

REVIEW ESSAY

Seeing Like an Anti-Fraud State

Susanna L. Blumenthal

University of Minnesota
Email: blume047@umn.edu

“They look upon fraud as a greater crime than theft, and therefore seldom fail to punish it with death,” Jonathan Swift famously wrote of the fictional island of Lilliput in *Gulliver’s Travels*. Appearing as an epigraph of Edward Balleisen’s *Fraud: An American History from Barnum to Madoff*, it invites comparison of Lilliput with the United States, not least because it is paired with a 2007 quotation from the former Federal Reserve Chairman Alan Greenspan, who was rather more philosophical about fraud. As the world teetered on the edge of economic crisis, he wrote it off as a regrettable but inevitable part of “the way human nature functions,” suggesting that “what successful economies do is keep it to a minimum.” Looking backward, Balleisen finds greater ambivalence in the historical record, as a matter of both human psychology and American law. From the nation’s founding, he observes, “the country’s lionization of entrepreneurial freedom has given aid and comfort to the perpetrators of duplicitous schemes.”¹ But this is not to say that they have been allowed to act with impunity. To the contrary, their creative deceptions have inspired a wide array of anti-fraud initiatives, operating “at the leading edge of regulatory innovation.”² In chronicling these conflicting and conflicted pursuits of profit and justice over the course of two centuries of American history, Balleisen brilliantly elucidates an enduring dilemma of governance: how to promote ingenuity without undermining “the capital of confidence upon which all progress depends.”³

While the mugs of P.T. Barnum, Charles Ponzi, and Bernard Madoff figure prominently on the cover of *Fraud*, the book centers on those who regulate the economy, which in Balleisen’s account include businesspeople as well as bureaucrats. The author treats America’s fraught relationship with fraudsters

¹ Edward J. Balleisen, *Fraud: An American History from Barnum to Madoff* (Princeton, N.J.: Princeton University Press, 2018), 5.

² *Ibid.*, 9.

³ *Ibid.*, 178.

as a window on evolving business–state relations, with particular attention to the role of law in setting the bounds of commercial liberty. Although the analysis focuses on organizational fraud—offenses committed by firms against others—Balleisen uses a wide-angle lens to capture the full range of public and private actors who address the problem of duplicity in the marketplace. In doing so, he shines light on a set of “intermediary institutions” such as the Better Business Bureau (BBB), industry trade associations, and media outlets, which engaged in self-policing and also performed surveillance, investigative, educative, and preventative functions.⁴ Sometimes working in concert with governmental agencies, other times competing with them for jurisdictional control, these quasi-public entities were vital parts of the complex and dynamic “regulatory ecology” within which businesses operated.⁵ Drawing upon an extensive archive of judicial decisions, legal treatises, and institutional records, as well as trade journals, newspapers, and personal papers of lawyers and businesspeople, Balleisen crafts a series of “capsule stories” designed to render visible “enduring patterns, pointing to pivotal inflection points, and evoking broader implications for contemporary policymaking.”⁶ In this he succeeds admirably. Readers of this deeply researched history of anti-fraud regulation will find it to be a veritable page-turner, masterfully narrated and filled with memorable characters and incidents, which convey how difficult it has been for fraud fighters to distinguish sellers from swindlers.

The book is divided into four parts, corresponding to distinct phases in the forms of fraud and modes of governance. The first phase, from the 1810s through the 1880s, roughly spans the lifetime of Barnum, who is taken to embody the era’s operative norm of *caveat emptor*, or ‘buyer beware.’ The consolidation of a national market economy rife with informational asymmetries nonetheless made economic deceit a source of intensifying concern, prompting statutory reforms and the development of new anti-fraud campaigns and institutions in a second, overlapping phase from the 1860s into the 1930s. The need for more extensive, federal oversight was brought home by the Great Depression and underscored by newly elected President Franklin Delano Roosevelt, who called upon Congress to impose “the burden of telling the whole truth on the seller.”⁷ In so doing, he inaugurated a third phase, running through the 1970s, when policy makers made investor and consumer protection a national priority, generally pivoting toward a regime of *caveat venditor*, or ‘seller beware.’ The pronounced solicitude for unsophisticated and unsuspecting purchasers expressed in this era did not relieve economic actors of the duty to exercise due diligence, however, and the effectiveness of the New Deal regulatory scheme depended upon the instrumentalities of nongovernmental business organizations, owing in no small part to the procedural hurdles faced by prosecutors and the leniency displayed by the bench in sentencing convicted fraudsters. Enforcement efforts were further limited by a

⁴ *Ibid.*, 8.

⁵ *Ibid.*

⁶ *Ibid.*, 12.

⁷ *Ibid.*, 245.

postwar political climate in which federal bureaucrats as well as BBB officials professed a strong commitment to “free enterprise,” deliberately distinguishing their forms of regulation from a “commercial Gestapo.”⁸ While a waxing consumer movement in the 1960s moved politicians across party lines to speak in terms of a “Buyer’s Bill of Rights” and to promote a wave of anti-fraud reforms at local, state, and federal levels of government, “punctilious proceduralism and tight budgets” combined to blunt the impact of consumer protection agencies, whose hamstrung heads tended to opt for negotiated settlements, which came to be accepted by targeted firms as one of the costs of doing business.⁹ Accumulating doubts about the efficacy of what Balleisen calls “the anti-fraud state” crystallized in the mid-1970s, at once expressing and fueling a resurgent anti-statism and deregulatory activity, hallmarks of the fourth and final phase in which “the market strikes back.”¹⁰ This era, extending into the 2010s, saw a succession of high-profile scandals resulting in losses to investors and consumers unprecedented in their scale and scope. At least as notable was the want of criminal prosecutions in their wake.

The America of the present thus appears to be as far removed as ever from the ways of the Lilliputians. Indeed, the closing pages of the book suggest that we are witnessing a resurgence of the ethos of *caveat emptor*, especially within the financial services industry, which is positively rife with “Barnumesque humbuggery.”¹¹ For Balleisen, this is a manifestation of abiding strains and contradictions within American legal culture, some of which are more deeply rooted in the human psyche. Despite considerable change over time in the ways and means of policing business fraud, he explains, policy makers have been perpetually caught in a bind as they struggle to prevent and redress wrongdoing without undermining the discipline of the market and squelching the entrepreneurial energies needed to sustain American competitiveness in a global economy. The book nonetheless closes on a note of cautious optimism, as Balleisen offers this history of anti-fraud regulation as evidence “that inventive governance can stay abreast of all the new twists on old games, shut down the worst frauds, fortify consumers and investors against imposition, and sustain, at reasonable cost, the social trust necessary for modern capitalism” to function as he understands the system.¹²

Still, readers might well wonder why economic deception has not been treated with greater severity over the course of American history. The fact that fraudsters are no longer sent to the gallows must be considered progress, but to prosecute only the most egregious of actors—the Madoffs of the world—risks legitimating the conduct of lesser (or simply less notorious) offenders without redressing the structural forms of inequality that not only enable financial deceit but also threaten our democracy. Precisely because Balleisen centers his analysis on *business* fraud, he might have said more about the

⁸ *Ibid.*, 283, 286.

⁹ *Ibid.*, 304, 311.

¹⁰ *Ibid.*, 351.

¹¹ *Ibid.*, 381.

¹² *Ibid.*, 383.

legal constitution of this keyword as well as the role of law in creating and sustaining the conditions of “modern capitalism.” In the opening pages of the book, these conditions are already largely in place: commerce has extended “beyond the social constraints of family, neighborhood, and religious community,” increasing the complexity and risks of economic transactions, which are dependent upon trust that is all too readily betrayed by enterprising firms.¹³ Taking advantage of what Balleisen describes as relatively fixed psychological impulses, these firms and their deceptive practices are presented as part of the price we pay for living in a capitalist society. Here his analysis is informed by recent work in behavioral economics, which is used to explain the recurrence of certain types of scams as well as our tendency to fall for them. Yet this way of accounting for fraud is less attuned to changes over time in the ways that swindlers as well as their marks have been apprehended by successive waves of psychologists and criminologists and the impact of their conceptual schemes on the substantive law and its application across time and jurisdictions.¹⁴ To be sure, the book summons up a fascinating array of cases from leading treatises, appellate opinions, and newspaper reports to illustrate “the porousness of the law” as well as its paternalistic concern for those deemed incapable of protecting themselves from the scams and snares of the marketplace, which tended to include women, children, and the elderly, as well as recent immigrants, the poor and illiterate, and eventually consumers as a whole.¹⁵ The published sources that Balleisen uses to reconstruct the everyday adjudication of fraud are mainly from the nineteenth century, however, and they afford only glimpses of how race, gender, and class figured in judicial determinations of who could be a victim or perpetrator of fraud as a matter of law.¹⁶ Much remains to be learned about the doctrinal reasoning of members of the bench and bar as capitalism “took command” of nineteenth-century American culture.¹⁷ The offense of larceny deserves particular attention in this regard. Even as it was demoted from a capital crime, it expanded to encompass cunning as well as coercive appropriations of property, occasioning

¹³ *Ibid.*, 5.

¹⁴ For an intriguing study that pursues some of these lines of inquiry, see Michael Pettit, *The Science of Deception: Psychology and Commerce in America* (Chicago: University of Chicago Press, 2013).

¹⁵ *Ibid.*, 43.

¹⁶ It bears noting that Balleisen accords historical priority to Sarah Howe for the pyramid scheme that has since been named after Charles Ponzi and was subsequently made all the more famous by Bernie Madoff. Nonetheless, her mug is noticeably absent from the book’s cover, and women mostly figure as victims in Balleisen’s account. On the enforcement side, mention is made of women holding important posts as consumer affairs advisors in postwar administrative agencies, (*Ibid.*, 291, 302, 304), and Elizabeth Warren is credited with providing the blueprint for the Consumer Financial Protection Bureau in the more recent past (370), but the role of gender in the anti-fraud state is not considered.

¹⁷ *Capitalism Takes Command: The Social Transformation of Nineteenth-Century America*, Michael Zakim and Gary J. Kornblith, eds. (Chicago: University of Chicago Press, 2012). For a case study probing these themes, see Susanna L. Blumenthal, “Counterfeiting Confidence: The Problem of Trust in the Age of Contract,” in Alison L. LaCroix, Saul Levmore, and Martha C. Nussbaum, eds., *Power, Prose, and Purse: Law, Literature, and Economic Transformations* (New York: Oxford University Press, 2019), 15–50.

reconsideration of the division of labor between civil and criminal courts in constituting markets and policing commercial morality.¹⁸ More systematic analysis of cases on both sides of court dockets that were litigated before, during, and after the so-called age of Barnum as well as the interaction among courts, legislatures, and administrative agencies will yield insights into the legal processes that encouraged Americans to think of business as a separate sphere, with its own norms of honesty and forms of fraud.¹⁹

Radiating outward from Balleisen's magisterial study are vital questions about the place of fraud-fighters in the broader history of the administrative state. By shining light on the duplicity that lies at the heart of American capitalism and illuminating the competing imperatives of innovation and regulation that have bedeviled the work of policy makers, he has made a signal contribution to both legal and historical scholarship on regulatory governance. Painstaking in his reconstruction of the tangled relationships between businesses and bureaucrats, Balleisen provides an exceptionally rich mine for historians of modern statecraft, both within and beyond the United States, not least because he leaves readers to ponder whether and to what extent the story that he tells about the policing of commercial deception is a distinctly American one.²⁰ Moreover, in speaking in terms of the *antifraud* state, he

¹⁸ These developments have been mapped most fully by historians of English law. See John P. Locker and Barry Godfrey, "Ontological Boundaries and Temporal Watersheds in the Development of White-Collar Crime," *British Journal of Criminology* (2006), 976–92; Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press, 2016), 201–33; James Taylor, *Boardroom Scandal: The Criminalization of Company Fraud in Nineteenth-Century Britain* (Oxford: Oxford University Press, 2013); Michael Lobban, "Commercial Morality and the Common Law: or, Paying the Price of Fraud in the Later Nineteenth Century," in Margot Finn, Michael Lobban, and Jenny Bourne Taylor, eds., *Legitimacy and Illegitimacy in Nineteenth-Century Law, Literature and History* (Basingstoke: Palgrave Macmillan, 2010), 119–47; Graham Ferris, "Larceny: Debating the 'Boundless Region of Dishonesty,'" in Judith Rowbothan and Kim Stevenson, eds., *Criminal Conversations: Victorian Crimes, Social Panic, and Moral Outrage* (Columbus: Ohio State University Press, 2005), 70–88; Cerian Charlotte Griffiths, *Prosecuting Fraud in the Metropolis, 1760–1820* (PhD dissertation, University of Liverpool 2017).

¹⁹ For evidence of the indeterminacy of the meaning of "business" in legal thought and practice at the turn of the twentieth century and the stakes of this definitional enterprise, see Edward A. Adler, "Business Jurisprudence," *Harvard Law Review* 28 (1914): 135–62. The legal foundations of American capitalism have received more extensive consideration in recent work by William J. Novak, *New Democracy: The Creation of the Modern American State* (Cambridge, MA: Harvard University Press, 2022); and Joseph Fishkin and William E. Forbath, *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* (Cambridge, MA: Harvard University Press, 2022); cf. Jonathan Levy, *Ages of American Capitalism: A History of the United States* (New York: Random House, 2021).

²⁰ Balleisen's citations to the work of James Taylor, in particular *Boardroom Scandal: The Criminalization of Company Fraud in Nineteenth-Century Britain* (Oxford: Oxford University Press, 2013), suggest significant parallels in the treatment of business fraud in Victorian-era courts on both sides of the Atlantic, but these comparative lines of inquiry are not pursued within the confines of *Fraud*. Moreover, while the antifraud initiatives upon which the book centers are described as novel departures in regulatory governance, they are not fully contextualized within the broader history and historiography of American statecraft. The proliferation of studies in the last two decades, illustrating the heretofore hidden strengths of the American state from the founding forward, are comprehensively assessed in Gautham Rao, "The New Historiography of the Early Federal

generates productive ambiguities about what this prefix is meant to imply and whether there can be said to be a distinctive mode of governing through fraud in United States.²¹ His concentration on the regulation of organizational fraud also invites comparison with other forms of deceit, which might or might not be categorized as economic, including frauds perpetrated by employees, consumers, and welfare recipients as well as those threatening the integrity of domestic, religious, artistic, scientific, and political life. At once ubiquitous and elusive, fraud is remarkably good to think with for legal scholars seeking to make historical sense of the state. Standing at the boundaries of legalism, fraud constitutes a keyword in American culture, one that has long been used to work through the relationship between capitalism and crime as well as more fundamental problems of value, knowledge, identity, trust, and authority. Attending to the broader stakes of fraud fighting will add dimension and complication to the burgeoning scholarship on law and political economy, particularly, but certainly not only, the recent work exploring the intertwined histories of the welfare state and the carceral state.²² Much remains to be learned about the distributional consequences of the policy-making paths pursued by Balleisen's regulators, whose ambivalence about creative deception stands in stark contrast to the mindset and surveillance strategies of the architects and administrators of public assistance programs. Indeed, the welfare system grew ever more punitive in the last decades of the twentieth century, stigmatizing and criminalizing those who struggled to survive on welfare as presumptive cheats during the same period in which Balleisen shows that deregulation was engendering greater permissiveness with respect to large business firms, even and perhaps especially where there was clear evidence of widespread, intentional deception, effectively normalizing the criminal behavior of corporate

Government: Institutions, Contexts, and the Imperial State," *William and Mary Quarterly* 771 (2020): 97–128; see also Jeremy Kessler, "The Struggle for Administrative Legitimacy," *Harvard Law Review* 129 (2016): 718–73.

²¹ For an argument of a criminologist along these lines, see Richard V. Ericson, *Crime in an Insecure World* (Cambridge: Polity Press, 2006), 72–73, which conceives of this mode of governing as characteristic of neoliberal political cultures; cf. Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007).

²² See, for example, Spencer Headworth, *Policing Welfare: Punitive Adversarialism in Public Assistance* (Chicago: University of Chicago Press, 2021); Julilly Kohler-Hausmann, *Getting Tough: Welfare and Imprisonment in 1970s America* (Princeton: Princeton University Press, 2017); Kaaryn Gustafson, *Cheating Welfare: Public Assistance and the Criminalization of Poverty* (New York: New York University Press, 2012); Loic Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham: Duke University Press, 2009); David Garland, *Culture of Control* (Chicago: University of Chicago Press, 2001); and Katherine Beckett and Bruce Western, "Governing Social Marginality: Welfare, Incarceration and the Transformation of State Policy," in *Mass Imprisonment: Social Causes and Consequences*, ed. David J. Garland (London: Sage Publications, 2001), 35–50. Earlier periods of United States history have been surveyed in two classic works by David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown, 1971; rev. ed. 1990); and *The Asylum and Its Alternatives in Progressive America* (Boston: Little, Brown, 1980; rev. ed. 2002).

actors.²³ In other words, seeing like an anti-fraud state has historically entailed more than a little winking, blinking, and looking the other way. Those seeking a corrective vision would do well to follow the invaluable leads to be found in Balleisen's *Fraud*. For all the puffery of his historical subjects, it is no exaggeration to say that he has written an indispensable book, especially in view of the way we live now.

Susanna L. Blumenthal is the William L. Prosser Professor of Law and Professor of History at the University of Minnesota. <blume047@umn.edu>

²³ Julilly Kohler-Hausmann, "Welfare Crises, Penal Solutions, and the Origins of the 'Welfare Queen,'" *Journal of Urban History* 41 (2015), 756–71; Julilly Kohler-Hausmann, "The Crime of Survival: Fraud Prosecutions, Community Surveillance, and the Original 'Welfare Queen,'" *Journal of Social History* 41 (2007), 329–54; and Balleisen, *Fraud*, 356–68.

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