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ESSAYS

DO WE NEED A "BEANIE BABY"* FRAUD STATUTE?

ELLEN S. PODGOR**

INTRODUCTION

This is not an Essay calling for the protection of "Peanuts," the royal blue elephant.[1] Nor is this Essay concerned with the confusion surrounding "Iggy," the Iguana or "Rainbow," the Chameleon.[2] This Essay does not even reflect on the ramifications of Ty, Inc.'s decision to retire Beanie Babies on December 31, 1999,[3] followed by its later decision to continue production.[4] Rather, the focus of this Essay is on whether Congress needs to pass a specific statute to criminalize Beanie Baby fraud.

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* "Beanie Babies" are produced by Ty, Inc.

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1. Ty, Inc., produced two different "Peanut" Beanie Babies. One is a light blue elephant that was retired on May 1, 1998, and the other is a royal blue elephant that was retired on October 2, 1995.

2. "Iggy" and "Rainbow's" tags were inadvertently reversed in January, 1998. *See* LES & SUE FOX, THE BEANIE BABY HANDBOOK 66 (1998).

3. *See* Paula Lyon & Natalie Evans, *Ty to Retire Beanie Babies at Year End*, CRAIN'S CHI. BUS., Sept. 6, 1999, at 106 (reporting that Ty, Inc., announced the retirement of all Beanie Babies as of Dec. 31, 1999); *see also* Claudia H. Deutsch, *Ty Puts Beanie Babies' Fate Into the Hands of Consumers*, N.Y. TIMES, Dec. 25, 1999, at B11 (discussing Ty, Inc.'s announcement to "let the public vote on whether it should keep producing new Beanie Babies in the new millennium").

4. *See* Renee Strovsky, *Beanie Babies Show Up Again*, ST. LOUIS DISPATCH, May 1, 2000, at D1 (discussing Ty's decision to continue producing Beanie Babies following an online vote of the public supporting continued production of Beanie Babies).

In the past, I have argued in favor of specific fraud statutes.[5] The widespread use of generic fraud statutes, such as mail fraud[6] and conspiracy to defraud,[7] have allowed prosecutorial discretion to exceed what historically would have been considered part of the executive function.[8] Prosecutors have attempted to legislate against new forms of criminality by prosecuting illegal activity under generic fraud statutes.[9] I considered the passage of the computer fraud statute,[10] the health care fraud statute,[11] and the bank fraud statute[12] to be legislative advancements because these statutes offered specific legislative definitions of what would constitute criminal conduct.[13]

But in calling for specific statutes, it is equally important to realize that enacting a multitude of specific statutes to address every new instance of fraud is absurd. Although the constant enactment of new federal statutes may foster political careers by demonstrating a tough stand on crime,[14] adding new volumes to the criminal code for political purposes serves little benefit in the development of criminal law.[15] The excessive number of federal statutes is well documented and is detrimental to the development of an efficient legal process.[16]

Discerning the appropriate line in legislative drafting between the

5. *See* Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 735 (1999) (advocating that "specific fraud statutes . . . offer tighter restraints which conform more closely with the initial legislative purpose of the statute.").

6. *See* 18 U.S.C. § 1341 (1994 & Supp. IV 1998); *see also* Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 438 (1995) (describing how the crime of mail fraud has been applied expansively).

7. *See* 18 U.S.C. § 371; *see also* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 408 (1959) (arguing that the concepts of "'conspiracy' and 'defraud' have assumed such broad and imprecise proportions").

8. *See* Podgor, *supra* note 5, at 732-33 (noting that prosecutors have used fraud statutes to generate new fraud theories).

9. Prosecutors have used the mail fraud statute to prosecute "'divorce mill' fraud, insurance fraud, securities fraud, and franchise fraud." *Id.* at 753-54.

10. *See* 18 U.S.C. § 1030 (1994 & Supp. IV 1998).

11. *See id.* § 1347.

12. *See id.* § 1344.

13. For example, in the computer fraud statute, Congress used seven specific applications of fraud. *See id.* § 1030(a)(1)-(7).

14. "In the face of serious and offensive incidents, it is becoming more and more frequent for citizens and legislators to simply urge that Congress should make the conduct a federal crime." TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION, THE FEDERALIZATION OF CRIMINAL LAW 12 (1999), *available at* <http://www.abanet.org/crimjust/fedcrimlaw.pdf> [hereinafter TASK FORCE].

15. "[S]everal recently enacted federal statutes, championed by many because they have a claimed impact on crime, have hardly been used at all." *Id.* at 20; *see also* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 42-44 (1996) (noting that "[b]y the mid-1990s, there were more than 3,000 federal crimes").

16. *See* TASK FORCE, *supra* note 14, at 43 ("Inappropriate federalization scatters, rather than focuses, the resources needed to combat crime.").

overly generic fraud statute, such as mail fraud, and the addition of an overly specific statute, such as Beanie Baby fraud, necessitates an examination of several factors. Clearly, issues of federalism warrant consideration to determine whether the conduct belongs in the realm of the state and local prosecutor or more aptly in the federal system.[17] Likewise, the scope of the federal statute needs to be clear in order to avoid ambiguity, overbreadth, and application of the Rule of Lenity.[18] This Essay, however, looks to a third factor for considering the propriety of the legislation: whether the statute is designed to advance the historic roles provided to each of the three branches of government. When the legislation accords a fair balancing to the executive, legislature, and judicial bodies, the appropriate line between the generic and specific statute is achieved.[19]

I. EFFICIENCY AND ADHERENCE TO CONSTITUTIONAL NORMS WARRANT SPECIFIC FRAUD STATUTES

Overly generic statutes can alter the balance of power, placing inordinate weight in the executive branch of government. The mail fraud statute, referred to by Jed Rakoff as a prosecutor's

17. *See, e.g.*, Gerald G. Ashdown, *Introduction: Macro and Micro Evaluation of the Federalization of Crime*, 98 W. VA. L. REV. 757, 757 (1996) ("[W]hether one characterizes the phenomenon of the multiplication of federal criminal statutes as a matter of federalism or federalization, the question is basically the same—which governmental entity, the states or the Congress, is better situated to enforce what types of crime?"); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1136 (1995) (concluding that "long standing issues of federalism" cannot be reconciled with "the trend to expand the body of federal criminal law and enlarge police power").

18. *See* Podgor, *supra* note 5, at 760-61 (noting that the judiciary has not been able to "curtail prosecutorial decision-making by restricting the use of a generic statute when a more specific statute also applies").

19. This Essay goes beyond questions of statutory interpretation. Although the constitutional framework for deciding the need for this legislation is in keeping with a "new textualism" analysis, its application is pre-interpretative. *See* Jerry L. Marshaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 845 (1991) (noting that it is impossible to know the intent of a legislature in drafting a statute). This Essay also does not focus on the propriety of legislative delegation. *See generally* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 758-60 (1999) (examining the magnitude of the legislative delegation of power and discretion to federal prosecutors in the criminal arena). Although discussion in this regard is necessary, this Essay does not resolve the right or power of the legislature to delegate its authority. Some courts note, however, that there are significant benefits in having a coherent body of federal criminal law. *See, e.g.*, Loving v. United States, 517 U.S. 748, 757 (1996) ("Deterrence of arbitrary or tyrannical rule is not the sole reason for dispersing the federal power among three branches, however. By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable.").

"Stradivarius" or "Colt 45,"[20] historically serves as a "stop-gap device" used until the legislature has the opportunity to pass "particularized legislation."[21] Because "particularized legislation" is rare, prosecutors often assume the role of determining the criminality that will be encompassed within the generic statute. In some instances, their determinations have proved accurate.[22] In other cases, however, the judiciary finds the conduct beyond the parameters of the statute.[23]

Although criminality, an evil within itself, should not be left unpunished, one presupposes that the prosecutor is correct in labeling the conduct as criminal. As noted by Judge Edmondson in reversing a mail fraud conviction in *United States v. Brown*,[24] "[a] limitless reading of the mail fraud statute could result in a kind of federal criminal common law, that is, a situation where a person could be convicted of a crime against the United States despite the conduct not violating an express statutory provision."[25]

In some instances, the judicial function of checking prosecutorial excess can lead to legislative action. For example, in *McNally v. United States*,[26] the Court rejected an intangible rights theory as a scheme to defraud for purposes of mail fraud.[27] This decision was followed by congressional legislation supporting prosecutors' use of mail fraud statutes in cases when the charge was premised upon a deprivation of the intangible right to honest services.[28] As a result of the new definition of what could be included as fraud,[29] prosecutors could

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20. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980).

21. United States v. Maze, 414 U.S. 395, 405-06 (Burger, C.J., dissenting) (noting that "[w]hen a 'new' fraud develops . . . the mail fraud statute becomes a stopgap device to deal on a temporary basis . . . .").

22. *See* Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 ST. THOMAS L. REV. 557, 560 (1998) [hereinafter Podgor, *Mail Fraud*] (noting that "a wide array of conduct has been prosecuted as mail fraud").

23. *See, e.g.*, United States v. Brown, 79 F.3d 1550, 1562 (11th Cir. 1996) (reversing mail fraud conviction determining that the defendants were wrongly convicted of charging "high prices" and not of deceiving buyers); United States v. D'Amato, 39 F.3d 1249 (2d Cir. 1994) (reversing mail fraud conviction by refusing to "infer fraudulent intention on the part of an attorney who accepts a retainer arrangement and is subsequently not called upon to perform services that the government or trier of fact deems worth the fee paid"). *See generally* Podgor, *Mail Fraud*, *supra* note 22, at 561-71 (discussing numerous cases in which mail fraud convictions have been reversed by appellate courts).

24. 79 F.3d 1550 (11th Cir. 1996).

25. *Id.* at 1556-57.

26. 483 U.S. 350 (1987).

27. *See id.* at 356 ("The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government.").

28. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (1994 & Supp. IV 1998)) (providing for a mail fraud provision within legislation addressing drug abuse).

29. Section 1346 states, "[f]or the purposes of this chapter, the term 'scheme or

resume some of their charging practices with legislative authorization.

In contrast to generic statutes that reserve for the executive the prerogative to take action against fraudulent conduct, but do so without the certainty of knowing whether the judiciary will curtail this discretion, more specific statutes expressly limit the prosecutorial charging function. By limiting the instrumentality of the fraud, prosecutors may only use the specific fraud statute when the conduct falls within the strict confines of the statute. For example, one cannot be charged with bank fraud if the fraud has not been committed on a federally insured bank.[30] Likewise, absent a bankruptcy matter, there can be no prosecution for bankruptcy fraud.[31] The benefit of specific statutes over generic statutes is two-fold: First, there is an increased efficiency when prosecutors know the types of conduct that fall within the parameters of the statute.[32] Second, the legislature, not the executive, assumes the lawmaking role.[33] Clearly, the judicial system is enhanced when defendants are only subjected to the criminal process in cases that can offer punishment.

II. THE PERVASIVENESS OF BEANIE BABY FRAUD

If one assumes that specific statutes present a superior role over generic statutes, logically it should follow that a Beanie Baby fraud statute would be worthwhile. Prosecutors would not need to use mail fraud, wire fraud, computer fraud, or theft as the vehicles for charging Beanie Baby fraud.[34] Further, a specific statute might

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artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *Id.*

30. In *United States v. Blackmon*, 839 F.2d 900, 906 (2d Cir. 1988), the Second Circuit, in reversing a bank fraud conviction, cited to the House Judiciary Committee's consideration of the bank fraud statute where it was stated that "[t]he Committee, however, is concerned by the history of expansive interpretations of that language [i.e., 'scheme to defraud' in 18 U.S.C. §§ 1341 and 1343] by the courts. The current scope of the wire and mail fraud offenses is clearly greater than that intended by Congress." *Id.*

31. *See* 18 U.S.C. §§ 152, 157 (1994 & Supp. IV 1998) (listing violative activities and defining bankruptcy fraud, respectively).

32. *See* Podgor, *supra* note 5, at 735 (noting that specific fraud statutes allow for "appropriate government prosecutions" but tend to control the ambiguity and prosecutions).

33. *But see* Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 5 (1997) (finding a "legislative supremacy position [that] conceives of federal crimes as purely legislative in origin" as "a rank fiction").

34. One also finds prosecutors using other statutes to combat Beanie Baby fraud. *See, e.g.*, *Beanie Babies Are Hot in More Ways Than One*, MILWAUKEE J. SENTINEL, Feb. 2, 1998, at 4 (detailing charges brought against individuals for receiving stolen property and committing fraud and theft in connection with Beanie Babies).

provide the impetus for needed resources to combat this criminality, which often requires extensive time and technology to properly investigate.[35] In addition, when the initial nefarious conduct includes the improper purchase of Beanie Babies, prosecutors might be able to add a Beanie Baby fraud charge to existing charges, thus providing multiple counts in the indictment.[36] One can only imagine if the funds obtained from Beanie Baby fraud activity might eventually be a basis for a money laundering charge.[37]

Beanie Baby fraud is a reality.[38] The crime occurs in the state,[39] federal,[40] and international arenas.[41] The Internet has further blurred the jurisdictional line by facilitating illegal conduct that extends beyond state borders.[42] A wide range of individuals indulge in Beanie

35. In discussing fraud cases via the Internet, including Beanie Baby fraud, one journalist reported that "[m]any local police departments don't have the time or resources to probe Internet fraud cases, which often involve time-consuming work that crosses state lines." Regina Hong, *The Safety Zone Spotlight: Gray Areas Hinder Web Fraud Probes Limits on Resources, Time, Jurisdiction Often Leave Investigations in Limbo*, L.A. TIMES, May 10, 1999, at B2.

36. *See* Gretchen Schuldt, *Ex-Chief of Bank Gets 63 Months; Man Guilty of Embezzling Wanted to Make Spouse Happy, Attorney Says*, MILWAUKEE J. SENTINEL, Aug. 12, 1999, at 1 (describing a man convicted of embezzlement who used stolen money to purchase $10,914 worth of Beanie Babies).

37. *See* 18 U.S.C. § 1956 (1994 & Supp. IV 1998) (detailing the elements of money laundering).

38. *See, e.g.*, *Bogus Beanies Are Sprouting Up All Over the Place in South King County*, SEATTLE TIMES, June 11, 1998, at B2 (detailing the story of a woman defrauded by a man selling fake Beanie Babies); Henry Farber, *Bogus Beanies Quell Collector's Urge to Buy*, ATL. J. CONST., May 27, 1999, at JG3 (telling the story of a woman whose money was returned after she was sold fake Beanie Babies); Diane White, *Beanie Babies' Popularity Spawns a Small Crime Wave*, BOSTON GLOBE, June 22, 1998 ("A wave of Beanie Baby-related crime is sweeping the nation.").

39. *See, e.g.*, Tony Gordon, *Mundelein Man Pleads Innocent in Beanie Scam*, CHI. DAILY HERALD, Jan. 21, 1999, at 5 (noting that the defendant was accused of selling fake Beanie Babies over the Internet); *Police Blotter*, TIMES UNION (Albany, N.Y.), Apr. 20, 1999, at F2 (reporting larceny of Beanie Babies in Albany, New York); Amanda Vogt, *Man Is Accused of Conducting Beanie Baby Scam on Internet*, CHI. TRIB., Dec. 9, 1998, at 3 (accounting the story of a defendant charged with five counts of felony computer fraud and five counts of felony theft in connection with the sale of fake Beanie Babies).

40. *See, e.g.*, Bill Rankin, *Couple Plead Guilty to Duping Shoppers in Beanie Baby Scam*, ATL. J. CONST., June 26, 1999, at F1 (describing a couple who entered guilty pleas to federal mail fraud charges in connection with Beanie Baby fraud); *2 Indicted in Beanie Baby Scheme*, ATL. J. CONST., Feb. 10, 1999, at B6 [hereinafter *2 Indicted*] (describing the indictments in this same case).

41. *See, e.g.*, *Britons Seize Fake Beanie Babies*, AP, Nov. 20, 1998, *available in* 1998 WL 23031519 (accounting the seizure of counterfeit Beanie Babies toys worth "about a half-million dollars" in England); Margaret Zack, *St. Louis Park Couple Accused of Smuggling Fake Beanie Babies*, STAR TRIB. (Minneapolis-St. Paul), Mar. 25, 1999, at 8B (reviewing federal charges against a couple for allegedly smuggling fake Beanie Babies into the United States from China and selling them over the Internet).

42. *See NJ Alleges Beanie Baby Auction Fraud*, AP, Feb. 14, 2000, *available in* 2000 WL 14320296 (discussing how Beanie Baby vendors were accused of fraud in their use of online auctions); *The Police Log, Irvine Citizen*, ORANGE CTY. REG. (Cal.), Aug. 26, 1999, at O6 (stating that online auction sites have defrauded buyers from New York to

Baby fraud. This fraud is perpetrated by both men and women and it is not conduct exclusive to juveniles. One finds individuals of all ages charged with crimes related to Beanie Baby fraud.[43]

Using criminal statutes to curtail Beanie Baby fraud activity raises many of the same issues encountered in other criminal law contexts. For example, courts have forced the issue of whether crimes involving Beanie Babies are committed as a result of an addiction,[44] and whether persons committing Beanie Baby fraud should receive a reduced prison sentence because of an addiction.[45] Some commentators have called for the abolition of Beanie Babies claiming that this could curtail the criminal activity.[46] Administrative efforts such as the recent passage of a new postal regulation that requires those providing private mailboxes to "obtain a photo identification and verify an applicant's home address before renting a mailbox," may assist in curbing this criminal activity.[47]

Beanie Baby fraud can be part of a sophisticated scheme[48] or just

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Hawaii).

43. *See, e.g.*, *Beanie Babies Purchase Brings Police Boy Lifted Credit Card Code to Obtain Toys on Internet*, MILWAUKEE J. SENTINEL, Apr. 8, 1998, at 8 (detailing the story of a 12-year-old charged with Beanie Baby fraud); *Beanie Baby Fraud Alleged*, PALM BEACH POST (Fla.), Oct. 31, 1998, at 3D (stating that an 18- and a 19-year-old were charged with one count of scheming to defraud, 6 counts of grand theft and 11 counts of petty theft); *Couple Sentenced in Beanie Babies Scam*, STAR TRIB. (Minneapolis-St. Paul), Oct. 7, 1998, at 7B (noting that a 58- and 55-year-old couple were sentenced in a Beanie Baby scam); *Woman Charged in Beanie Scam*, FLA. TODAY (Melbourne, Fla.), Feb. 1, 1998, at 8B (stating that a 35-year-old woman was charged with Beanie Baby fraud).

44. *See Beanie Babies Addiction Lands a Collector in Jail*, PORTLAND OREGONIAN, Nov. 20, 1998, at A30 (reporting that defendant was prohibited from possessing Beanie Babies because "the toys . . . are like a drug and ought to be treated as such"); *Toy Addict Jailed on Theft Charges*, CHI. TRIB., Nov. 21, 1998, at 11 [hereinafter *Theft Charges*] ("A woman who used stolen credit card numbers to feed her habit was given 6 months in jail and 5 years of probation on condition she not touch her drug of choice: Beanie Babies.").

45. *See* Stephen Hudak, *Sentence Cut In Beanies Fraud*, PLAIN DEALER, Feb. 18, 1999, at 1B (describing how a judge halved the sentence of a woman claiming to be addicted to Beanie Babies).

46. *See* Diane White, *Is it Time for a Beanie Baby Ban?*, BOSTON GLOBE, June 22, 1998, at D7 (describing "extreme Beanie Baby-related crimes," including smuggling, forgery, robbery and "incidences of thievery, duplicity, and fraud," and speculating that "for every Beanie Baby crime that makes the news, you can be sure that there are dozens, maybe even hundreds, more that we never hear about"); Diane White, *Time to Halt Crime Wave by Banning Beanie Babies*, STAR TRIB. (Minneapolis-St. Paul), Aug. 10, 1998, at 4E ("If Beanie Babies are outlawed only outlaws will have Beanie Babies.").

47. *See* Kelly St. John, *Postal Service Change Angers Modesto, Calif.-Area Merchants*, MODESTO BEE (Cal.), June 11, 1999 (noting that the changes are designed to prevent credit card fraud and other crime, but compliance often is costly to legitimate businesses).

48. *See* Hong, *supra* note 35, at B2 (noting numerous Beanie Baby scams operating on the Internet).

plain old-fashioned theft.[49] One finds an array of perverse conduct as the basis for Beanie Baby fraud charges. For example, fraud charges were filed where an individual obtained the stuffed toys for free premised on a false representation that the toys were going to a sick child.[50] Another incident involved allegations that a couple placed "classified ads in newspapers, offering to sell rare and unusual Beanie Babies to help them run their homeless shelter."[51]

The number of victims of Beanie Baby fraud is extensive.[52] Law enforcement has investigated counterfeit Beanie Babies. For example, customs agents "detained a quarter-million counterfeit Beanie Babies at the Port of Oakland, Calif[ornia]."[53] The Internet has been a vehicle for Beanie Baby scams with "charges of computer fraud and conducting a false auction" used where an individual was accused of using "on-line auctions to defraud Beanie Baby fanatics out of thousands of dollars by pretending to sell stuffed animals that were never delivered."[54] Internet auction fraud also has been a statutory basis used in the criminal prosecution of a "'fictitious' series of Beanie Babies."[55] It is no surprise that Internet fraud is a Department of Justice priority, perhaps, in part, because of conduct such as Beanie Baby fraud.[56] In addition to computer fraud and Internet auction fraud, prosecutors also have used the federal mail

49. *See City Desk News*, PEORIA J. STAR (Ill.), July 24, 1998, at B2 (describing the theft of 184 Beanie Babies).

50. *See* Patti Weaver, *Plea Entered in Beanie Baby Fraud Case*, TULSA WORLD, July 13, 1999, at 7 (describing how an avid Beanie Baby collector pleaded guilty to obtaining money by fraud after she convinced the owner of a gift shop, who had recently lost a daughter to cancer, to donate several Beanie Babies that the collector claimed would be given to a sick nine-year-old girl).

51. Stephen Hudak, *Medina Officer Once Again Hot on the Toy Trail of Beanie Fraud*, PLAIN DEALER (Cleveland), Mar. 27, 1999, at 1B.

52. *See* Tanya Eiserer, *Omahan Sought in Beanie Scam; An Internet Auction Site Was Used to Bilk Would-Be Toy Buyers of at Least $10,000*, OMAHA WORLD-HERALD, July 9, 1999, at 1 (describing how 28 people from 20 states claimed they sent money for purchase of Germania bear); Clark Mason, *More than 200 Victims in Net Fraud Case, Police Say Additional Charges Due in Beanie Baby Auction Scam*, PRESS DEMOCRAT (Santa Rosa, Cal.), Oct. 1, 1999, at B1 ("Authorities plan to slap more charges on a man accused of running an Internet Beanie Baby scam that has turned up more than 200 victims around the country and abroad, a number that is expected to grow."); *Officials Close in on Beanie Baby Scam*, COM. APPEAL (Memphis), May 3, 1998, at B8 ("About 75 people who ordered Beanie Babies from an Internet site complained they did not receive their merchandise.").

53. *Fake Beanie Babies Facing Bulldozer*, ATL. J. CONST., Dec. 23, 1998, at A10.

54. Michael Cooper, *Beanie Baby Scams and Identity Thefts*, N.Y. TIMES, Sept. 22, 1999, at 19.

55. Kenny MacIver, *Beanie Baby Fraud Exposed*, LONDON TIMES, Aug. 4, 1999, at 15.

56. *See* Michael J. Sniffen, *Clinton Administration Targets Internet Fraud; Program Will Crack Down on Growing Threat*, DALLAS MORNING NEWS, Mar. 6, 1999, at 1F (noting that this is the first time that the Department of Justice has made Internet fraud a priority).

and wire fraud statutes to prosecute Beanie Baby fraud.[57]

Prosecutors have not attempted, however, to proceed criminally with all possible Beanie Baby abuses. For instance, one does not find criminal charges being used when there are allegations that a teacher "traded bonus points for Beanie Babies."[58] Likewise, individuals inadvertently bringing a few extra Beanie Babies into the United States in violation of trade restrictions have not been prosecuted for these acts.[59] The sale of counterfeit Beanie Babies can also be the subject of a civil action. Although scholars have criticized the "blurring" between civil fraud and criminal fraud,[60] this discussion, as of yet, has not entered into the context of Beanie Babies.[61]

III. FEDERALIZATION CONCERNS TEMPER THE NEED FOR A BEANIE BABY FRAUD STATUTE

Having a distinct federal criminal statute for every conceivable product that might be the instrumentality of a fraud would present criminal codes that far exceed library budgets. Two interrelated considerations are at play here. The first consideration is whether a *federal* statute needs to be enacted. Is the conduct in fact a federal concern? Assuming the federal government should be monitoring

57. *See* Bill Rankin, *supra* note 40, at F1 (reporting that a couple accumulated more than $53,000 in a Beanie Baby scam before they pleading guilty to mail fraud); *2 Indicted*, *supra* note 40, at B6 (reporting a federal grand jury indictment of a couple who received bids over the Internet for Beanie Babies they did not possess); Margaret Zack, *Couple Sentenced for Selling Counterfeit Beanie Babies*, STAR TRIB. (Minneapolis-St. Paul), Aug. 6, 1999, at 3B [hereinafter Zack, *Counterfeit Beanie Babies*] (describing defendants who were sentenced on charges of conspiracy to commit mail fraud after smuggling counterfeit Beanie Babies from China and selling them over the Internet).

58. Jennifer Brett, *Cobb School Board Set to Rule in Beanie Case*, ATL. J. CONST., July 21, 1999, at C4.

59. *See Official Chagrined by Beanie Babies*, N.Y. TIMES, July 11, 1998, at 7 (discussing inadvertent violation of a trade restriction by reentering the United States with more than the permitted number of Beanie Babies).

60. *See* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1890 (1992) (arguing that criminal law should be confined to "clearly egregious behavior"); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1796 (1992) ("[T]he criminal law is meant to punish, while the civil law is meant to compensate. The criminal and civil law, each with different purposes and procedural rules, constitute paradigms by which legislatures and courts analyze their actions and by which textbooks and scholarly literature structure arguments.") (citations omitted).

61. The criticism recently vocalized by Professor Coffee as to whether federal mail fraud charges are appropriate in the case of a private fraud, as opposed to being limited to public frauds, may be applicable to Beanie Baby fraud. *See* John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 430 (1998) [hereinafter Coffee, *Modern Mail Fraud*] ("Courts have proven much less willing to tolerate the criminalization of minor transgressions in the private context than they have in the public context.").

the criminality, the second question for consideration is whether existing legislation properly covers the criminal conduct. In part, this second question implicates legislative drafting. Both of these questions also encompass constitutional legitimacy concerns.[62]

In the federal arena, over-federalization is the discussion of today.[63] Chief Justice Rehnquist criticized over-federalization at a recent American Law Institute meeting.[64] Although there is no consensus on whether over-federalization exists[65] and whether it is problematic,[66] the American Bar Association (ABA) Task Force on Federalization of Criminal Law noted "that of all federal crimes enacted since 1865, over forty percent have been created since 1970."[67] The ABA Task Force discusses the harms accruing from the increased federalization of crimes. The preface to the Task Force's Report states "that the congressional appetite for new crimes regardless of their merit is not only misguided and ineffectual, but has serious adverse consequences, some of which have already occurred and some of which can be confidently predicted."[68] Perhaps the most fascinating observation included in this report is that "several recently enacted federal statutes, championed by many because they would have a

62. *See* Marshaw, *supra* note 19, at 845 (discussing the role of new textualism in the interpretive process).

63. *See* TASK FORCE, *supra* note 14, at 43 (arguing that the federalization trend is "capable of altering and undermining the careful decentralization of criminal law"); Ashdown, *supra* note 17, at 757 ("The states are not suffering from or complaining about the rampant enactment of federal criminal statutes which duplicate the coverage of their own criminal codes. The enforcement of these dual jurisdictional offenses by the federal government takes some of the burden off of state and local law enforcement."); Brickey, *supra* note 17, at 1172 ("Thus, instead of complementing state criminal law, federal law began competing with it. Federal duplication of state criminal law unduly burdens the federal justice system, which is ill-equipped to supplant local law enforcement. The system is strained to capacity . . . .").

64. *See* William H. Rehnquist, Address to the 75th Annual American Law Institute Meeting (May 11, 1998) (arguing that over-federalization creates an unnecessary burden on the federal government) (copy on file with author).

65. *See* Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1031 (1995) (emphasizing that despite the addition of many federal crimes in recent years, federal courts still handle only a small percentage of criminal prosecutions).

66. *See* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, CORNELL J.L. & PUB. POL'Y 247, 324 (1997) ("Federalism-based considerations suggest that the national government should increase its share of enforcement efforts in a way that advances its historic and inspiring role of promoting equality of opportunity along income and racial lines."). *But see* Brickey, *supra* note 17, at 1172 (criticizing federal criminal law as competing with state law and straining the federal judicial system, especially noting the burdensome effects of the extensive federalization of drug laws).

67. TASK FORCE, *supra* note 14, at 2.

68. *Id.* at 3; *see also* H. Scott Wallace, *The Drive to Federalize is a Road to Ruin*, 8 CRIM. J. 8, 9 (1993) (arguing that federalization of criminal statutes is not the answer to fighting crime).

claimed importance on crime, have hardly been used at all."[69] Arguably, the ABA Task Force's criticism of federal statutes that are never used as the basis of enforcement is misdirected in this context, because already there have been several prosecutions related to Beanie Baby fraud.

One needs to consider federalism issues when determining whether to enact a federal statute. Is the conduct in fact strictly a local concern? Is the federal government better equipped to handle the investigation or prosecution?[70] Does the fraud have implications in the international arena?[71] These and other questions can be explored in determining the appropriate line between federal and state authority.

In addition, the question of whether the conduct should be subject to criminal penalty, or more appropriately addressed with civil remedies, must be considered. Furthermore, one must consider other influential factors such as the harm involved, the necessity for the criminal punishment, and whether the fraud is private or public.[72]

The prosecution of Beanie Baby fraud has occurred at the federal and state levels. Some state cases employ classic theft offenses, while mail fraud and other federal offenses may be used when the activity produces effects beyond a locality.[73] One can, of course, question the need for federal government intervention in some of the Beanie Baby fraud prosecutions. The use of mediums such as the Internet,

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69. TASK FORCE, *supra* note 14, at 20. The Report states:

> Two of the most publicized recent violent federalizations, drive-by shooting and interstate domestic violence, were not cited in a single prosecution in fiscal year 1997. Both federal statutes have been in effect since 1994. . . . [M]any other recently enacted federal criminal statutes have been used rarely or not at all.

Id.

70. *See, e.g.*, Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPP. L. REV. 321, 340 (1983) ("Federal prosecution of local offenses such as political corruption is justified in cases where local enforcement officials are incapable of successfully prosecuting serious offenses.").

71. *See* Ellen S. Podgor, Essay, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325, 327 (1997) (analyzing the international jurisdictional questions "that have arisen as a result of white collar criminal activity").

72. *See* Coffee, *Modern Mail Fraud*, *supra* note 61, at 459 (arguing in favor of a sharp distinction between private and public fraud statutes). If Congress decides it is appropriate to criminalize private frauds, then a statute with appropriate limitations could accomplish this goal. The statute could offer monetary limitations. It could offer limiting language as to what constitutes a "scheme or artifice to defraud." Podgor, *supra* note 5, at 762. The federal concern might not be as pervasive as the mailing element of mail fraud that includes innocent mailings, routine mailings, or no mailing where the delivery is via an interstate carrier. *See id.* at 760-67.

73. *See* Zack, *Counterfeit Beanie Babies*, *supra* note 57, at 3B (noting that the defendants, who smuggled Beanie Babies from China, pled guilty to a charge of conspiracy to commit mail fraud in federal court); *Theft Charges*, *supra* note 44, at 11 (describing four women who pled guilty to four counts of burglary).

however, provide strong arguments for increased federal enforcement.

IV. CORRELATING THE NEED FOR SPECIFIC LEGISLATION WITH A DESIRE TO ACHIEVE AN APPROPRIATE BALANCE OF GOVERNMENT POWER

If, in fact, there is a basis for federal enforcement, then a methodology needs to be considered for effectuating this process. A key factor for discussion here is whether there is a need to adopt a specific Beanie Baby fraud statute, or prosecute the activity under existing legislation. Where is the appropriate line in the legislative drafting process between the overly generic statute and the specific statute? Should the appropriate statute be "toy fraud" to encompass not only fraudulent Beanie Babies, but also fraud with respect to Pokemons?[74] Or perhaps product fraud would offer a more efficient range for these criminal prosecutions?

It is always important to provide clear statutes. Generic statutes can be vague and overbroad and therefore, fail to advise citizens of what conduct constitutes a crime. Generic statutes also provide forums for prosecutors to exceed their charging authority. When the Rule of Lenity needs to be employed, Congress is on notice that it needs to modify the statute if the court's statutory interpretation is contrary to Congress's intent.[75]

Federalism concerns and clarity of existing legislation, however, only present portions of the picture that should be used in deciding the need for a criminal statute and the posture that should be taken in drafting the statute. Consideration also needs to be given to whether the statute provides a proper balance of power among the three branches of government.

The appropriate line between the generic statute and the specific statute can be found when the statute results in each of the three branches of government serving the normative roles appropriate to their respective branch. Questions that warrant consideration here are: Will the statute require prosecutors to serve as lawmakers? Will

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74. *See, e.g.*, Margaret O'Brien & David Heinzmann, *A Monstrous Pokemon Seizure*, CHI. TRIB., Sept. 29, 1999, at 1 ("But like the Beanie Babies, Cabbage Patch dolls, Power Rangers and Furbies that were the hottest, greatest, most stupendous things in the history of the world in their bygone eras, adult-style greed already has begun to pervert the innocence of the latest childhood fad.").

75. *See* Rewis v. United States, 401 U.S. 808 (1971) ("Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."); *see also* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345 (1994) (arguing that the "rule of lenity" is essential to "securing a variety of values of near-constitutional stature").

the statute require the judiciary to serve in a lawmaking role? Will there in fact be "legislative supremacy?"[76]

The framework composing our governmental structure is premised upon three branches that, although separate, are not "wholly unconnected with each other."[77] More than "parchment demarcations" are necessary.[78] Essential to this framework is the notion that the "several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[79]

The balance of power among the three government branches is achieved when the judicial branch reverses a conviction finding that the prosecution has exceeded the statute. In such circumstances the judicial branch does not permit the executive to encroach the legislative function. Balancing can also be seen when the executive uses its prosecutorial prerogative and decides not to use a statute passed by the legislature. As previously noted, this is a common occurrence with newly enacted statutes.[80] The balancing process can be seen when the tension between the three branches causes a mediated response.[81]

What is interesting to note, however, is that in considering all of these scenarios, the balancing process typically is responsive to action by one branch of the government. It occurs only after one branch has engaged in conduct.[82] Further, it is only activated when a defendant believes that one branch has exceeded its authority. Whether the executive has exceeded its powers becomes an issue only after the indictment and only after a defendant has selected this issue as one to be reviewed.

A balancing approach from a proactive perspective offers a more efficient process. Defendants are not subject to inappropriate prosecutorial discretion caused by an improper use of a generic

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76. *See* Loving v. United States, 517 U.S. 748, 757 (1996) ("Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking.").

77. THE FEDERALIST NO. 48 (James Madison).

78. *See id.*

79. THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

80. *See* TASK FORCE, *supra* note 14, at 20 ("Two of the most publicized recent violent federalizations, drive-by shooting and interstate domestic violence, were not cited in a single prosecution in fiscal year 1997.").

81. The separation of powers that facilitates this balancing stresses a federalist approach. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 404 (1996) ("[S]eparation of powers established balanced government, thereby discouraging rash or arbitrary action.").

82. *See supra* note 23 (demonstrating the balancing process when the judiciary reverses convictions and finds that the prosecution exceeded the statute).

statute.[83] Further, clogging within the courts is relieved when non-criminal matters are filtered out of the system prior to indictment.[84] Proactive balancing is achieved when a statute's passage in Congress includes a thorough consideration of whether the statute is in accord with the historic role of each governmental branch.

Additionally, in deciding the need for legislation, it would be helpful if the historic roles of the branches were used as a source for determining the necessity for the legislation. Finding the line between the generic statute and the specific statute might include an examination of whether the three branches of government will provide the normative roles initially assigned to these entities.[85]

Questions that could be considered here include whether the statute provides sufficient terminology to notify citizens of the full scope of what the executive can prosecute. Will the statute require executive stretching to have the conduct conform to the legislative language? Will judicial interpretation require referencing outside sources to discern the scope of the legislation? Will the executive in fact be legislating in prosecuting prospective criminal conduct under the statute?

Crucial to this analysis is the fact that the examination occurs pre-legislative enactment. In such an instance, the dilemma of whether to provide a specific Beanie Baby fraud statute is subsidiary to the decision of whether the legislation is warranted. This methodology proves beneficial in that it is not post-analysis reflection that is considering whether the legislation, prosecution, and incarceration of a defendant was proper. Rather, this balancing approach promotes judicial efficiency in having an initial decision as to whether new legislation is warranted prior to using the legislation and finding that the alleged conduct is not included within the statute's scope.[86]

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83. *See* United States v. Brown, 79 F.3d 1550, 1556 (11th Cir. 1996) (discussing the rule of lenity, whereby a court will interpret an ambiguous criminal statute more favorably to a defendant unless there is "clear and definite language" necessitating a stricter reading).

84. Cases that are ultimately dismissed by courts raise concerns about using sparse prosecution resources inefficiently. *See supra* note 23.

85. This Essay does not confront issues of the propriety of legislative delegation of its powers. *See generally* Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 333 (1998) (describing the lack of discussion concerning the initial role of branches of government in relation to federal and state law). Whether deference should be given to these congressional decisions is beyond the scope of this Essay. *See* Richman, *supra* note 19, at 758 (arguing that the abdication of legislative responsibility in federal criminal law is part of the political decision-making process of Congress).

86. One can also argue that this approach offers more predictable results. *See* William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U.

Who conducts this test? Will this disrupt the balancing process by having one entity make the initial determination of whether to enact the statute?[87] These concerns are not stumbling blocks to this analysis. Historically, the legislature has made the decision of what statutes to enact.[88] Thus, it would be consistent with that role to have the legislative body as the source for determining whether to endorse a Beanie Baby fraud statute, to compromise with a product fraud statute, or to continue use of the mail, wire, and computer fraud statutes.[89]

Considerations of increased federalism and a need for statutes that are not vague and ambiguous are but the first steps in deciding whether specific legislation is warranted. Adding to the examination, a consideration of whether an appropriate balance of the government branches will be achieved should immediately reduce possible prosecutorial excesses in applying the law. In addition to offering clear legislation, this analysis also can reduce judicial reversals that might accrue from the misuse of prosecutorial discretion.[90]

CHI. L. REV. 671, 672 (1999) ("Subjecting theories of statutory interpretation to systematic factual testing, therefore, should be potentially attractive to both formalists and pragmatists.").

87. It can be argued that Congress could easily delegate its power to the executive by an endorsement of open-ended prosecutorial discretion. Such a delegation would indicate congressional acceptance of increased executive power. This, however, goes to the practicality of this proposal and not its merits. One can hope that Congress will endorse the merits of the analysis presented here and select to keep their power. *See* David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1227 (1985) (arguing for a more coherent approach to delegation where the "statute itself must speak to what people cannot do; the statute may not merely recite regulatory goals and leave it to an agency to promulgate the rules to achieve those goals").

88. *See* U.S. CONST. art. I, § 8.

89. The initial mail fraud statute, passed in 1872, focused on schemes of the post office establishment. *See* Michael McDonough, *Mail Fraud and the Good Faith Defense*, 14 ST. JOHN'S LEGAL COMMENT. 279, 282 (1999). In response to differing interpretations of the statute, Congress in 1889 amended the "scheme to defraud" language of the statute listing an array of different schemes. *Id.* at 283. For example, the mail fraud statute could be employed for "sawdust swindles" and counterfeit schemes related to "green coin," "green articles," or "green cigars." *See* Rakoff, *supra* note 20, at 809. The specificity provided in this statute was later eliminated with the adoption of a generic mail fraud statute. *See id.* at 816-21. The generic statute has recently seen prosecutorial charging decisions that have not always been supported by the courts. *See generally* Podgor, *Mail Fraud*, *supra* note 22, *passim* (reviewing decisions where courts have limited conduct subject to prosecution under the mail fraud statute).

90. "Interbranch dialogue" can also offer positive direction in achieving appropriate checks and balances. *See* Peter M. Shane, *Reflections in Three Mirrors: Complexities of Representation in a Constitutional Democracy*, 60 OHIO ST. L.J. 693, 693 (1999) (discussing the benefits of "substantial interaction among the branches").

CONCLUSION

Achieving the proper balance between the branches of government does not require the extreme measure of having a specific Beanie Baby fraud statute. The prosecutorial charging discretion does not need to be so constrained so that prosecution of new frauds, such as fraudulent Pokemans, will not be allowed until the activity has reached a level warranting specific legislative action. On the other extreme, a mail fraud statute that covers every imaginable fraud, whether civil or criminal, may place too much power in the hands of the executive. This Essay argues that absurd legislation is not needed to counteract generic statutes; rather, a balanced approach between the branches should be adopted in combating Beanie Baby fraud.