions. Taking seriously the role of meso-level institutions (such as this commercial court) and their social roles raises the issue of all the institutions that need to change in order not to waste contemporary existential crises. This angle of observation gives an

added dimension to the perspective on institutional change described by Polanyi and Archer. Combining their perspectives helps identify both root causes of great transformations and new downstream causes combining structure, culture and agency in further morphogenetic changes branching out of prior changes. It is not the place of this paper to elaborate on the concatenation of mechanisms, but recognizing this recursive causality provides a potential searchlight for further detecting BIs and the consequences of their work.

In particular, these coinciding mechanisms—of borderline institutions pushing normative boundaries and controlling downstream consequences of contingencies generated by this push—raise the question of whether BI can be created and used by other actors than business and finance. Banks have financial risk calculation models that lead them to fund environmentally destructive development with short-term returns and not to invest in more radical and unprofitable ecologically-friendly projects that are vital for society as a whole. This takes place even though the costs of their inaction are likely to be much higher than the costs of long-term reconstruction. As competing institutions dominated by finance expect and promote short-term returns, such returns are unlikely to ever be sufficient by contemporary standards of exploitation, extraction, exclusions, and destruction.

As a “closed public institution” rendering a public service, such a BI becomes also an example of Habermas' (1989) decline of the public sphere through the increasing ability of states and corporations to manipulate information and discussion. Few social actors can mobilize the same capacities as finance in systematic, sustainable, and unaccountable ways. But BIs can be identified in other fields. For example, it is possible to find in Big Relational Tech (BRT) the same BI character (Lazega, 2020). BRT platforms have been driving the emergence, over the last generation, of a new normal in terms of access to personal data, a form of intrusion in citizen privacy and personal data accumulation that was, earlier, culturally and morally widely perceived as deviant and unacceptable, as pathological as fascism. Today such platforms have developed artificial intelligence-based analyses of this personal data as a way not only to satisfy commercial purposes (advertising being BRT's original business model) but also of selling analyses of this data to other powers such as, among many, governmental security agencies fighting fake news or “angry mood manipulations” of the public by rogue political candidates or hostile foreign powers.

As a BI, BRT has redefined breach of privacy: the deviance of its data collection and accumulation via email accounts and smartphone apps, etc. has disappeared as deviance, while unauthorized access by one individual citizen to the relational information of another individual citizen still counts as a violation of privacy. This second AI-based business model is based not only on technology but on the legal intellectual property and regulatory instruments promoted in parallel, helping any client organization manage contingencies associated with downstream misuse of the very same data. Such BIs benefit from artificial intelligence black boxes (Al-Amoudi & Latsis, 2019) since this technology helps pursue normative goals and practices that are not (yet) socially acceptable, with little accountability. Here again, vertical concentration facilitates control of the entire process from upstream records of behavior to downstream guidance of such behavior.

This comparison between finance and BRT platforms may seem far-fetched but both illustrate the same morphogenetic mechanism of anormative regulation by a BI that pushes the limits of upstream normalization of deviance and downstream exploitation of subsequent consequential contingencies. They both show that questioning conventional approaches to institutions by looking at how they regenerate themselves as BIs is a timely project. The characteristics that define (the different degrees of) a BI provide a template, rough as it may be, that helps to identify other BIs. Identifying Bis is also important to look at the possibility of building new BIs that pick up the pieces of failures of so many predictions in the name of regeneration, thus helping with radical change. Recursive causal dynamics create cycles in which new meso-level changes build on consequences of prior macro-level changes,

triggering new changes at the meso-level and leading to new macro-level changes. Much remains to be urgently done in the knowledge of this coevolution of meso-level changes and macro-level changes.

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DATA AVAILABILITY STATEMENT

Research data are not shared yet.

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ENDNOTES

[1] For historical background, see for example Hilaire (1989).

[2] The organizational functioning of courts is complex. It is not the purpose of this paper to describe it here in great detail for the CCP.

[3] See for example Financial Conduct Authority (2019).

[4] Author's translation.

[5] See for example a report published by a Senate committee investigating the bankruptcy proceedings in France and called *Une Justice en faillite?* [A Bankrupt Justice?] (Colcombet & Montebourg, 1998).

[6] This is not the only area of law in which banks are interested in remote controlling the court. For example, the financial sector invests in damage control in litigation related to competition law. Litigation for unfair competition can try to reach banks' deep pockets to obtain punitive damages (Lazega, 2010; Lazega & Mounier, 2009, 2012; Lazega et al., 2012). One way to exercise this damage control is the same vertical concentration as in the case of bankruptcies.

[7] The ease with which judges from the financial sector could access chambers of collective proceedings is also due to the fact that a significant proportion of other lay judges coming from different sectors of the economy did not wish to sit in these chambers. For some, insolvency proceedings are a kind of "death trap" for companies, reaching judgment "when it is already too late".

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