

How Much Do You Really Know About Fraud?

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Ed Balleisen, [Fraud: An American History from Barnum to Madoff](#) (2017).

How did mail fraud come to be a powerful, all-purpose statutory tool for pursuing financial fraud in the United States? How does financial fraud resemble and differ from other kinds of commercial fraud—false advertising, misrepresenting the qualities of goods or land, or making impossible promises a seller never intends to keep? And is there, as there seems to be, a connection between novelty and innovation—new markets, new products, new frontiers—and fraud?

[Ed Balleisen](#)'s new book, *Fraud: An American History from Barnum to Madoff*, examines fraud, writ large in America from the end of the civil war through the turn of the millennium. As anyone who knows Balleisen's work would expect, *Fraud* is exceptionally researched, observant, thoughtful, and rendered in charming prose. *Fraud* spans the familiar legal silos to provide a sweeping history of different varieties of fraud, and their regulation. This is useful, and the book works because of Balleisen's disciplined focus on his core questions—how fraud manifests, how regulatory anti-fraud strategies have evolved across time, how and when industry self-regulation has intervened to control it, and how judicial institutions and processes have influenced anti-fraud efforts. The book examines a recurring toggle between interventionist and laissez-faire regulatory approaches; the venerable, if inconsistent and imperfect, tradition of industry self-regulation; and the seemingly perennial link between influence (or lack thereof), and punishment (or lack thereof). It makes a remarkable contribution to our understanding of how fraud and its regulation have evolved thus far, and the conditions out of which our current regulatory models developed.

It turns out that, in telling ways, regulation of fraud maps onto social priorities across time. Through the microcosm of fraudulent conduct and its regulation, Balleisen's narrative exposes all the richness, promise, contradiction, and imperfection of American society and government. For example, where social status matters—as it did in the tight, homogeneous 19th century business establishment—it will matter to fraud enforcement too. One aggressive businessman with some sketchy conduct in his past will skate through to fame and fortune (see [Richard W. Sears](#) of Sears, Roebuck), while another will be ruined (see St. Louis publisher and banker [Edward Gardner Lewis](#)).

Balleisen also makes clear the abiding link between moral outrage, and core social characteristics or values. The variable forms that exhortative anti-fraud campaigns take across time tell us something about American society across time. Balleisen describes Better Business Bureau rallies in the early 20th century that were reminiscent of Protestant revival meetings; of urgings to be “a man” and therefore upstanding in the 1950s; and of claims, throughout the 20th century that fraud (or, alternatively, regulatory efforts to curb it) was “anti-American.” Predictably, more than once, such moral statements have shaded into anti-immigrant or anti-Semitic sentiment. Also predictably, though there were populist moments in which farmers or the poor were front-and-center, most anti-fraud campaigns were primarily directed toward protecting the white middle class. And yet, we should not underestimate the broader success of regulation, which inures to everyone's benefit. I can go to the garden store to buy fertilizer, confident that it contains what it says it does. Blatant frauds like the Volkswagen emissions scandal are the exception now, at least with respect to tangible products.

One social norm is especially central, and it has dominated both opportunities for fraud and anti-fraud regulation. That is capitalism. *Fraud* makes clear just how thin is the line between “acceptable” capitalist pursuit of profits and “unacceptable” deceit. Particularly in boom times, capitalist enthusiasm soars and regulatory waters seem to recede. Why didn't merit-based “blue sky” securities laws gain a more permanent foothold, for example, given how energetic the populist moment that engendered them was? Perhaps it all just seemed so burdensome during the Roaring Twenties, when everyone seemed to be getting rich quick. Balleisen also tells a series of intriguing stories about the links between novelty—new markets, new products, new frontiers—and fraud. In innovative contexts, fraud often surrounds a nugget of real promise. Novelty entails uncertainty, which blurs the line between honest, excessive optimism and outright deceit. And yet, novelty also both attracts fraudsters, and makes it harder to recognize and track their misbehavior. (Is it too obvious to mention cryptocurrencies here?)

Law has played both sides of the fostering-innovation-versus-protecting-investors dialectic. Law can be the mechanism through which fraudsters are stopped, information asymmetries are addressed, and potential victims are protected; however, law is also the means through which alleged fraudsters raise procedural complaints, claiming that state action is over-intrusive or that it violates their rights. This is not surprising: that balance is fundamental to what we mean by the Rule of Law. Still, watching those competing imperatives rise and fall across time in the context of fraud illuminates just how dependent legal practice is on its normative environment, and how implicated it is in our sometimes internally inconsistent sentiments about both capitalism and fairness. Industry self-regulation has reflected some of the same tensions: industry sometimes pressed its advantage where it could, arguing for self-regulation rather than state oversight where public sentiment seemed to allow it. And yet industry also got ahead of state regulation and implemented its own meaningful anti-fraud strategies, during times when public sentiment seemed to demand that instead.

In the end, as this history of fraud and its regulation show us, law remains a tool rather than a force unto itself. Law can occasionally change norms, but there are limits. Law-in-action finds its level, contingent on and subordinate to the dense network of norms, power and influence, and historical context in which it is embedded. If this is true, we should end with a question: what does it mean that virtually no one has been criminally prosecuted for the multiple financial frauds we have collectively endured over the last fifteen years, which Balleisen tells us are greater in magnitude and

frequency than they have been at any other time in the last century?

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