THE LEWIS CARROLL OFFENSE: THE EVER-CHANGING MEANING OF "CORRUPTLY" WITHIN THE FEDERAL CRIMINAL LAW*

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"There is no hope in one opinion of providing a definitive gloss on the word 'corruptly'; neither would it be wise to try."[1]

"There's certainly a core meaning to it: Conduct is corrupt if it's an improper way for a public official to benefit from his job. But what's improper turns on many different factors, such as tradition, context and current attitudes about legitimate rewards for particular officeholders."[2]

"All law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases then in which it is necessary to speak universally but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error."[3]

"Vague terms do not suddenly become clear when they are defined by reference to other vague terms."[4]

"While the quest for certainty in the criminal law is very much to be desired, the quest itself can be counterproductive if the definitions of concepts like 'corruptly' become too complex, or in striving for precision catch cases that should not be caught, or fail to catch cases that should be caught."[5]

I. INTRODUCTION

Many federal statutes contain the term "corruptly."[6] Nevertheless, distinguished

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* The title comes from a phrase found in an article by Professor G. Robert Blakey and Brian J. Murray. In *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 1076 (2002), the authors imagined a defense entitled the "Lewis Carroll Defense." As prosecutors and courts are able to shift the meaning of "corruptly" with overbroad definitions, these shifts seem to be properly considered a "Lewis Carroll Offense." The cited passage from CHARLES L. DODGSON (LEWIS CARROLL), THROUGH THE LOOKING GLASS 186 (Signet Classic ed. 1960) reads "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean— neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.'" The redefinition of the word "corruptly" by the various circuits within different statutes is what is meant by a "Lewis Carroll Offense."

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1. United States v. Brady, 168 F.3d 574, 578 (1st Cir. 1999).

2. United States v. Dorri, 15 F.3d 888, 894 (9th Cir. 1994) (Kozinski, Circuit Judge, dissenting).

3. LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDEL HOLMES LECTURES 21 (Harvard University Press 1958) (quoting Aristotle, *Ethica Nicomachea*, *in* 9 WORKS OF ARISTOTLE bk.V, ch.10, fol.1137, l.12-28 (W.D. Ross ed., 1915)).

4. Cartwright v. Maynard, 822 F.2d 1477, 1489 (10th Cir.1987) (en banc).

5. THE MODEL CRIMINAL CODE OFFICERS COMM., MODEL CRIMINAL CODE REPORT, (Ch. 3: *Theft, Fraud, Bribery and Related Offences*) 263 (Austl., Dec. 1995).

6. *See, e.g.*, 18 U.S.C. § 201(b) (2000) (bribery of public officials and witnesses); 18 U.S.C. §§ 1503, 1505, 1512(a)(1)(B), 1512(b) (2000) (obstruction of justice); 26 U.S.C. § 7212 (2000) (attempts to interfere with administration of Internal Revenue laws).

commissions and institutes oppose the use of the word because "corruptly" has a large variety of definitions.[7] In fact, the majority of courts called upon to interpret "corruptly" give it a definition that while incomplete, can be harmonized to reflect the common law meaning of the term. Though "corruptly" in the context of Title 18 prosecutions does have a wide variety of definitions, the common law meaning already is used consistently across the federal circuits in the context of prosecutions under 26 U.S.C. § 7212(a). The state of mind intended by the term "corruptly" is reflected in a survey of English election law. Because the statutory structure found within English law matches the structures within the federal criminal code, it is possible to clarify the work that the term "corruptly" ought to do within the federal criminal law. Abandonment of the word is not necessary. Congress should enact a general definition in federal law,[8] or courts should consistently recognize and implement the traditional common law definition. Either way, current confusion could be mitigated if not eliminated by a return to common law moorings of the term.

"Corruptly," as currently used, continues to perplex courts and lawyers. In his separate opinion in *United States v. Aguilar*,[9] Justice Scalia wrote, "Statutory language need not be colloquial, however, and the term 'corruptly' in criminal laws has a longstanding and well-accepted meaning."[10] In fact, it has a longstanding meaning, but that meaning is not well-accepted. Justice Scalia approvingly quoted the Tenth Circuit decision *United States v. Ogle*[11] to define "corruptly."[12] Justice Scalia agreed that a "corrupt" act is "[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others. . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another."[13] This definition comports with the traditional common law understanding and the way in which most prosecutions are brought.[14] Justice Scalia went further and promulgated a classic mistake common among the circuits. He added, "Acts specifically intended to 'influence, obstruct, or impede, the due administration of

7. The National Commission on Reform of Federal Criminal Laws referred to "corruptly" as a term "used in existing law, which is a term of uncertain meaning" and hence "[i]n defining the culpability requirement, the draft [the Study Draft of a New Federal Criminal Code] avoids reliance upon the term." National Comm'n on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code § 1361 at 127 (U.S. Gov't Printing Office 1970) (comment). The Working Papers associated with the Study Draft referred to "corruptly" as an "uncertain and undefined term . . . used in existing law." I National Comm'n on Reform of Federal Criminal Laws, I Working Papers 686(f) (U.S. Gov't Printing Office 1970) (comment). The Commentary to the Model Penal Code takes an equally dismal view of "corrupt." The MPC Commentary states that "the requirement of 'corrupt' purpose provides virtually no guidance as to the intended scope of the law. . . ." MODEL PENAL CODE AND COMMENTARIES, § 240.1 at 8 (A.L.I. 1980) (comment). The Commentary also explains that "the use of the general term 'corruptly' should be abandoned and that the issues [with] which it deals should be addressed more particularly." *Id.* at 5.

8. Congress did enact a provision that defines "corruptly" within an obstruction of justice statute at 18 U.S.C. § 1515(b) (2000) (applying the definition to 18 U.S.C. §1505 (2000)). The reason for the enactment, *see infra* note 237, was to make it clear that "lying" to Congress was part of obstruction of justice.

9. 515 U.S. 593 (1995).

10. *Id.* at 616 (Scalia, J., dissenting in part and concurring in part).

11. 613 F.2d 233, 238 (10th Cir. 1979).

12. 515 U.S. at 616 (quoting *Ogle*, 613 F.2d at 238 (quoting I BOUVIER'S LAW DICTIONARY 357 (2d ed. 1843)) (Scalia, J., dissenting in part and concurring in part).

13. *Id.*

14. *See infra* Part II.

justice' are obviously wrongful, *just as they are necessarily 'corrupt.'*"[15] Under the statute, however, not all acts specifically intended to influence, obstruct, or impede are unlawful, but only those done "corruptly."[16] While some cases conclude that acts intended to obstruct or impede the due administration of justice are tantamount to "corrupt" actions,[17] the inclusion of "influence" makes the statement overbroad. Moreover, actions intended to "obstruct" justice need not be "necessarily corrupt."[18] As Justice Scalia himself noted, "corruptly" means "with an intent to give some advantage inconsistent with official duty and the rights of others. . . ."[19] An effort must be made to give content to the phrases "official duty" and "the rights of others." Only then can content be given to the term "inconsistent." "Corruptly" does not mean simply "wrongful"[20] or "unlawful"[21]—its meaning is more precise. Hinted at by phrases such as "improper purpose" or "evil and wicked intent," "corruptly" is giving or receiving an unlawful benefit for one's self or another, where "unlawful" is defined by other bodies of law focusing on "duty" or "rights." The term "unlawful" is not constrained simply by reference to statute, but includes relevant codes of conduct.[22] The terms "unlawful" and "improper" are now interchangeable, though when the term "corruptly" was used in the English common law they were not.[23]

Even when courts offer particular definitions for "corruptly," they often subsequently misconstrue their own comments. For instance, an explanation for "corruptly" occurred in the case *Bosselman v. United States*.[24] The court explained that "[t]he word 'corruptly' is capable of different meanings in different connections. As used in this particular statute, we think any endeavor to impede and obstruct the due administration of justice in the inquiries specified is corrupt."[25] *Bosselman*'s reading of

15. *Aguilar*, 515 U.S. at 617 (emphasis added) (citations omitted).

16. 18 U.S.C. § 1503 (2000). Section 1503 also applies to threats of force. This application is outside the focus of this Article.

17. *See Ogle*, 613 F.2d at 238. In a subsequent evaluation of the *Ogle* decision, the Fifth Circuit omitted the word "influence" from its summary of Ogle's holding. United States v. Reeves, 752 F.2d 995, 999 (5th Cir. 1985).

18. If an act by defense counsel "obstructed" the due administration of justice and was therefore automatically seen as "corrupt," no room would be left for an adversarial criminal system. The line between obstruction and good lawyering is a line drawn by the term "corruptly." *See, e.g.*, United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987) (holding that a defense attorney who offers a client otherwise lawful advice but with a corrupt motive is guilty of obstruction of justice). *See also* United States v. Fayer, 523 F.2d 661 (2d Cir. 1975) (holding that because the trial judge determined a lawyer's advice to a non-client was possibly given with both a good and a bad motive, there is not enough evidence to prove the "corrupt" motive necessary for the obstruction conviction).

19. *Aguilar*, 515 U.S. at 616.

20. *Id.* at 617.

21. *Ogle*, 613 F.2d at 238 ("It [corruptly] really means unlawful."). To do an act "corruptly" does usually involve an unlawful act (assuming, of course, doing actions under color of right is prohibited by law); but it is the difference between a necessary and sufficient condition. The court in *Ogle*, Justice Scalia, and numerous other courts have made this common logical fallacy take on the appearance of validity by creating an apparent tautology between "corruptly" and "unlawful." An act done "corruptly" might well be "unlawfully done," but its essence is the search for an unlawful benefit or advantage.

22. This point was made by the Supreme Court in the decision *United States v. Birdsall*, 233 U.S. 223, 230–31 (1914).

23. *See infra* Part II (discussing the conflation of *malum in se* (unlawful) and *malum per se* (improper) offenses).

24. 239 F. 82 (2d Cir. 1917).

25. *Id.* at 86.

the word, however, removes it from the statute. If the prohibited conduct is "corruptly endeavoring to impede or obstruct the due administration of justice," a construction of "corruptly" to mean "to endeavor to impede and obstruct" renders the term "corruptly" surplusage.

"Corruptly" does reflect different meanings in different contexts, as the *Bosselman* court suggests. Those contexts, however, are not at the statute-to-statute level but exist in case-by-case settings. In fact, the different meanings of "corruptly" stem from the definition of "unlawful advantage."

Workable definitions of "corruptly" abound. In 1865, the State of New York's proposed Penal Code, the Field Code, defined "corruptly" as "a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person."[26] In 1999, the member States of the Council of Europe also agreed to a treaty dealing with corruption. The treaty defined "corruption" as "requesting, offering, giving or accepting, directly or indirectly, a bribe or any other *undue advantage or prospect thereof*, which distorts the proper performance of any duty of behaviour required of the recipient of the briber, the *undue advantage or the prospect thereof*."[27] These sensible definitions are reflected in the reading of some statutes.[28]

The typical problem arises from lower courts' efforts to instruct juries. Appellate courts then strain to harmonize inadequate definitions of "corruptly" into an acceptable case-specific meaning. The problem could be resolved by modifications of those instructions.[29] The prospect for uniformity is not good, however, since the lower courts continue on their unreformed way because the appellate courts continue to uphold the inadequate instructions to save convictions. This effort on the part of the appellate courts is no longer necessary in light of changed Supreme Court jurisprudence regarding errors within jury instructions.[30]

This article surveys a variety of legal materials, including English election law, jurisprudence of the federal circuits in the contexts of the obstruction statutes (both justice and Internal Revenue Service), and the federal bribery statute. As the various cases within the context of bribery and obstruction of justice are presented, this article will make an effort to apply the proposed definition of "corruptly" against the definition exemplified by each case. This analysis demonstrates that, though the problem of the proper definition of "corruptly" is wide-spread, its solution is not painful.

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26. COMM'RS OF THE CODE, PENAL CODE OF THE STATE OF NEW YORK § 765 (1865). *See also* PENAL CODE OF CALIFORNIA § 7(3) (T.A. Springer 1872).

27. Civil Law Convention on Corruption, [Nov. 4, 1999], ch.1, art. 2 [Eur. T.S. No. 174] (emphasis added).

28. *See, e.g.*, United States v. Reeves, 752 F.2d 995, 1001 (5th Cir. 1985) (defining "corruptly" as "an intent to secure an unlawful advantage or benefit" in the context of 26 U.S.C. § 7212(a)). In fact, every circuit that has addressed the meaning of "corruptly" within 26 U.S.C. § 7212(a) has consistently applied the same definition. *See infra* note 92 (collected cases).

29. *See infra* Part IV.

30. *See, e.g.*, Neder v. United States, 527 U.S. 1 (1999) (holding that error in jury instructions is reviewed under harmless error analysis).

II. ENGLISH DEFINITIONS OF THE COMMON LAW TERM "CORRUPTLY" WITHIN ELECTION LAWS[31]

The English common law concerned itself with the definition of "corruptly" in the context of election laws. Historically, the common law split offenses into two categories. These categories reflected the belief that some offenses were against morals or the laws of God while other offenses were merely against the laws of man. Those offenses against morals or the laws of God were classified under the term "corruptly." Offenses that were against man-made laws were termed "illegal." The distinction has all but vanished today, but a more detailed explanation of this practice illustrates the meaning that "corruptly" once had.

The relevance to the modern definition of "corruptly" is that the type of benefit prohibited, either an "improper" or an "unlawful" one, is currently a distinction without difference as "corruptly" includes both types. Moreover, analysis of English cases from the 1850s and beyond illustrates that the distinction was fading even then. The relevant understanding from this analysis is that "corruptly" now encompasses both "illegal" and "immoral" intentions—hence improper or unlawful benefits are prohibited by the term "corruptly."

Historically, an argument could have been made that whether "corruptly" involves an "improper" or an "unlawful" benefit makes a crucial difference. Though the difference today between "improper" and "unlawful" may seem minimal, historically, it mattered.[32] The term "corruptly" permeated the election laws of nineteenth century England.[33] Halsbury's Laws of England advanced several reasons for canceling the results of an election, including the presence of "either corrupt or illegal practices...."[34] The difference between a "corrupt" practice and an "illegal" practice was that "corrupt" practices were considered "*mala in se* [while] illegal practices have been said to be *mala prohibita*."[35] Halsbury further explains that "[a] division of offenses favoured [sic] by older authorities was into two classes termed *mala in se* and *mala prohibita*."[36] *Mala in se* offenses were "those described as offending against the rights which God and nature had established or contrary to the moral sense of the community."[37] *Mala prohibita* offenses were those that "offend[ed] against the laws which enjoin only positive duties, and forbid things which are not *mala in se*, and to which were annexed a penalty for non-compliance without making the transgression into a moral offence."[38]

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31. For a much more detailed treatment of the common law roots of "corruptly" and the evolution of extortion, see Jeremy N. Gayed, Note, *Paved with Good Intentions*, 78 NOTRE DAME L. REV. 1731 (2003).

32. Logically, it seems that "improper" is a broader category of actions, with "illegal" actions being a subset of that category. Some might argue in the case of "unjust laws" the picture would resemble a Venn diagram, which is reasonable. Arguably, some "improper" things are not "illegal" (like committing adultery) and some "illegal" things are not "improper" (like speeding on interstates). Here, we focus on the illegal actions. Nevertheless, these distinctions are beyond the scope of this Article.

33. *See, e.g.*, Corrupt Practice and Prevention Act, 1854, 17 & 18 Vict., c. 102 (Eng.) (creating offenses for bribery, treating, and undue influence; each contains the term "corruptly").

34. 14 HALSBURY'S LAWS OF ENGLAND 163 (1956).

35. *Id.* (footnote omitted).

36. 10 HALSBURY'S LAWS OF ENGLAND 273 (1956).

37. *Id.*

38. *Id.* Halsbury states that this division is no longer followed, but does note that vestiges of this system still remain. *Id.* For a further discussion of the origin of *mens rea* as a moral concept that resulted in this

Though this distinction is no longer in favor, its value lies in the modern day observation that "corrupt" benefits can be either "improper" or "unlawful."

A. The Misunderstood Case of Cooper v. Slade: "Corruptly" in Action

In 1854, two individuals running for elected office in England sent a letter to an elector requesting his return to their town on the appointed day to cast his vote in their favor.[39] After the signature of the letter, the following words appeared: "Your railway expenses will be paid."[40] The election committee discussed the legality of payment for these sorts of expenses. Its decision was ultimately made by one of the candidates himself, who relied upon a book on election law by a distinguished jurist of the time.[41] The issue in *Cooper* was whether the payment of those expenses violated the English Corrupt Practices Prevention Act (CPPA) of 1854.[42] The relevant portion of the CPPA read:

> II. The Following Persons shall be deemed guilty of Bribery, and shall be punishable accordingly:
>
> 1. Every Person who shall, directly or indirectly, by himself, or by any other Person on his Behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure or to endeavor to procure, any Money, or valuable Consideration, to or for any Voter, or to or for any Person on behalf of any Voter, or to or for any other Person in order to induce any Voter to vote, or refrain from voting, or shall corruptly do any such Act as aforesaid, on account of such Voter having voted or refrained from voting at any Election . . . . Provided always, that the aforesaid Enactment shall not extend or be construed to extend to any Money paid or agreed to be paid for or on account of any legal Expenses *bona fide* incurred at or concerning any Election."[43]

A feature of this branch of the Act worth noting is that before a vote is cast, any inducement via money or valuable consideration is prohibited. It is after the act of voting (or omission in the case of a vote not cast) that the term "corruptly" defines the conduct covered by the statute. The Lord Chancellor certified three questions for the consideration of the eight justices and barons selected to hear the case. Those three questions were:

> 1. Whether assuming the letter of the 12th of August 1854 to have been written and sent to [the voter] by the direction and authority of the defendant in error, there was any evidence for the jury that the defendant was guilty of bribery within the true

division between moral offenses and legal offenses, *see* 1 RUSSELL ON CRIME 34 (11th ed. 1958).

39. Cooper v. Slade, 27 L.J.R. 449, 450 (Q.B. 1858). The elector traveled from Huntingdon to Cambridge, a distance of roughly 18 miles.

40. *Id.*

41. *Id.*

42. 17 & 18 Vict., c. 102 (Eng.).

43. *Id.* at s. 2.

intent and meaning of the 2nd section of 17 & 18 Vict. c. 102?

2. Whether . . . there was any evidence for the jury that the letter in question was written and sent by the direction or authority of the defendant in error?

3. Whether there was evidence that the defendant corruptly paid money to [the voter] on account of his having voted at the election?[44]

Several of the opinions in *Cooper* speak directly to the import of the term "corruptly" and are worth a careful consideration.

In an opinion that answered all three questions in the affirmative, Baron Channell observed, "In a moral point of view there may have been nothing corrupt in the conduct of the defendant, acting on the belief that I think he did."[45] Baron Channell next looked to the text of the statute and held that the defendant's actions did violate the statute's prohibitions. He held, "But the defendant's conduct would have been corrupt within the meaning of the statute if the defendant had himself promised contrary to the statute, and had himself paid in fulfillment of his promise, after obtaining an advantage which the statute means he should not obtain."[46] This section of the opinion reflects some of the modern day understanding of "corruptly," that the act be done to secure an unlawful advantage. It also seems to reflect the merger between *mala in se* and *mala prohibita* offenses. If the difference still mattered in 1858, the question of whether the defendant acted "corruptly" would have been settled by the conclusion that the defendant did not act immorally. Alas for the defendants, Baron Channell went forward and cast his vote to uphold their conviction based upon his statutory reading because he felt that they violated the letter of the statute.[47]

The more influential section of the opinion in *Cooper* was written by Justice Willes. More recent cases still involve discussion of Justice Willes' viewpoint,[48] and even the modern day report by the UK Law Commission on Corruption mentions his views.[49] Justice Willes' discussion on the third question is both insightful and controversial. He wrote, "I think the word 'corruptly' in this statute means, not

44. *Cooper*, 31 L.J.R. at 451 (Channell, B.).

45. *Id.* at 452.

46. *Id.*

47. *Id.*

48. *See, e.g.*, *R. v. Smith*, 1 ALL E.R. 256 (Crim App. 1960) (Lord Parker, C.J.) (stating that Justice Willes was wrong and "corruptly" does mean something; this case falls into the category of cases this Article argues gets Willes' position incorrect by not finishing the paragraph from which it extracts its "damning" text).

49. U.K. LAW COMM'N, CONSULTATION PAPER NO. 145: LEGISLATING THE CRIMINAL CODE: CORRUPTION § 8.10 (1998) (stating that "[t]he difference is that Coleridge J thought this tendency [to subject the casting of votes to influences which ought to have no weight, such as the hope of reward] is not necessarily present in the payment of money to a voter for having already voted, whereas Willes J thought it must inevitably be present."). The report misconstrues Willes' comments, as Willes did not believe that it must be inevitably present (he mentioned charitable motives as an example of proper motives).

The Law Commission is an organization created to promulgate the reform of British laws. This report was on the history of corruption legislation in the UK and several suggestions for reform. It is an excellent place to start when researching the details of the English conception of corruption.

'dishonestly,' but in purposely doing an act which the law forbids, as tending to corrupt voters. . . ."[50] His subsequent observation is the source of many pages of future discussion; he wrote, "The word 'corruptly' seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being corrupt, rather than as part of the definition of the offense."[51] While it has been said that he effectively read the term out of the offense, his later comments within the same paragraph refute that assertion.[52] In agreeing with comments made by the trial judge, Justice Willes noted:

> [I]f the moving cause of giving the money is the voter having voted for the particular candidate, such gift is contrary to the statute, as being given by way of reward for the vote, and therefore corrupt. This may exclude cases in which money is given from purely charitable motives, though to a voter. . . .[53]

Justice Willes concluded that "in the present case no other probable motive besides the vote upon the defendant's side itself appears or can be suggested."[54] These statements are inconsistent with subsequent views that argue that Justice Willes read "corruptly" out of the statute; in fact, he offered a situation where "corruptly" had meaning (when it would distinguish between a charitable motive and a vote-inducing motive), but he was unable to muster a single plausible motive for the particular defendant's actions that was not corrupt. Rather than reading the term out of the statute for all of posterity, Willes recognized those circumstances where the term "corruptly" reflects a general category of "corrupt" conduct. "Corruptly" classifies conduct rather than explicitly defining it.[55] As the conduct the statute reached was an attempt to receive an unlawful benefit (influence an election by offering voters things of value), "corruptly" merely acted as a designation for this sort of conduct. This view is not entirely without historical basis, as English reference materials often distinguish between "corrupt" and "illegal."[56] Because the offense of bribery is contained within

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50. *Cooper*, 31 L.J.R. at 457 (Willes, J.).

51. *Id.*

52. A dissenting voice within the *Cooper* opinion leans toward this claim. Justice Coleridge seems to discount the holding of the trial judge that if the money was paid, it was done so corruptly. *Id.* at 462.

53. *Id.* at 457.

54. *Id.*

55. An example of this might be the distinction between homicide and murder. Justice Willes probably would have equated a formal charge that someone "homicidally committed murder" to a phrase like "corruptly did bribe a voter." Our example has not formally read away the requirement of "homicide" from the more specific category of murder, nor did Justice Willes read out "corruptly." It is this Article's contention that there are some circumstances where "corruptly" does not bear much weight (for instance, in 18 U.S.C. § 201 (b)(1)(B) and (C) (2000)) while still maintaining some meaning. When used to define conduct already *prima facie* improper or unlawful, "corruptly" does not carry the same weight it does in contexts where identical conduct can be sorted into categories of "lawful" and "unlawful" based solely upon intent. For instance, in 18 U.S.C. § 201 (b)(1)(A) (2000), "corruptly" means the difference between lawful influence of any official act (i.e. campaign contributions) and an unlawful influence (an explicit *quid pro quo* to influence official decisions). *See also* United States v. Reeves, 752 F.2d 995, 999 (5th Cir. 1985) (explaining that some types of obstruction implicitly contains the meaning of "corruptly").

56. *See, e.g.*, 14 HALSBURY'S LAWS OF ENGLAND 164 (1956) ("The following are corrupt practices: (1) bribery; (2) treating; (3) undue influence; (4) personation (5) making a false declaration as to election expenses; (6) incurring certain expenses without the authorisation of the election agent." (citations omitted)). With an understanding of these offenses in mind, "X acted 'corruptly'" does not unequivocally designate which of the above offenses was committed (the corrupt action could refer to bribery, treating, undue influence, etc.). Here "corruptly" might well be a designation of an act rather than a definition of an offense.

the spectrum of offenses broadly labeled "corrupt," the statement "he corruptly offered a bribe" is redundant.

Cooper also contains a dissent as to questions two and three. Justice Coleridge took issue with the trial court's jury instructions because those instructions interpreted the word "corruptly" as "purely superfluous and otiose."[57] The trial judge "expressly [told] the jury that they ought to find for the plaintiff, if they were satisfied that the money was given by or for the plaintiff, and that the moving cause for the gift was that [the voter] had voted for the defendant. . . ."[58] The crux of Coleridge's objection was whether a candidate could ever pay reasonable travel expenses, for he continued, "even though the amount was no more than the fair and reasonable expense incurred, and though the defendant honestly believed he was committing no offense thereby."[59] The trial judge assumed that expenses could not be given to a voter in any circumstance.[60] Such assumption was technically incorrect according to a strict construction of the statute, but today his construction would probably have been seen as harmless error. Justice Coleridge, continuing his exacting statutory interpretation, discussed the presence of "corruptly" in the statute and stated that it "certainly was not inserted into the statute without a purpose. . . ."[61] He observed:

> "[Corruptly" appeared]: "twice in the section [section 2], in branches 1 and 2, it is omitted in the first parts, which relate to promises and agreements to procure future votes; twice it is inserted in the latter parts, where the reference is to votes having been given or withheld at the election past."[62]

Explaining this placement of the word, Justice Coleridge argued that "a promise to pay money or to procure a place to induce a voter to vote for a particular candidate, can only be made with a view to influence the voter's mind, and interfere with the independence of the vote."[63] He further reasoned that to give any valuable consideration

> on account of the vote . . . given or withheld after the election may or may not be within the mischief with the act was intended to prevent. . . . [I]t is material to bring an act within this part of the section, that is should have been done 'corruptly' . . . . [H]ere the statute expressly makes the operating motive in the mind of the party material. . . .[64]

This, too, is still consistent with a view that "corruptly" means an attempt to secure an improper/unlawful advantage. In the context of 18 U.S.C. § 201 (b)(1)(A) (2000), "corruptly" means to attempt to influence any official act via one of the above methods.

57. *Cooper*, 27 L.J.R. at 462 (Coleridge, J.).
58. *Id.*
59. *Id.*
60. *See id.*
61. *Id.*
62. *Id.*
63. *Cooper*, 27 L.J.R. at 462 (Coleridge, J.).
64. *Id.*

B. The Expansion of Cooper (While Still Getting Parts of it Wrong): R. v. Smith

More than one hundred years later, the impact of the *Cooper* decision was still being felt. In *R. v. Smith*,[65] by its own admission a case about "an extraordinary man," the defendant, John Smith, was on a crusade of sorts against corruption.[66] The portion of his crusade that served as the plot for this prosecution involved his efforts to induce the city council of his town to accept a "bribe" in order to supply him with some land; he intended to revoke the bribe after the city council's acceptance in principle of his "offer."[67] Having met with and sent an insurance adjuster named Lockyer to meet with the mayor and offer the bribe, Smith "wrote a number of letters just after the time when this offer was made by Lockyer inviting members of the press, the police, and [others] to come down because he was going to expose some fraud."[68] The mayor, to Smith's great chagrin, refused the bribe from Lockyer and had both Lockyer and Smith charged with bribery.[69]

The case of *R. v. Smith* presented the following question:

> [W]hether the word 'corruptly' in its context means deliberately offering money, or whatever it may be, with the intention that it should operate on the mind of the person to whom [the offer] is made so as to make him enter into what I may call a corrupt bargain, or whether it means that the intention must be that the transaction should go right through and that the offeror should obtain the favour for which he sought.[70]

The court held that "corruptly" was used "in the former sense, namely, that it denotes that the person making the offer does so deliberately and with the intention that the person to whom it is addressed should enter into a corrupt bargain."[71] This construction of the language is not without difficulty, as the opinion noted, because "if that is all that 'corruptly' means, then it really adds nothing to the words which are already there...."[72] As in the statute at issue in *Cooper v. Slade*, which expressly left out the term "corruptly" when it was implicit in the conduct, Chief Justice Lord Parker contended that "corruptly" does add meaning in that subsection "in the case of rewards or fees given for services or favours already rendered."[73] This assertion raises the ghost of

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65. [1960] 2 Q.B. 423 (Lord Parker, C.J.).

66. *Id.* at 426.

67. *Id.*

68. *Id.*

69. *Id.* The bribery statute at issue in *R. v. Smith* was contained in section 1 of the Public Bodies Corrupt Practices Act, 1889, which read:

> Every person who shall by himself or by or in conjunction with any other person corruptly give, promise or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanour.

Id. at 423.

70. *Smith*, [1960] 2 Q.B. at 428.

71. *Id.*

72. *Id.*

73. *Id.*

Cooper. Again, an English case summarizes (incorrectly) Willes' opinion in *Cooper* to mean "corruptly" adds nothing to the statute (compared to adding nothing to the facts specific to the *Cooper* case).[74] The majority in *Smith* both determined that Willes' view was that "corruptly" added nothing and cited approvingly Willes' definition of corruptly:

> The view which we have formed is, we think, confirmed by the passage which I have already quoted from Willes, J., in *Cooper v. Slade*. . . . 'I think the word 'corruptly' in this statute means not 'dishonestly,' but in purposely doing an act which the law forbids as tending to corrupt voters. . . .'[75]

The *Smith* court upheld Smith's conviction and approved the challenged jury instructions.[76] The jury instructions themselves are relevant to an understanding of "corruptly" and are reproduced below.[77]

III. THE MODERN ANALOGUES OF ELECTION LAW

The structure of several key federal code provisions is parallel to the structure of election law in the weight that the term "corruptly" bears. Title 18, United States Code Section 201 lists two offenses: illegal gratuity and bribery.[78] The difference in seriousness between these two offenses is reflected both by their respective sentences and by the elements required. Bribery is "unlawful gratuity" plus the state of mind element "corruptly." Those individuals who intend to offer illegal gratuities act corruptly—hence are guilty of bribery under federal law. This structure follows election laws' form: offering a voter a thing of value is an offense, but to do so with intent to influence elevates the offense to a more serious level. So, too, with bribery and gratuity. The upshot of this situation is "corruptly" means more than "improper

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74. *Id.* at 429 ("[T]he word 'corruptly' where used in connection with a reward to somebody who had voted was held in effect to add nothing.").

75. *Id.* (quoting Cooper v. Slade, 27 L.J.R. 449, 457 (H.L. 1858) (Willes, J.)). It seems rather odd that Willes would take the time to define "corruptly" if he felt it should mean "nothing" as the decision in *R. v. Smith* contends.

76. *See Smith*, [1960] 2 Q.B. at 430. ("[T]he direction given by the trial judge was perfectly correct...."). This mistake also occurred in the case *United States v. Dorri*, 15 F.3d 888 (9th Cir. 1994). *Dorri*, however, contained a powerful dissent explaining exactly what the problem is with this reasoning. *Id.* at 892 (Kozinski, J., dissenting).

77. The part of the approved jury instructions read:

> The next thing to note is the word 'corruptly'. You will notice the words 'corruptly give or offer'. What does the word 'corruptly' mean? This is law and I am telling you this as law: 'corruptly' there means 'with the intention to corrupt'. In other words, if I offer you a reward in order that you should do something which may help me, I am doing it corruptly—if I am offering and hoping that the offer will induce you to act in the way in which I want you to act. Motive does not matter: it may be that I do it because I am anxious to help myself; it may be that I am anxious to help a widow, who, perhaps, is starving and whom I think I can help by getting a public official, a person in public life, to do something which would help her. In one sense, I suppose, it could be said that any such motive sprang from the best possible motive, the endeavour to help. It does not matter. When I offer you that gift, I do it with the intention that you should so receive a reward for doing something in connection with your public duties. This is the meaning of the word 'corrupt', intent to corrupt, the intention to corrupt the person to whom the offer is made.

Id. at 427.

78. *Compare* 18 U.S.C. § 201 (b) (2000) (bribery) *with* 18 U.S.C. § 201 (c) (2000) (illegal gratuity).

purpose" or "evil intent." It means attempting to receive a benefit prohibited by law. This definition comports with election law[79] and with common usage within Title 26's obstruction statute.[80]

The bribery/gratuity structure exists within the obstruction/false statement area of federal criminal law. Section 1503's obstruction of justice prohibition is merely Section 1001's prohibitions plus a formalized intent to benefit from the false statements, schemes, or artifices to defraud. Those who violate the prohibitions of Section 1001 with intent to benefit are guilty of a Section 1503 violation—they perform the conduct of Section 1001 with an intent to benefit from their unlawful/improper action, hence acting "corruptly."

The distinction between Section 1001 and Section 1503 is illustrated by the Supreme Court's recent treatment of the subject in *United States v. Aguilar*.[81] In *Aguilar*, a federal judge was convicted of, *inter alia*, uttering a false statement to FBI agents during an investigation.[82] The Supreme Court affirmed the Ninth Circuit's reversal of this conviction, holding that Section 1503 required knowledge on the part of a defendant that his false statement would likely be provided to a grand jury.[83] The Court determined that the evidence introduced at trial could not support the conclusion that the intent of the false statement would have the "'natural and probable' effect of interfering with the due administration of justice."[84] *Aguilar* illustrates a case where the lesser offense of making a false statement to a federal agent was established, but the greater offense of obstruction—requiring a "corrupt" intent—was not. Justice Scalia, in dissent, argued that the majority's conception made the term "endeavor" irrelevant.[85] Justice Scalia stated that the majority opinion left only "a prohibition of . . . actual obstruction and competent attempts."[86] Justice Scalia's point misses the mark; while "endeavor" does necessarily include an "intent," it does not necessarily include an "intent to receive an unlawful/improper benefit for one's self or another." If the jurisprudence of the federal criminal law nailed down a meaning for "corruptly," these problems would be eliminated.

The structural similarities between gratuity and bribery and false statements and obstruction do not encompass all possible meanings for "corruptly." They represent the "unlawful" component found in the common law term. The "improper" component expands the reach of "corruptly" to other areas, including custom, tradition, and things like codes of conduct or ethics. The Supreme Court in 1914 explained that the unlawful gain from bribery need not be formally rooted in a statute.[87] The Court noted:

> Every action that is within the range of official duty comes within the purview of these sections [the bribery sections of the federal code]. . . . To constitute official

79. *See supra* Part II.
80. *See infra* Part V.
81. 515 U.S. 593 (1995).
82. *Id.* at 595.
83. *Id.* at 601.
84. *Id.*
85. 515 U.S. at 612 (Scalia, J., dissenting).
86. *Id.*
87. United States v. Birdsall, 233 U.S. 223 (1914).

> action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the Department under whose authority the officer was acting.[88]

Moreover, the Court stated that it was not "necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities."[89] To cement the merger of improper acts and unlawful acts within the context of bribery—hence "corrupt" practices—the Court explained that even "settled practice" constituted a guideline for judging actions under the bribery sections.[90]

IV. "CORRUPTLY" WORKING SMOOTHLY: THE CONTEXT OF 26 U.S.C. § 7212

In one area of prosecutions, federal courts apply the common law definition of "corruptly" without exception. This rare circumstance arises in the area of obstruction of IRS investigations covered by 26 U.S.C. § 7212(a). This section will discuss an illustrative case that both demonstrates the simplicity of the common law definition and refutes other commonly applied definitions.

A. The Uniform Application of the Common Law Definition of "Corruptly"

The federal circuits that have addressed the meaning of "corruptly" within the obstruction of an IRS investigation section[91] are unanimous in its meaning.[92] The accepted definition of "corruptly" is well-illustrated by *United States v. Reeves*.[93] In *Reeves*, the court held that "corruptly" means acting with an "intent to secure an unlawful advantage or benefit."[94] The decision expressly rejected the view that

88. *Id.* at 230–31 (citations omitted).

89. *Id.* at 231 (citations omitted).

90. *Id.*

91. 26 U.S.C. § 7212(a) (2000).

92. *See* United States v. Kelly, 147 F.3d 172, 177 (2d Cir. 1998) (approving jury instruction reading, "To act corruptly is to act with the intent to secure an unlawful advantage or benefit either for one's self or for another); United States v. Wells, 163 F.3d 889, 897 (4th Cir. 1998) ("We have interpreted the term 'corruptly' to mean acting with the intent to secure an unlawful benefit for oneself."); United States v. Mitchell, 985 F.2d 1275, 1278 (4th Cir. 1993); United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997); United States v. Reeves, 752 F.2d 995, 998 (5th Cir. 1985); United States v. Valenti, 121 F.3d 327, 332 (7th Cir. 1997) (holding "corruptly" means "to unlawfully secure a benefit for himself"); United States v. Dykstra, 991 F.2d 450, 453 (8th Cir. 1993) (defining "corruptly . . . as an effort to secure an unlawful advantage or benefit, and, in particular, to secure a financial gain.") (internal quotation omitted); United States v. Yagow, 953 F.2d 423, 427 (8th Cir. 1992); United States v. Hanson, 2 F.3d 942, 946 (9th Cir. 1993) (holding "[a]n act is 'corrupt' within the meaning of section 7212(a) if it is performed with the intention to secure an unlawful benefit for oneself or for another. . . . Mere evidence of an improper motive or bad or evil purpose is insufficient to prove corruption.") (citations omitted); United States v. Workinger, 90 F.3d 1409, 1414 (9th Cir. 1996); United States v. Winchell, 129 F.3d 1093, 1098–99 (10th Cir. 1997) ("[T]o act corruptly means to act with the intent to secure an unlawful benefit either for oneself or for another."); United States v. Popkin, 943 F.2d 1535, 1540 (11th Cir. 1991) ("We agree with the definition [of 'corruptly'] adopted in *Reeves*.").

93. 752 F.2d 995 (5th Cir. 1985).

94. *Id.* at 1001.

"corruptly" means "an improper motive or bad or evil purpose."[95] As many courts accept the "improper motive" or "bad or evil purpose" definitions for "corruptly" in other criminal statutes,[96] the logic underpinning the opinion in *Reeves* is enlightening.

Reeves filed a common law lien against the home of the IRS agent investigating his tax returns.[97] The lien was recorded, and it "purported to attach to [the IRS agent's] residence and demanded payment of $250,000."[98] Reeves was charged and tried under 26 U.S.C. § 7212(a) for "'corruptly' endeavoring to obstruct the due administration of Title 26."[99] The trial judge "expressly adopted the definition of 'corruptly' as meaning 'with improper motive or bad or evil purpose. . . .'"[100] The Fifth Circuit reversed.

The majority opinion expressly rejected the definition used by the trial court. The majority stated "[i]t is unlikely that 'corruptly' merely means 'intentionally' or 'with improper motive or bad or evil purpose.'"[101] "[E]ndeavor," the court explained, "already carries the requirement of intent; one cannot 'endeavor' what one does not already 'intend.'"[102] Moreover, "the mere purpose of obstructing the tax laws is 'improper' and 'bad'; therefore, to interpret 'corruptly' to mean either 'intentionally' or 'with an improper motive or bad or evil purpose' is to render 'corruptly' redundant."[103] Judge Jolly noted that "[c]orruptly is a word with strong connotations; it is difficult to believe that Congress included this 'key' word only to have it read out of the statute or absorbed into the meaning of 'endeavor.'"[104] The majority explained that "[S]ection 7212(a) is directed at efforts to bring about a particular advantage such as impeding the collection of one's taxes, the taxes of another, or the auditing of one's or another's tax records."[105] This statutory analysis ought to translate smoothly into the context of Section 1503—but courts have lost the details in the translation.

The opinion in *Reeves* further addressed the meaning of "corruptly" within the context of Section 1503 prosecutions. The *Reeves* court cited *United States v. Ogle*[106] for the proposition that obstructing or impeding the due administration of justice is "per se unlawful and *tantamount* to doing the act corruptly."[107] The *Ogle* decision involved a prosecution under Section 1503 where the defendant was convicted of an endeavor to influence a juror in a criminal matter.[108] The *Ogle* court summed up the trial court's instruction as "an endeavor to influence a juror in the performance of his or her duty or to influence, obstruct, or impede the due administration of justice is per se unlawful and

95. *Id.*

96. *See infra* Part V(A)(1) (approving "improper motive") and Part V(A)(2) (approving "evil motive").

97. *Reeves*, 752 F.2d at 996.

98. *Id.* at 997.

99. *Id.* at 996 (quotation marks omitted).

100. *Id.* at 997. The trial judge's opinion on the matter is reported in *United States v. Reeves*, 1984 WL 21209, *4 (N.D. Texas, 1984). The trial judge relied upon parallel obstruction statutes found in Title 18. *Id.* at *4.

101. *Reeves*, 752 F.2d at 998.

102. *Id.*

103. *Id.*

104. *Id.* (quotation omitted).

105. *Id.*

106. 613 F.2d 233 (10th Cir. 1979).

107. *Reeves*, 752 F.2d at 999 (citing *id.* at 238)(emphasis in original).

108. *Ogle*, 613 F.2d at 235.

is tantamount to doing the act corruptly."[109] This language was misquoted by the *Reeves* court by omitting the term "influence," making its restatement an accurate interpretation of the statute.[110]

The terms "obstruct" and "impede" inherently contain the notion that success or an endeavor to succeed is tantamount to seeking an unlawful benefit for one's self or another.[111] The term "influence" is problematic—one may influence the due administration of justice in either a corrupt or a non-corrupt manner.[112] The *Ogle* court, focusing on its facts alone, did not appropriately limit the language by omitting the neutral term "influence." In *Ogle*, the defendant endeavored to influence a juror in the performance of her duty. The *Ogle* court explained that "[a]ll that [the jury] had to find was that there was a corrupt endeavor which was an effort to wrongly influence the [jury]."[113] The question of whether *Ogle* was correctly charged was not addressed, but the discussion of "corruptly" within Section 1503 still has relevance.[114]

Not only did the *Reeves* court hold that the appropriate definition of corruptly is the intent to secure an improper benefit or advantage for one's self or another, the court explained why competing definitions must not be adopted. The majority in *Reeves* evaluated the possibility of overbreadth when "corruptly" is defined as "with improper motive or bad or evil purpose."[115] The *Reeves* court offered the example of a case where a person under investigation by IRS agents filed a "nonfrivolous criminal complaint" against the investigating agents, and he was protected by the First Amendment even though the filing was "motivated by a bad or improper desire to impede the agents' investigation."[116] The majority in *Reeves* explained that even if the filing was not protected by the First Amendment, current doctrine holds that overbreadth is possible when activities come close to protected areas.[117] To avoid creating this problem, and following a Supreme Court admonition to avoid construing statutes in a manner that might be unconstitutional,[118] the *Reeves* court concluded that a different definition of "corruptly" was required. The majority concluded that the definition of "corruptly" that avoids constitutional problems must be "an intent to

109. *Id.* at 238.

110. *Reeves*, 752 F.2d at 999 ("Thus, 'to obstruct or impede the due administration of justice is per se unlawful and tantamount to doing the act corruptly.'")

111. The court in Reeves said as much. The court noted that "where a defendant has endeavored to obstruct a criminal proceeding, the 'advantage inconsistent with the duties and rights of others' is so clear that courts have often been willing to impute the desire to obtain such advantage on a *per se* basis." *Id.*

112. *E.g.*, an attorney may file for a continuance in a matter. If the lawyer does so for an ethical reason, no evidence of corruption may be found. If an attorney files for a continuance to prolong litigation to harass the opposing party, "corruption" is arguable.

113. *Ogle*, 613 F.2d at 239.

114. The conduct complained of in *Ogle* involved a corrupt endeavor to influence a petit juror. 18 U.S.C. § 1503 contains express prohibitions against this conduct. Whether the "omnibus" provision is the appropriate language for an indictment on these facts is an open question beyond the scope of this article.

115. *Reeves*, 752 F.2d at 1001.

116. *Id.* (citing United States v. Hylton, 710 F.2d 1106, 1112 (5th Cir. 1983) (*Hylton* held that a non-frivolous petition to the government for redress of grievances cannot be the crime of obstruction) (citation omitted)).

117. *See id.*

118. The court cited *Arnett v. Kennedy*, 416 U.S. 134 (1974), for the proposition that "[T]he Court has a duty to construe a federal statute to avoid constitutional questions where such a construction is reasonably possible." *Reeves*, 752 F.2d at 1001 (brackets in original).

secure an unlawful advantage or benefit."[119] This construction is followed in all eight of the federal circuits that have addressed the definition of "corruptly" within the context of 26 U.S.C. § 7212(a) prosecutions.[120]

Further illustrations of why a definition of "with improper purpose" should fail may be found in Judge Gee's concurrence in *Reeves*. Judge Gee observed that "the essence of § 7212(a) seems to be the attempt to influence or impede the government agent's official actions. . . ."[121] Judge Gee pointed out several actions that might be done "with improper motive"; one of these actions was "paying one's tax with sacks of pennies."[122] The motive behind paying with pennies might be "simple contrariness. . . ."[123] In that case, while a taxpayer might be acting in an annoying fashion, he cannot be said to be acting "corruptly." In the context of Section 1503, imagine a witness who submits truthful documents to a grand jury in 72 point font. While this conduct might be characterized as "simple contrariness," it ought not be considered "corrupt" for purposes of federal criminal prosecutions.

The *Reeves* decision contains a pragmatic dissent by Judge Williams. While Judge Williams would have upheld the conviction on the facts of the case, he does grant that "even if the district court did interpret the word 'corruptly' too broadly in reaching its conclusion in this case, the error was clearly harmless."[124] He further noted that "[t]his was not a trial to a jury. The critical words were not contained in instructions to a jury."[125] Finally, Judge Williams observed that "[a]ssuming that the court's interpretation of the word 'corruptly' was too broad to be a proper jury instruction, the issue before the court was whether the action of this accused in placing this false and fraudulent lien on the property of the IRS agent was corrupt."[126] In answering this question, Judge Williams stated that "[b]y any definition of the word [corruptly] it was [corrupt to file the lien]."[127] While a reasonable position, this desire to uphold the right result in a given case handicaps the true meaning of "corruptly" in general use. Judges ought not ignore the means utilized to reach a given end.

B. The Jury Instruction that Reflects Both the Common Law and Case Law

The Seventh Circuit, which approves different definitions of "corruptly" in its jury instructions for bribery and obstruction of justice,[128] gives the traditional common law definition for "corruptly" within Section 7212.[129] The definition of "corruptly" within Section 7212 is the definition that should be applied across the various sections of Title

119. *Reeves*, 752 F.2d at 1001.

120. *See supra* note 92 (citing cases from the Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits approving the same definition).

121. *Reeves*, 752 F.2d at 1002 (Gee, J., concurring).

122. *Id.*

123. *Id.*

124. *Id.* at 1004 (Williams, J., dissenting).

125. *Id.*

126. *Id.*

127. *Reeves*, 752 F.2d at 1004.

128. *See infra* note 138 (18 U.S.C. § 1503 - Obstruction of Justice) and note 147 (18 U.S.C. § 201 - Bribery).

129. It is also the only circuit with a definition for "corruptly" within § 7212(a).

18 and adopted by the other circuits: "The word 'corruptly' means that the act or acts were done with the purpose to secure an unlawful benefit for oneself or another by obstructing or impeding the administration of the internal revenue laws."[130] This definition perfectly captures the "unlawful benefit" or "advantage" language that would allow for one definition of "corruptly" across offenses and the circuits. It also demonstrates the how to write a single definition of "corruptly." It is interesting that the Seventh Circuit follows *Reeves*' definition (and therefore its reasoning) in defining "corruptly" within Title 26, but refuses to do so within Title 18.

V. THE SELF-PERPETUATING PROBLEM OF PATTERN JURY INSTRUCTIONS

The misleading definitions of "corruptly" originate in the pattern federal jury instructions. Without a substantive rewrite of these instructions, appellate courts will continue to struggle to acknowledge the traditional common law definition of "corruptly." Correcting these instructions would effectively eliminate a vast amount of federal appellate litigation involving the term's meaning within specific statutes.[131] This section first will survey the different definitions of "corruptly" proposed by the federal pattern jury instructions and conclude with a workable model for correction based upon the model instructions for "corruptly" within the context of 26 U.S.C. § 7212(a).[132]

A. "Corruptly" in the Context of Bribery

In the suggested federal jury instructions for bribery, the term "corruptly" is defined as "[an act] performed voluntarily and deliberately and performed with the purpose of either accomplishing an unlawful end or unlawful result or of accomplishing some otherwise lawful end or lawful result by any unlawful method or means."[133] The definition continues to state that "[t]he motive to act 'corruptly' is ordinarily a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit to another."[134] This definition, technically, is correct as it does encapsulate the effort to

130. FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 7212 (1999) [hereinafter SEVENTH CIRCUIT JURY INSTRUCTIONS].

131. *See infra* note 132 (explaining that California courts face little litigation on the question of "corruptly" since the State's definition of "corruptly" comports with the common law definition endorsed by this Article).

132. This Article does not examine the pattern jury instructions of the several states, but it is interesting that California's jury instructions contain the definition of "corruptly" rooted in the common law. The instruction reads, "The word 'corruptly' means with a wrongful design to acquire or cause some monetary or other advantage to the person guilty of the act or omission referred to, or to some other person." 1 CALIFORNIA JURY INSTRUCTIONS: CRIMINAL § 7.00.5 (7th ed. 2004). This definition is not overly surprising, since the Penal Code of California adopted the same definition in 1872. CAL. PENAL CODE § 7(3) (West 1999) ("The word 'corruptly' imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person."). There are very few California state cases on the meaning of the term "corruptly." Presumably, it is because the definition California enacted from the Field Code has been clear enough that defendants do not find it worth challenging.

133. 2 KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 27.09 (5th ed. 2000) [hereinafter O'MALLEY].

134. *Id.*

obtain an advantage (the financial gain or benefit), though the concept of "advantage" is replaced by the long phrase "financial gain or other benefit to one's self, or some aid or profit to another." Moreover, the "unlawful" characterization in the definition of the act is not carried into the "motive" portion. To maintain this definition, the "financial gain or benefit" should be explicitly labeled unlawful.[135]

The Fifth Circuit has a different instruction that defines "corruptly." The Fifth Circuit approves the following statement: "An act is 'corruptly' done if it is done intentionally with an unlawful purpose."[136] This definition, which seems to simply collapse the "unlawful end or unlawful result or of accomplishing some otherwise lawful end or lawful result by any unlawful method or means" language employed by the other circuits into "unlawful purpose," is only lacking the explicit understanding that the "unlawful purpose" is actually some "unlawful benefit." This instruction, as drafted, does not describe a meaningful definition of the term "corruptly." Because "corruptly" is found within criminal statutes, the acts it is supposed to describe are necessarily "unlawful." Defining it to mean "intentionally with an unlawful purpose" is not illuminating.[137]

The Seventh Circuit, in the context of bribery, has a jury instruction that reads in part, "corruptly [means] with the purpose, at least in part, of accomplishing either an unlawful end result, or a lawful end result by some unlawful method or means."[138] The Seventh Circuit's version can be harmonized to the "advantage" language by noting that an "unlawful end result" and "a lawful end result by some unlawful method or means" both contain the implicit undertone that the person seeking either of those two results seeks an "improper benefit." The Comments to this section of the Seventh Circuit pattern instructions contain a citation to *Roma Construction Co. v. aRusso*, a case that supports an interpretation of "corruptly" to mean "unlawful benefit."[139] The current instruction, as written, fails the test of § 201(b)(1)(A). It is not bribery to influence *any* official act, it is bribery to influence an official act "corruptly." The seeking of an "improper benefit" (i.e. the receipt of an official act because of unlawful gratuity) is the conduct prohibited. If a court only has "unlawful end result" (ostensibly, influencing official acts) or "lawful end result by some unlawful method or means" to work with, the comment in the dissent to *United States v. North* decision will ring true: "[W]e might as well convert all of Washington's office buildings into prisons."[140]

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135. *See supra* text at note 346 (dissent's discussion of this instruction in *United States v. Dorri*).

136. FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CRIMINAL CASES § 2.12 (2001) [hereinafter FIFTH CIRCUIT JURY INSTRUCTIONS] (discussing instructions for 18 U.S.C. § 201(b)(1)); *see also* FIFTH CIRCUIT JURY INSTRUCTIONS § 2.13 (2001) (same definition for § 201(b)(2)).

137. *See supra* Part IV(A).

138. SEVENTH CIRCUIT JURY INSTRUCTIONS § 201 (1999).

139. *Id.* committee cmt. (citing Roma Const. Co. v. aRusso, 96 F.3d 566 (1st Cir. 1996)). *aRusso* interprets "corruptly" as "the intention to obtain ill-gotten gain. . . ." *aRusso*, 96 F.3d. at 574. This conception is consistent with the definition supported by this Article and similar to the Seventh Circuit's version.

140. United States v. North, 910 F.2d 843, 942 (1990) (Silberman, J., concurring *dubitante* in part and dissenting in part).

B. "Corruptly" in the Context of Obstruction of Justice

The obstruction of justice offenses maintain the following definition of "corruptly": "To act 'corruptly' as that word is used in these instructions means to act voluntarily and deliberately and for the purpose of improperly influencing, or obstructing, or interfering with the administration of justice."[141] While this definition is circular, it can be harmonized with the proper "undue advantage" language. Note that the definition includes the adverb "improperly" which modifies "influenc[e]," "obstruct[]," and "imped[e]." The logical conclusion is that there is a way to *properly* "influenc[e]," "obstruct[]," or "imped[e]" the "administration of justice."[142] Rather than create statute-specific definitions for a single term, the use of the "undue advantage" language would create a consistent definition from statute to statute. In the case of obstruction of justice, the "undue advantage" sought after will be the improper interference with the administration of justice. The differences between definitions need only be considered semantics for the correct interpretation to govern. This type of confusion was noticed even in the 1800s in the English case *County of Norfolk (Northern Division) Election Petition.*[143] The judge noted that varied definitions of "corruptly" were common, and observed that "[t]he words may have varied; different judges may have used different words, but the meaning has been always the same."[144] In the context of English election law, the "advantage" prohibited by statute was the giving of "meat and drink" with "the intention of influencing the voters at this election. . . ."[145]

The Fifth Circuit has a separate definition of "corruptly" within Section 1503. The jury instruction states, "'[C]orruptly'[means] that the defendant acted knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice."[146] Again, this definition does nothing more illuminating than reference the conduct prohibited. The Seventh Circuit's definition is no better. The Seventh Circuit's instruction reads, "corruptly, that is, with the purpose of wrongfully impeding the due administration of justice."[147] In this instruction, "wrongfully" is the word chosen to mean "acquiring an undue advantage." The Ninth Circuit, in the context of Section 1503, defines "corruptly" as an act "done with the purpose of obstructing justice."[148] Again, these are all circular definitions.

C. "Corruptly" Done Correctly: 26 U.S.C. § 7212 (a)

The Seventh Circuit, which approves different definitions for "corruptly" in its jury instructions for bribery and obstruction of justice, has a different definition for "corruptly" within 26 U.S.C. § 7212.[149] The definition for "corruptly" within Section

141. O'MALLEY, *supra* note 133, § 48.04.

142. 18 U.S.C. § 1503 (2000).

143. 21 L.T.R. 264, 269 (1869).

144. *Id.*

145. *Id.*

146. FIFTH CIRCUIT JURY INSTRUCTIONS § 2.66.

147. SEVENTH CIRCUIT JURY INSTRUCTIONS § 1503.

148. NINTH CIRCUIT MODEL JURY INSTRUCTIONS: CRIMINAL § 8.108 cmt. (2000) [hereinafter NINTH CIRCUIT JURY INSTRUCTIONS].

149. It is also the only circuit with a definition for "corruptly" within § 7212(a).

7212 is what should be applied in a consistent manner across the circuits: "The word 'corruptly' means that the act or acts were done with the purpose to secure an unlawful benefit for oneself or another by obstructing or impeding the administration of the internal revenue laws."[150] This definition perfectly captures the "unlawful benefit" or "advantage" language that would allow for one definition of "corruptly" across circuits and offenses. It also demonstrates how to construct a complete definition of "corruptly."

D. The Way to Tailor "Corruptly" to Different Statutory Contexts

The definition "with the purpose to secure an unlawful benefit for oneself or another" can be tailored to each context in which "corruptly" appears. To demonstrate this, the Seventh Circuit's definition may be broken into two parts: the first part consists of the phrase "done with the purpose to secure an unlawful benefit for oneself or another" and the second part contains the phrase "by obstructing or impeding the administration of the internal revenue laws."[151] To create a consistent definition of "corruptly" specific to each statute, committees drafting pattern instructions should consistently take the first part and add the relevant statute-specific text to form a corresponding second part. For instance, to create a definition of "corruptly" for bribery under Section 201(b)(1)(a), one would take the language "done with the purpose to secure an unlawful benefit for oneself or another" and add the phrase "by giving any thing of value to a public official with intent to influence an official act." This construction makes it explicit that one can give a public official a thing of value with intent to influence an official act as long as the purpose is not to secure an "unlawful" benefit. Breathe safely Congress, campaign contributions and logrolling, as are the current custom, are still lawful. In the context of Section 1503's "obstruction of justice" language (rather than Section 7212's parallel language "obstruction of internal revenue service laws"), a straightforward application of the above method would create the following definition: the word "corruptly" means "that the act or acts were done with the purpose to secure an unlawful benefit for oneself or another by obstructing or impeding..."[152] the "due administration of justice."[153] The "benefit" language simplifies the complicated decisions of the past. For example, the issue in the *Cintolo* decision[154] was whether a lawyer's admonition to a client to take his Fifth Amendment right during a grand jury could be "corrupt" within the meaning of Section 1503.[155] The nature of the benefit sought draws the line between corrupt conduct and lawful conduct on the part of an attorney. In *Cintolo*, William Cintolo was found guilty of attempting to confer an unlawful benefit for underworld associates by manipulating his client under a definition of "corruptly" as an intent to "obstruct or impede . . . the due

150. SEVENTH CIRCUIT JURY INSTRUCTIONS § 7212.

151. *Id.*

152. SEVENTH CIRCUIT JURY INSTRUCTIONS § 7212.

153. 18 U.S.C. § 1503 (2000).

154. *See* discussion, *supra* note 18.

155. *United States v. Cintolo*, 818 F.2d 980, 990 ("We have previously held that '[a]n effort to alter the testimony of a witness for corrupt purposes is plainly an endeavor to impede the due administration of justice.'").

administration of justice."[156] There were several amicus briefs filed that were concerned that the effect of a ruling upholding Cintolo's conviction would be to "chill" the representation of the defense bar.[157] If the court had applied the common law definition of "corruptly," those amicus briefs would not in all likelihood have been filed. The definition accepted within *Cintolo* is disturbing. The intent to "obstruct the due administration of justice"[158] is circular; it is limited only the by discretion of a federal prosecutor in making his charging decision. The definition "with intent to receive an unlawful benefit by obstructing the due administration of justice" does not create the fears expressed by the amicus. An attorney acting lawfully within his powers to help his client would have nothing to fear. This construction is supported by the structure and text of the obstruction of justice statutes. Section 1515(c) explicitly states that "[t]his chapter . . . does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding."[159] Legal representation, so long as consistent with the law and ethics codes, is not captured by this chapter via both Section 1515(c) and a correct definition of "corruptly."

VI. Exploring The Meaning of "Corruptly" Within Obstruction of Justice

Generally, the definitions of "corruptly" in the obstruction of justice statutes adopted at one time or another by various circuits illustrates the full spectrum: "with improper purpose," "with evil or wicked intent," or "with intent to obstruct justice." Yet each of these definitions is overbroad.[160] Unfortunately, the courts do not focus on the overbreadth of the definitions because the conduct at issue is manifestly prohibited by the statute regardless of which definition is applied.[161] Though this situation has given rise to the wide variances in the definition of "corruptly" between and within the circuits, jurisprudence is not well-served to use a definition merely because it does not result in an injustice in a particular situation.

The various circuits are in disagreement about the meaning of "corruptly" within Sections 1503, 1505, and 1512. Meanwhile, Congress proceeds on the assumption that the courts are using a unified definition.[162]

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156. *Id.*

157. *Id.* at 996.

158. *Id.* at 990–91.

159. 18 U.S.C. § 1515(c) (2000) (brackets omitted).

160. *See supra* note 101 *et seq.* and accompanying text (discussing the *Reeves* refutation of "with improper purpose" or "with evil or wicked motive"). There is not a decision at the federal level that quarrels with the definition used in the context of 26 U.S.C. § 7212(a) as of publication of this Article.

161. Judges have endorsed the view that because certain conduct fits all conceivable definitions of "corruptly" the instruction given in the case is not essential. *See, e.g., United States v. Reeves*, 752 F.2d 995, 1004 (Williams, J., dissenting).

162. The House Report accompanying the bill that created the present-day bribery section 201 stated that "[t]he word 'corruptly' which is also used in obstruction-of-justice statutes (18 U.S.C. 1503-1505), means with wrongful or dishonest intent." H.R. 748, 87th Cong. (1962). The amendment to 1512 that created the "corruptly persuades" language was part of the Anti-Drug Abuse Act of 1988, 102 Stat. 4181. Senator Biden, in the Congressional Record, stated the purpose of the 1988 amendment was "merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503." 134 CONG. REC. S17300, S17369 (daily ed. Oct. 21, 1988) (statement of Senator Biden). This information is found in the dissent to *United States v. Farrell*, 126 F.3d 484, 492 (3d Cir. 1997) (Campbell, J., dissenting).

In most cases, the exact definition of the term "corruptly" does not affect the outcome of a trial. Juries "know" that a person who kills a witness obstructed justice. Juries "realize" that threats to witnesses obstruct justice. Juries do not realize, for example, that a lawyer suggesting her name be removed from a memo is not obstruction of justice but professional responsibility.[163] Under the traditional common law definition,[164] jurors would not be so easily confused.

A. Section 1503 and "Corruptly"

The language of the obstruction of justice statute, 18 U.S.C. Section 1503,[165] parallels the language of 26 U.S.C. Section 7212(a).[166] Nevertheless, while the construction of "corruptly" under Section 7212(a) is consistent within and between the circuits,[167] the construction of "corruptly" within Section 1503 is in disarray.

1. "With Improper Intent" and/or "With Evil or Wicked Intent"

In *United States v. Brady,*[168] after noting the difficulties involved with the word "corruptly,"[169] the First Circuit held that "it is ordinarily sufficient to satisfy the

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The dissent in *Farrell* concluded that "[g]iven this background, it is logical to attribute to the 'corruptly persuade' language in § 1512, as adopted by Congress in 1988, the same well-established meaning already attributed by the courts to the comparable language in § 1503, i.e. 'motivated by an improper purpose.'" *Id.* So, if § 1512 is equivalent to § 1503, which is equivalent to § 1505, it seems like the meaning of "corruptly" should be consistent across each statute. As this part will demonstrate, it is not. Moreover, the preceding discussion is useful for equating the parts, but the definition advocated, i.e. "with improper motive," requires the refinements of history to adequately serve the common law purpose.

163. For a brief, but insightful, discussion of this phenomenon with respect to the Andersen verdict, see Stephen Gillers, *The Flaw in the Andersen Verdict*, N.Y. TIMES, June 18, 2002, at A25.

164. As based on English Election law, the New York Field Code, the California adoption thereof, and the modern California statutory definition.

165. The full text of the relevant provisions for the purpose of this discussion is reproduced below:

> (a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

18 U.S.C. § 1503 (2000).

166. *Compare* 18 U.S.C. § 1503 (2000) *with* 26 U.S.C. § 7212(a) (2000).

167. *See infra* Part IV.

168. 168 F.3d 574 (1st Cir. 1999).

169. The *Brady* court stated that "[t]he scienter element in the obstruction statute is the subject of more confusing case law than can be described in brief compass." *Id.* at 578. The court went on to write, "There is no hope in one opinion of providing a definitive gloss on the word "corruptly"; neither would it be wise to try." *Id.* While the latter statement is arguably untrue, the former is most definitely accurate. The problem,

'corruptly' requirement in the statute—without regard to other circumstances that might also establish corruption (e.g., offering a bribe)—if the contemnor's purpose for refusing to testify is to prevent the grand jury from locating the criminals."[170] The court then noted that "[t]his is broadly consistent with a standard instruction for the obstruction statute,[171] captures most of the malign cases, and will need qualification only in the rare cases where such a purpose may be privileged by law or otherwise."[172] *Brady* does not reference the complete definition of "corruptly,"[173] but the caveat that qualification will be required when a purpose may be privileged by law or otherwise is nothing more than "an unlawful benefit/advantage."

In *United States v. Fasolino*,[174] the defendant appealed his conviction under section 1503 claiming insufficiency of the evidence against him.[175] Fasolino twice asked someone who knew the sentencing judge to take the judge to lunch in order to secure a more favorable sentence.[176] The acquaintance of the judge outright denied each request.[177] Fasolino later spoke to a government informant and claimed that "I've got a guy going in to straighten that out. . . . My man's having lunch with [the judge] tomorrow."[178] The *per curiam* opinion defined an action "corruptly" done to be "motivated by an improper purpose."[179]The Court then found that the statements demonstrated an "improper purpose" sufficient to convict for "corruptly" endeavoring to obstruct justice.[180] The *Fasolino* definition of "corruptly," that is, "for improper purpose," continues to be used.[181]

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as we argue, is that the word "corruptly" has become unmoored from its common law roots. As the word drifts aimlessly from statute to statute, and is subsequently interpreted to mean different things, it would be difficult for one court to provide a definitive gloss using only court decisions. For that reason, we have gathered the common law history of "corruptly" in an effort to create a definitive gloss. We hope this common law history will result in a consistent meaning to the term "corruptly" within the federal criminal law.

170. *Id.* at 578–79.

171. *Id.* at 579 n.3 (The instruction the court referenced was: "The word 'corruptly' means simply having the improper motive or purpose of obstructing justice." 2 Sand et al., MODERN FEDERAL JURY INSTRUCTIONS, Instruction 46-6, at 46–24 (1998)). (This is a slight oversimplification, as Sand itself admits, see *id.* at 46-11, but it captures the thrust of the term.) It is interesting that a federal appellate court is satisfied with an "oversimplification" of the term "corruptly." Other courts have argued that a mere "improper motive or purpose" is too vague to be useful. *See* United States v. Reeves, 752 F.2d 995, 1002 (5th Cir. 1985) (holding it is "unlikely" that "corruptly" means "with an improper purpose").

172. *Brady*, 168 F.3d at 579.

173. As advocated by this Article as "with the purpose to secure an unlawful benefit for oneself or another."

174. 586 F.2d 939 (2d Cir. 1978).

175. *See id.* at 940.

176. *Id.*

177. *Id.*

178. *Id.* at 941.

179. *Id.* (citations omitted).

180. *Fasolino*, 586 F.2d at 941. The Court stated, "We agree with the government that an endeavor to exploit such a relationship [with someone who knew the judge], actual or perceived, may be found to be corrupt." *Id.*

181. *See, e.g.*, United States v. Thomson, 76 F.3d 442, 452 (2d Cir. 1996) (citing *Fasolino*, 586 F.2d at 941)). *Thompson* holds that § 1503's "corruptly" and § 1512's "corruptly" mean the same thing: "We interpret § 1512(b)'s use of that term in the same way, and, as thus interpreted, the section is not impermissibly vague." *Id.* at 452. This interpretation matches Congress's definition for § 1505's "corruptly": "As used in section 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or

On the other hand, the Second Circuit was more explicit in defining "corruptly" in *United States v. Sun Myung Moon*,[182] where the court of appeals reversed a conviction under section 1503 because the government did not adequately prove the *mens rea* of the defendant.[183] In *Sun Myung Moon*, the defendant was subpoenaed to produce several documents; the defendant knew these documents were fraudulent, but produced them nonetheless.[184] The court found that there was no evidence introduced that the defendant could have resisted production, and therefore reasonable doubt existed as to whether or not the defendant displayed a "corrupt intent."[185] In this case, submitting false documents, with "ample proof of their being falsely backdated" to a grand jury was found not to be actionable under Section 1503.[186] Using the definition of "corruptly" found in the common law history, the court would have upheld this conviction.[187] This would have been an attempt to receive an unlawful benefit—unlawful in that the knowing presentation of false writings or documents to any branch of the government is prohibited by 18 U.S.C. § 1001(a)(3). The benefit sought could be the impact of the false statements upon the grand jury investigation. Under existing definitions of "corruptly," this conduct is acceptable. The Fifth Circuit in *United States v. Haas*[188] followed a definition containing both "an improper motive" and an "evil or wicked purpose."[189] *Haas* was followed with little comment in the subsequent decision *United States v. Stratton*.[190] These decisions illustrate the persistent use of an overbroad definition among the federal circuits.

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destroying a document or other information." 18 U.S.C. § 1515(b) (2000). A natural reading of this sort of definition would be to extend it to all uses of the term "corruptly" within this chapter of Title 18. Nevertheless, Congress demonstrated its ability to extend definitions to the entire chapter of Obstruction of Justice offenses in 18 U.S.C. § 1515(c): "This chapter [18 U.S.C.S. §§ 1501 *et seq.*] does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." 18 U.S.C. § 1515(c) (2000). That Congress explicitly did not extend this definition of "corruptly" to the entire chapter leaves open the construction that "corruptly" means something different in sections other than 1505. The Congressionally-stated purpose of the § 1515 definition was to set aside the decision in *United States v. Poindexter*. 951 F.2d 369, 379 (D.C. Cir. 1991) (holding "corruptly" in the context of § 1505 is unconstitutionally vague). *Poindexter* is discussed *infra* at Part V(b)(2). Sadly, Congress did not take that opportunity to deal with the "vagueness" of the concept throughout Title 18.

182. 718 F.2d 1210 (2d Cir. 1983).

183. *Id.* at 1236.

184. *Id.*

185. *Id.* ("Whether or not [the defendant] could have resisted production, as the government argues, evidence of this government theory was not before the trial jury. Without it, a reasonable doubt as to [the defendant's] *mens rea* exists.").

186. *Id.* ("[T]he government answers that Kamiyama's corrupt intent was adequately demonstrated by the facts that he could have resisted production of the documents on Fifth Amendment grounds and that he vouched for the accuracy of the documents in his testimony before the grand jury."). The court found this unpersuasive as there was no proof on the record he had vouched for the accuracy of the documents. *See infra* note 185.

187. Had the questions posed been: Does a citizen have a duty not to present false documents to a grand jury? Did the defendant know that the documents were false? If the answer was "yes" to both, a case could be made that the defendant corruptly endeavored to obstruct justice.

188. 583 F.2d 216 (5th Cir. 1978).

189. *Id.* at 220.

190. *See* 649 F.2d 1066, 1075 (5th Cir. 1981) ("However, in *United States v. Haas*, 583 F.2d 216, 219–21 (5th Cir. 1978), *cert. denied*, 440 U.S. 980, 99 S. Ct. 1788, 60 L. Ed. 2d 240 (1979), this court held that the words "corruptly did endeavor to" the language used in the indictment in the case at bar was indeed sufficient to allege a knowing, intentional and willful act.").

2. "With Intent to Obstruct Justice"

The Fourth Circuit equated "corruptly" with "the intent to influence, obstruct, or impede [a] proceeding in its due administration of justice."[191] In *United States v. Littleton*,[192] the court overturned a conviction for perjury and obstruction of justice on the grounds that the false testimony was not "relevant." While the perjury reversal is correct, the fact that the court drew the conclusion that the obstruction of justice charge cannot stand is odd, at least under a correct view of "corruptly."[193] The majority view was that the government did not extract from Littleton her exact intent in regards to her "allegedly" false testimony.[194] This perspective drew a strong dissent:

> Carrie Littleton testified falsely at a suppression hearing before the district court that her son called her at work at 3:15 p.m. on July 21, 1992, and requested her to come to the police station and obtain a lawyer for him and that she arrived at the police station at 3:45 p.m. for that purpose. By giving this testimony, Littleton intended to corroborate her son's position that during detention he had requested a lawyer and therefore his statements, incriminating him in a murder, were taken in violation of his Sixth Amendment right to counsel. Littleton's testimony was intended to support her son's position.[195]

It is not inappropriate to state Littleton "intended to corroborate" the position of her son; the jury did find her guilty of obstruction, which does require intent.[196] How the majority managed to overlook the finding of intent and claim Littleton had no idea how her testimony might help her son is beyond comprehension.[197] Returning yet again to

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191. United States v. Grubb, 11 F.3d 426, 437 (4th Cir. 1993).

192. 76 F.3d 614 (4th Cir. 1996).

193. *See id.* at 618. The court notes, "We reach the inescapable conclusion that Littleton testified to nothing at the suppression hearing that could have conceivably influenced the district court to suppress her son's confession. Her entire testimony was, therefore, immaterial to the court's inquiry, and, as a result, her perjury conviction must be reversed." *Id.* This is an obvious point of statutory construction in that the perjury statute states "Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration. . . ." 18 U.S.C. § 1623(a) (West Supp. 1995). Since § 1623 requires the false statements to be "material" and the court determined that her statements were not, perjury must fail.

This finding should not automatically kick the obstruction of justice charges. False statements, against the oath undertaken by a witness, would serve as the responsibilities violated by a "corruptly" acting witness. Since her statements were intended to obstruct justice (an inference made based on the jury finding that she had done so), but could not based on their apparent non-materiality, under the common law meaning of "corruptly" she could still face obstruction of justice charges. As many cases have pointed out, it is the "endeavour" that matters; it is not important for obstruction of justice charges whether or not the "endeavour" was successful. In this case, a correct understanding of the word "corruptly" would have allowed a successful prosecution against someone who intended to mislead a grand jury but merely was not smart enough to fashion "material" lies.

194. *Littleton*, 76 F.3d at 619. ("The government's evidence was likewise insufficient to permit the jury to ascertain that Littleton intended to obstruct justice. There was, for example, no direct or circumstantial evidence that Littleton had contrived with Kelley, his attorney, or any of the defense witnesses to fabricate her story.") One must wonder why the court felt Littleton needed to contrive with anyone to make up a story.

195. *Id.* at 620 (Niemeyer, J., dissenting).

196. *Id.*

197. The majority stated, "That Littleton understood the purpose of the suppression hearing, was aware of the importance of the evidence that Kelley sought to suppress, and desired the district court to grant her son's motion, *does not establish that she understood how her testimony would assist in accomplishing that*

the two step analysis: What were her duties? Answer: she presumably took an oath to tell the truth. Next question: Did she tell the truth? Answer: No. Why? She intended to secure an advantage for her son. Was it a "lawful advantage"? No. Verdict: She "corruptly" endeavored to influence the due administration of justice.

The Fourth Circuit also rendered a decision whose impact softened the standard of intent required for conviction under Section 1503. In *United States v. Neiswender*,[198] the court determined that "[i]n our view, the defendant need only have had knowledge or notice that success in his fraud would have likely resulted in an obstruction of justice. Notice is provided by the reasonable foreseeability of the natural and probable consequences of one's acts."[199] The defendant in *Neiswender* had attempted to commit a fraud (by claiming he could influence a juror in a pending trial against former Maryland Governor Marvin Mandel), but had hoped to not obstruct justice.[200] Neiswender was convicted because he should have known "the natural and probable consequences" of his acts, but he admitted his fraud was just that, a fraud.[201] He had no designs to actually influence a juror; he had designs to make Mandel's lawyer *think* he could for money.[202]

In *United States v. De La Rosa*,[203] the court stated that an element of a conviction under Section 1503 is "that the defendant acted corruptly with the specific intent to influence, obstruct, or impede that proceeding in its due administration of justice."[204] *De La Rosa* does not actually define "corruptly" —the court merely concluded that by rearranging the words of the statute a clearer explanation could be reached.[205]

The Sixth Circuit primarily follows a general and specific intent-based definition of corruptly. In *United States v. Collis*,[206] the court stated the intent element of Section 1503 prosecution to be that "the defendant acted corruptly with the intent of influencing, obstructing, or impeding the proceeding in the due administration of justice."[207] The court rephrased: "the endeavor must have the 'natural and probable effect' of interfering with the due administration of justice."[208] The *Collis* court also held there exists a "knowledge" element to a Section 1503 prosecution.[209]

In *United States v. Mullins*, the court followed a definition of "corruptly" requiring proof of both "general intent of knowledge" and "specific intent of purpose to obstruct."[210] *United States v. Jeter*[211] is the case generally cited within the Sixth

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objective." *Id.* at 619 (emphasis added). The jury's conclusion entails a finding that Littleton endeavored to obstruct the grand jury (to convict him they must have determined she had understood her action could help her son; her actions involved false statements).

198. 590 F.2d 1269 (4th Cir. 1979).

199. *Id.* at 1273.

200. *Id.* at 1271.

201. *Id.* at 1273.

202. *Id.* at 1275.

203. 171 F.3d 215 (5th Cir. 1999).

204. *Id.* at 220-21.

205. *Cf.* the Fifth Circuit's treatment of "corruptly" within 26 U.S.C. § 7212, *supra* Part V.C.

206. 128 F.3d 313 (6th Cir. 1997).

207. *Id.* at 318.

208. *Id.*

209. *Id.*

210. 22 F.3d 1365, 1369 (6th Cir. 1994) (citations omitted).

211. 775 F.2d 670 (6th Cir. 1985).

Circuit for this proposition.[212] *Jeter* also demonstrates that the Sixth Circuit tends to follow the Second Circuit with their construction of "corruptly" involving both a general and specific intent.[213] "Specific intent" when used in this context means whatever the court decides it means. The actual intent of Section 1503 is "corruptly," while the conduct is "endeavor," and the result is "obstruct justice."[214] Here again, the court defines "corruptly" as "corruptly" and moves on.[215] "Prosecutors and courts can make "specific intent to obstruct" anything they want, regardless of whether it is actually "corrupt" or not.[216]

In *United States v. Cueto*,[217] the Seventh Circuit noted approvingly jury instructions that defined "corruptly" as:

> to act with the purpose of obstructing justice. The United States is not required to prove that the defendant's only or even main purpose was to obstruct the due administration of justice. The government only has to establish that the defendant should have reasonably seen that the natural and probable consequences of his acts was [sic] the obstruction of justice. Intent may be inferred from all of the surrounding facts and circumstances. Any act, by any party, whether lawful or unlawful on its face, may violate Section 1503, if performed with a corrupt motive.[218]

These instructions require conviction if a defendant should have "reasonably seen" that his actions could obstruct justice. Prosecutions under this standard could reach almost anyone. The court further noted that "[o]therwise lawful conduct, even acts undertaken by an attorney in the course of representing a client, can transgress § 1503 if employed with the corrupt intent to accomplish that which the statute forbids."[219] Close, but again too far away. The law should not be reduced to something on par with horseshoes and hand-grenades. The statute reads, "Whoever . . . corruptly . . . endeavors . . . to . . . obstruct . . . justice."[220] An excellent example of the inherent flaw in these definitions of "corruptly" within Section 1503 comes from the *Cueto* case itself. In *Cueto*, an undercover agent, ostensibly for the purposes of gathering evidence, suggested to the owner of an illegal gambling operation that a bribe might help the investigation go away.[221] Using the definitions accepted in *Cueto* itself (and *arguendo*,

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212. *Id.* at 679 ("The obstruction of justice statute possesses a limited standard of culpability that confines its coverage to constitutionally unprotected activity, which stems from its explicit *mens rea* requirement that a person must "corruptly" endeavor to interfere with the due administration of justice. Thus one must impede the due administration of justice with the general intent of knowledge *as well as the specific intent of purpose to obstruct.*" (citation omitted)).

213. *See id.* at 675 (citing United States v. Cioffi, 493 F.2d 1111, 1118-19 (2d Cir. 1974)).

214. *See Mullins*, 22 F.3d at 675.

215. *See id* (demonstrating the title of this Article, "The Lewis Carroll Offense").

216. *See* note 1 for explanation.

217. 151 F.3d 620 (7th Cir. 1998).

218. *Id.* at 630-31.

219. *Id.* at 631.

220. 18 U.S.C. § 1503 (2000).

221. *See* 151 F.3d at 625 ("In an attempt to gather evidence, Robinson, who was present at the VFW raid, indicated that Venezia could avoid further interruptions of his illegal gambling operation if he were to offer a bribe to discourage the investigation and the interference, and he suggested to Venezia that they meet.").

that the FBI agent knew a grand jury investigation was going on), it does not matter that the agent's "purpose" was to gather evidence; a "natural and probable" consequence of suggesting bribery as a method to slow an investigation is that bribery might indeed occur. That the target might consider other bribes is foreseeable. The act of bribery does not necessarily have to be in the manner suggested by the agent; the illegal gambling owner might discover a more appealing target to bribe than that suggested by the FBI agent. Seemingly, what matters in the Seventh Circuit is not actual intent, but an imputed version of it. While the odds of a successful prosecution of an FBI agent under the previous fact pattern are slim, the fact is that it could happen. Under the common law definition of "corruptly," it would be inconceivable.[222]

In *Cueto*, the defendant and *amicus* argued that extending Section 1503 to the conduct of defense attorneys would have a chilling effect on representations.[223] The court wisely noted that "[i]t is true that, to a certain extent, a lawyer's conduct influences judicial proceedings, or at least attempts to affect the outcome of the proceedings. However, that influence stems from a lawyer's attempt to advocate his client's interests *within the scope of the law.*"[224] Acting within the scope of the law necessarily means that the benefit sought is not an "unlawful" one. The definition of "corruptly" involving an effort to secure "an unlawful benefit for one's self or another" would present no issue in similar cases.

The Eighth Circuit follows a general/specific intent requirement for convictions under Section 1503. In *United States v. Jackson,*[225] the court approved a jury instruction reading, in part:

> To establish the offense charged in each count of the indictment, the government must prove that Cleo Jackson acted corruptly and with the specific intent of influencing Mrs. Turner and/or Mr. Greer in the discharge of their duties and to influence, obstruct and impede the due administration of justice. In this case, the word "corruptly" means willfully, knowingly, and with the specific intent to influence a juror to abrogate his or her legal duties as a petit juror.[226]

The court rejected the appellant's contention because the instruction did not explicitly define "corruptly" as "improper motive or with bad or evil or wicked

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222. The Seventh Circuit has approved a definition of "corruptly" involving both intent to obstruct the proceedings and an intent to receive an unlawful benefit. *See* United States v. Machi, 811 F.2d 991, 996 (7th Cir. 1987) (defining "corruptly" to mean "with 'a wrongful design to acquire some pecuniary or other advantage' . . . [and] that the act must be done with the purpose of obstructing justice") (citations omitted).

223. *See Cueto*, 151 F.3d at 631-32. "The Association [National Association of Criminal Defense Lawyers] believes that this type of sweeping prosecution will sufficiently chill vigorous advocacy and eventually destroy the delicate balance between prosecution and defense which is necessary to maintain the effective operation of the criminal justice system." *Id.* at 632. The court's response mirrors our own. We are not attempting to create a system where lawyers have carte blanche to act illegally under the guise of legal representation. As the court explained, "If lawyers are not punished for their criminal conduct and corrupt endeavors to manipulate the administration of justice, the result would be the same: the weakening of an ethical adversarial system and the undermining of just administration of the law." *Id.*

224. *Id.* (emphasis in original).

225. 607 F.2d 1219 (8th Cir. 1979).

226. *Id.* at 1221.

purpose. . . ."[227] Affirming its specific intent definition, the court concluded that they were "satisfied that the issue of specific intent in the context of this case was properly submitted to the jury and the motion for a new trial was appropriately denied."[228]

B. Section 1505 and Corruptly

Section 1505[229] has resulted in relatively few prosecutions in recent years, but the few that have occurred impacted the current discourse involving "corruptly." The two most influential cases in this area come from the Iran/Contra Affair and the prosecutions of Oliver North and John Poindexter.[230] The result of these cases was that "corruptly" was unconstitutionally vague in the context of Section 1505. Both cases contained strong dissents.[231] The *Poindexter* holding that "corruptly" was unconstitutionally vague resulted in a change to the federal code to explicitly override the decision.[232] These two cases are illustrative of the debate that rages today.

1. *United States v. North*: The D.C. Circuit Commits a Lewis Carroll Offense

The story of the Iran/Contra Affair that lead to the *Poindexter* and *North* decisions is beyond the scope of this Article. The decisions have import to the topic at hand because both have contributed to the current understanding of "corruptly." The decision involving Oliver North's contributions, spanning 117 pages, exemplifies the treatment courts usually give to the term "corruptly."[233] Interestingly enough, in *United States v. Poindexter*,[234] the D.C. Circuit recited the definition it approved (but did not use) in the *North* decision on the way to its determination that the term "corruptly" was

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227. *Id.*

228. *Id.* at 1222.

229. The complete text of 18 U.S.C. § 1505 reads:

> Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act [15 U.S.C.S. §§ 1311 et seq.], willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or
>
> Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—
>
> Shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1505 (2000).

230. *See* United States v. North, 910 F.2d 843 (D.C. Cir. 1990); United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991).

231. *See North*, 910 F.2d at 913 (Wald, C.J., dissenting in part, and Silberman , J., concurring *dubitante* in part and dissenting in part); *Poindexter*, 951 F.2d at 388 (Mikva, C.J., dissenting in part).

232. *See infra* note 237.

233. *North*, 910 F.2d at 843.

234. 951 F.2d at 379.

unconstitutionally vague and failed "to provide constitutionally adequate notice that it prohibits lying to the Congress."[235] This strange result motivated Congress to enact a definition of "corruptly" into 18 U.S.C. § 1515 that made clear that "corruptly" could reach "personal" conduct as well as conduct which "influenc[es] another."[236] Courts have later explained that the basic reason for this change was to make it clear that lying to Congress was covered under the statute.[237] In its attempt to prevent a decision like *Poindexter* from happening again, Congress missed the proverbial 'forest from the trees' and enacted an incomplete definition of "corruptly" which would render the term meaningless in certain circumstances.[238]

To understand the trouble that "corruptly" has given courts, the D.C. Circuit's opinion in *North* serves as a guide. As in most of the interesting cases on this topic, a dissenting voice examines the majority's reasoning with a clarity not found in the controlling opinion. In *North*, the majority stated that "[b]ecause Congress is not shown to have intended otherwise, 'corruptly' should be understood by a jury and by a court to have its usual meaning. In general, common words in statutes should be given their common or popular meanings, in the absence of congressional definition."[239] The problem with this point of view is demonstrated when the word is a term of art, entitled to its common law roots rather than its "common or popular" meaning.[240] The court turned to a "standard dictionary" for a definition of "depraved, evil: perverted into a state of moral weakness or wickedness . . . of debased political morality: characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements."[241] Usually, definitions of this sort (taken from non-legal soil) are unhelpful—defining "corruptly" as "evil" or "perverted into a state of moral weakness" or "other improper political or legal transactions" hardly casts an

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235. *Id.*

236. 18 U.S.C. § 1515(b) (2000) ("As used in section 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.").

237. *See* United States v. Brady, 168 F.3d 574, 578 n.2 (1st Cir. 1999) ("As explained on the floor of Congress, the provision was to make clear that lying or otherwise obstructing Congress was covered by section 1505, and to counter any suggestion of undue vagueness made in United States v. Poindexter.") (citations omitted)); *see also* 142 CONG. REC. S11605-02, S11607-608 (daily ed. Sept. 27, 1996).

238. 18 U.S.C. § 1515(b) states that "'corruptly' means acting with an improper purpose . . . including making a false or misleading statement. . . ." 18 U.S.C. § 1515(b) (2000).

239. *North*, 910 F.2d at 881 (citations omitted).

240. In *Evans v. United States*, the Court stated,

> It is a familiar "maxim that a statutory term is generally presumed to have its common-law meaning." *Taylor v. United States*, 495 U.S. 575, 592 (1990). As we have explained: "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette v. United States*, 342 U.S. 246, 263 (1952).

504 U.S. 255, 259–60 (1992).

Finally, *Evans* cites Justice Frankfurter: "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Id.* at 260 n.3 (citing Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM.L. REV. 527, 537 (1947)). *But see* Taylor v. United States, 495 U.S. 575 (1990) (stating burglary does not keep common law soil).

241. *North*, 910 F.2d at 881 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 512 (1976)).

illuminating light on the subject.[242] The court offered another definition, this time from a legal dictionary: "the intent to obtain an improper advantage for oneself or someone else, inconsistent with official duty and the rights of others."[243] Searching for definitions of legal terms within a legal dictionary provides more useful definitions, at least in the case of "corruptly." Having mentioned the common law definition, the court shifts gears to discuss how other appellate courts have treated 18 U.S.C. § 1503's "corruptly" requirement.

The *North* court noted approvingly that other courts, in the context of Section 1503, have defined "corruptly" as "nothing more than an intent to obstruct the proceeding."[244] Unfortunately, this definition creates a reading of Section 1503 that is circular; this contention is illustrated by using the omnibus provision, "whoever [intending to obstruct the proceeding] . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice. . . ."[245] The majority distinguished the application of a "per se" presumption of "corrupt actions" within Section 1503 from Section 1505 by concluding that the "assert[ion] that all endeavors to influence, obstruct or impede the proceeding of congressional committees are, as a matter of law, corrupt—would undoubtedly criminalize some innocent behavior."[246] Moreover, the court noted that "[n]o one can seriously question that people constantly attempt, in innumerable ways, to obstruct or impede congressional committees."[247] This distinction is untenable. While the court states, "Very few non-corrupt ways to or reasons for intentionally obstructing a judicial proceeding leap immediately to mind," at least one method does come to mind: a witness within a judicial proceeding that exercises his Fifth Amendment right to remain silent.[248] This witness intends to obstruct or impede the judicial proceeding by remaining silent; presumably, if the witness spoke, he might incriminate himself, hence clearing the way for a quicker judicial proceeding. This conduct, however, is not an attempt to secure an "unlawful benefit" but to exercise a lawful right, namely the right against self-incrimination contained within the Fifth Amendment.[249] Under the definition of "corruptly" the majority adopts in the Section 1503 context, this witness would fall within the reach of Section 1503 for exercising a constitutional right. Juxtaposing this hypothetical with an actual "corrupt" requirement, only a witness that does not have a right to remain silent would be swept into the coverage of Section 1503. That witness would be seeking an unlawful benefit (silence without a compelling reason in a judicial proceeding to avoid prosecution) for himself or another.

North was challenging this area because he felt that a mistake-of-law defense should have been presented to the jury based on the term "unlawful" within the offered

242. As the Tenth Circuit noted in *Cartwright v. Maynard*, "Vague terms do not suddenly become clear when they are defined by reference to other vague terms." 822 F.2d 1477, 1489 (10th Cir. 1987) (en banc).

243. *North*, 910 F.2d at 882 (citing BALLENTINE'S LAW DICTIONARY 276 (3d ed. 1969)).

244. *Id.* at 822.

245. This definition is the result of substituting the phrase "intending to obstruct the proceeding" for "corruptly" as found in 18 U.S.C. § 1503.

246. *North*, 910 F.2d at 882.

247. *Id.*

248. *Id.*

249. U.S. CONST. amend. V.

definition of "corruptly."[250] This contention causes a major split between the majority and the dissent.[251] Since North declared that then-President Reagan authorized his actions, had Reagan been compelled to testify, North argues, the President's authorization would negate the intent covered by the term "corruptly."[252] The court held that "a person who 'corruptly' intends to obstruct a pending investigation has the requisite criminal intent under 18 U.S.C. § 1505. The person need not know that his actions are unlawful in order to violate the statute."[253]

Judge Silberman, who took the unusual position of both concurring *dubitante* and dissenting in part, explains with clarity the analysis that must be undertaken to understand the term "corruptly" in the Section 1505 context. Judge Silberman begins from the seemingly obvious premise that the term "'corruptly' in Section 1505 means *something*."[254] Moreover, he noted that "'corruptly' modifies the word 'endeavor'—by describing either the defendant's means or his motive or both—and thereby adds something substantive to the statute."[255] Following the majority's method, the dissent cites Webster's dictionary and a legal dictionary for definitions of "corruptly."[256] Insightfully, the dissent states, "It is hard to believe that anyone could quarrel with [those definitions] . . . but there are cases—primarily dealing with Section 1503—which interpret 'corruptly' to refer to the defendant's motive but then inconsistently say that the bad or evil motive denoted . . . means nothing more than an intent to obstruct the proceeding."[257] The dissent's commentary on these cases bears repetition: "If the statute says that it is a crime if one 'corruptly endeavors to obstruct [an inquiry or proceeding]' it simply makes no sense to construe that to mean only that one must do it with the intent to obstruct the inquiry or proceeding."[258] The value of this insight should not be downplayed; the dissent cited opinions from the Sixth Circuit,[259] Ninth Circuit,[260] Tenth Circuit,[261] and arguably the Fourth Circuit[262] that define "corruptly" in such a manner. It is tough to argue with the dissent's point that "the word 'endeavor'

250. *North*, 910 F.2d at 889.

251. The dissent challenges the majority's disposition of the term "corruptly," but as a means to its ultimate end. The gist of the dissent's view on this matter is that the purpose and means of the defendant are important. *See id.* at 943–44.

252. *See id.* This analysis is substantively correct, but technically North was charged as an aider and abettor under 18 U.S.C. § 2 for the actions of Poindexter and Casey. If their actions were not "corrupt," then North could not be convicted for aiding and abetting a "non-corrupt" obstruction of a proceeding.

253. *Id.* at 889.

254. *North*, 910 F.2d at 940 (Silberman, J., concurring *dubitante* in part and dissenting in part) (emphasis in original).

255. *Id.*

256. *Id.* ("According to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 'corruptly' is the adverbial form of the adjective 'corrupt,' meaning 'depraved, evil'. . . . Also instructive is the definition in BLACK'S LAW DICTIONARY at 311 (5th ed. 1979) that the word corruptly 'when used in a statute . . . generally imports a wrongful design to acquire some pecuniary or other advantage.'").

257. *Id.*

258. *Id.* at 941.

259. United States v. Jeter, 775 F.2d 670, 679 (6th Cir. 1985).

260. United States v. Laurins, 857 F.2d 529, 536–37 (9th Cir. 1988).

261. United States v. Ogle, 613 F.2d 233, 238 (10th Cir. 1979).

262. United States v. Mitchell, 877 F.2d 294, 299 (4th Cir. 1989).

in the statute already requires that the defendant intend to obstruct the inquiry or proceeding."[263]

Resorting again to strict statutory construction, the dissent buttresses its point by "focusing on the term 'influence' in Section 1505, which appears in a parallel construction with 'obstruct' and 'impede.'"[264] Noting that it is "possible to be charged with 'corruptly endeavoring to influence' a congressional inquiry," the dissent concludes that the statement "must require something more than merely acting with the purpose of influencing the congressional committee."[265] If the charge meant that one only had to endeavor to influence the committee, the dissent wisely concluded that "we might as well convert all of Washington's office buildings into prisons."[266] The dissent finally discusses nuances of what it means to "corruptly" endeavor, including whether the term reflects a purpose, means, or perhaps both.[267]

2. The *Poindexter* Case: The D.C. Circuit Pushes "Corruptly" Off the Wall

In *United States v. Poindexter*,[268] the majority held that the term "corruptly" was "too vague to provide constitutionally adequate notice that it prohibits lying to the Congress."[269] John Poindexter was convicted of, *inter alia*, violating 18 U.S.C. § 1505 for "corruptly obstruct[ing] the Congress's inquiry."[270] The court strangely determined that "'corruptly influencing' a congressional inquiry does not at all clearly encompass lying to the Congress. . . ."[271] The majority engaged in a discussion of "transitive" and "intransitive" forms of the word "corruptly," eventually concluding that the only possible interpretation of "corruptly" (one that disallows a person individually to obstruct a proceeding) within Section 1505 would not be enough to reach Poindexter's conduct.[272] The interpretation the majority offers makes little sense; it is easy enough to say that a person, by choosing to lie to Congress, corrupts himself. The majority seemingly does not believe that a person may do such a thing. The dissenting opinion,

263. *North*, 910 F.2d at 941.

264. *Id.* at 942.

265. *Id.*

266. *Id.*

267. This section of the dissent would constitute an advanced class in statutory interpretation, but is beyond the scope of this Article. Since this Article is attempting to solidify a consistent definition among courts and statutes, discussing whether a defendant must have a "corrupt" purpose, means, or both would be over-enthusiastic. For Judge Silberman's discussion, see *North*, 910 F.2d at 942–45.

268. United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991).

269. *Id.* at 379.

270. *Id.* at 372. The specific acts covered by this count included, "making false statements . . . participating in the preparation of a false chronology, and deleting from his computer information regarding the arms shipment." *Id.*

271. *Poindexter*, 951 F.2d at 378.

272. *Id.* at 379. The majority notes:

> Narrowing the transitive interpretation to include only 'corrupting' another person by influencing him *to violate his legal duty* would both take account of the context in which the term 'corruptly' appears and avoid the vagueness inherent in words like 'immorally.' But that interpretation, which for convenience we shall refer to as the 'subornation' interpretation of the statute, would not cover the conduct of Poindexter at issue on this appeal.

Id.

citing the definition of "corruptly" the *North* majority mentioned, was dismissed in a curt footnote stating:

> Our dissenting colleague suggests that as he would redefine the vague term corruptly—"i.e. acting in a manner inconsistent with a legal duty"—it is sufficiently clear to pass constitutional muster. The question before the court is not, however, whether we can now rewrite the statute to make it clear, but whether the defendant was fairly on notice of its meaning when he acted.[273]

To construe merely offering a definition of a statutory term as "rewrit[ing] the statute," the majority concludes that defining terms of art is not the province of courts.

The dissent uses far less space in the federal reporter refuting the majority's take on "corruptly." The dissent defines "corruptly" as "acting in a manner inconsistent with a legal duty."[274] Simply reciting the fact that "Poindexter lied to Congress about the existence of the first Presidential finding and then later destroyed it" allowed the dissent to easily conclude that "[t]his was a clear violation of his oath of office, his oath to Congress, and his duty not to lie."[275] In an excellent example of elemental analysis,[276] the dissent makes clear the different possible charges under Section 1505, and rightly concludes that Congress could not have "meant to prohibit attempts to obstruct justice by influencing someone else to violate a legal duty, but did not mean to prohibit attempts to obstruct justice by violating one's own legal duty."[277] The phrase "inconsistent with a legal duty" is not inconsistent with the "unlawful/improper advantage or benefit" language advocated by this Article; the presence of a legal duty implies a certain level of conduct. If that conduct is intentionally not followed (violation of an oath, for instance), the act of violating the duty is an attempt to receive an unlawful advantage or benefit by acting in opposition to the expectation society has of that conduct. Poindexter easily violated the definition both supported by common law and advocated by this Article.

As a result of this opinion, Congress passed 18 U.S.C. § 1515, part (b) of which reads, "As used in Section 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information."[278] Congress, in an effort to counteract the *Poindexter* holding, enacted an incomplete definition of "corruptly." Both the *North* majority, and the dissent in *Poindexter*, concluded that "corruptly" should mean "the intent to obtain an improper

273. *Id.* at 380 n.1 (citations omitted).

274. *Id.* at 391 (Mikva, C.J., dissenting in part).

275. *Id.*

276. *Poindexter*, 951 F.2d at 391. ("A person can violate section 1505 by corruptly (i.e. acting in a manner inconsistent with a legal duty) obstructing, influencing, or impeding a congressional inquiry; a person can violate the statute by using threats in a manner that obstructs, influences, or impedes a congressional inquiry; and a person can violate the statute by using force to obstruct, influence, or impede a congressional inquiry. None of these uses is inconsistent with the statute and none involves a defendant influencing *another* person to violate his legal duty in a manner that obstructs a congressional inquiry.").

277. *Id.*

278. 18 U.S.C. § 1515 (2000). *See* False Statements Accountability Act of 1996, P.L. 104-292, 110 Stat 3459 (redesignated § 1515(b) as § 1515(c); and added a new § 1515(b)).

advantage for oneself or someone else, inconsistent with official duty and the rights of others."[279] Congress, however, missed the chance to fully correct the problems caused by the misunderstanding of "corruptly."

C. Section 1512(b) and Corruptly

The perspective of the federal courts on the meaning of the phrase "corruptly persuades" within 18 U.S.C. § 1512(b)[280] is amply shown by two decisions. In 1996, the Second Circuit held in *United States v. Thompson* that the meaning of "corruptly" within section 1512(b) is analogous to Section 1503 and means "with an improper purpose."[281] In the 1997 decision *United States v. Farrell*,[282] the Third Circuit determined that "corruptly" in Section 1503 is different than "corruptly" in Section 1512(b), but hesitated to provide an abstract meaning of the term.[283] "Corruptly," they wrote, in the context of Section 1503 means an act done "with improper motive."[284] In regard to Section 1512's "corruptly persuades" language, the *Farrell* majority observed that, "the inclusion of 'corruptly' in section 1512(b) [necessarily implies] that an individual can 'persuade' another not to disclose information to a law enforcement official with the intent ofhindering an investigation without violating the statute, i.e.,

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279. *See North*, 910 F.2d at 881–82; *Poindexter*, 951 F.2d at 391 (Mikva, C.J., dissenting in part).

280. The full text of 1512(b) is:

> (b) Whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--
>
> (1) influence, delay, or prevent the testimony of any person in an official proceeding;
>
> (2) cause or induce any person to—
>
> (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
>
> (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
>
> (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
>
> (D) be absent from an official proceeding to which such person has been summoned by legal process; or
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings;
>
> shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1512(b) (2000).

281. 76 F.3d 442, 452 (2d Cir. 1996).

282. 126 F.3d 484 (3d Cir. 1997).

283. *Id.* at 490. ("[W]e do not find the use of 'corruptly' in § 1503 sufficiently analogous to its use in § 1512(b)'s "corruptly persuades" clause to justify construing the terms identically.") This brings up an interesting split among the circuits, as Senior Circuit Judge Campbell pointed out in his dissent in *Farrell*: "Given this background [legislative history], it is logical to attribute to the 'corruptly persuade' language in § 1512, as adopted by Congress in 1988, the same well-established meaning already attributed by the courts to the comparable language in § 1503, i.e. 'motivated by an improper purpose.'" *Id.* at 492 (Campbell, J., dissenting). As Judge Kearse pointed out in *United States v. Thompson*, "Section 1512(b) does not prohibit all persuasion but only that which is 'corrupt[].' The inclusion of the qualifying term 'corrupt[]' means that the government must prove that the defendant's attempts to persuade were motivated by an improper purpose." 76 F.3d 442, 452 (2d Cir. 1996).

284. *See Farrell*, 126 F.3d at 490 ("This interpretation of "corruptly" in § 1503 [as the intent element meaning 'with an improper purpose'] is entirely appropriate given the structure of that statute.").

without doing so 'corruptly.'"[285] *Farrell* held that "corruptly persuades" does not "include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain... from volunteering information to investigators."[286] The court noted that Section 1515(c) removes "lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding" from the reach of the entire obstruction of justice section, including 1512(b).[287] Moreover, the court stated that "we do not think the attorney-client situation constitutes the only type of noncoercive persuasion to withhold information that falls outside the purview of § 1512(b)(3)."[288] The court's conclusion is that members of a conspiracy may persuade one another not to testify against the conspiracy, so long as they do not do so corruptly.[289] Using the common law definition of "corruptly"—"with the purpose to secure an unlawful benefit for oneself or another"—Farrell was guilty because he attempted to secure a benefit he was not entitled to (another person's silence) in order to "hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense."[290]

D. Let the Jury Decide: Cases When "Corruptly" Does Matter

The Eleventh Circuit, in *United States v. Brenson*,[291] rejected a claim that "corruptly" was unconstitutionally vague within Section 1503. The manner in which they did so created a split within the jurisprudence of the Eleventh Circuit.[292] In *Brenson*, a member of a sitting grand jury (i.e. Brenson) described the contents of the proceedings to a person he knew to be an associate of the target of the proceeding.[293] Brenson disclosed the contents of the grand jury in "an attempt to get a date with [the target of the investigation's] daughter."[294] He was convicted of both conspiracy to obstruct justice and obstruction of justice.[295] On appeal, Brenson contended that the

285. *Id.* at 489.

286. *Id.* at 488.

287. *Id.* (citing 18 U.S.C. 1515(c) (2000)).

288. *Id.*

289. *Id.* at 489.

290. 18 U.S.C. § 1512(b)(3) (2000).

291. 104 F.3d 1267 (11th Cir. 1997).

292. For instance, the Eleventh Circuit, in *United States v. Barfield*, held that "corruptly" had nothing to do with personal gain (i.e. seeking an improper advantage). 999 F.2d 1520, 1525 (11th Cir. 1993). The court wrote:

> The district court concluded that Barfield did not act corruptly in large part because the government never showed that Barfield stood to gain personally from the obstruction. According to Eleventh Circuit precedent, this is not the appropriate standard with which to evaluate the 'corruptly' requirement. As previously discussed, 'the government must show that the defendant knowingly and intentionally undertook an action from which an obstruction of justice was a reasonably foreseeable result.

Id. (citations omitted). *Barfield* illustrates the Eleventh Circuit reading "corruptly" out of the statute by making it mean "endeavor." *But see* United States v. Banks, 942 F.2d 1576, 1579 (11th Cir. 1991) (holding that "legitimate and well-founded fear for his own safety and that of members of his family" as a reason for refusing to testify in front a grand jury is not "corrupt[ ].").

293. *Brenson*, 104 F.3d at 1273.

294. *Id.*

295. *Id.* at 1274.

term "corruptly" was unconstitutionally vague.[296] The Eleventh Circuit panel denied his challenge and cited approvingly a case defining "corruptly" in the context of 26 U.S.C. § 7212(a).[297] The Eleventh Circuit used a decision involving 26 U.S.C. § 7212(a) in defining "corruptly" as "forbidding those acts done with the intent to secure an unlawful benefit either for oneself or for another" to overcome a vagueness challenge to "corruptly" in Section 1503.[298] This extension of 7212(a) has passed largely unnoticed, as the jury instruction approved in *Brenson* stated that:

> Corruptly describes the specific intent of the crime. Generally, the government must show that the defendant . . . knowingly and intentionally [undertook] an action from which an obstruction of justice was a reasonably foreseeable result.
>
> Although the government is not required to prove that the defendant . . . had the specific purpose of obstruction of justice, it must, the government, must establish that the conduct was prompted at least in part by the corrupt motive.[299]

This instruction is not as clear as the definition of "corruptly" used to overcome the vagueness challenge. It seems reasonable that if the *Brenson* court can claim that the definition of "corruptly" used within another statute makes the present statute clear (or at least not unconstitutionally vague), it has implicitly approved the definition for use in that context.

In 1991, the Eleventh Circuit implicitly acknowledged the definition this Article proposes for "corruptly."[300] The Eleventh Circuit considered:

> whether a person who, in refusing to give testimony before a grand jury, is motivated solely by legitimate and well-founded fear for his own safety and that of members of his family, can be said to have 'corruptly' endeavored to impede the due administration of justice.[301]

In *Banks*, an inmate (Banks) was called as a witness in a federal grand jury to testify about a former acquaintance suspected of being the "leader of a large-scale drug organization."[302] Banks refused to testify "on the stated ground that to do so would endanger his own life and the lives of members of his family."[303] The Eleventh Circuit held:

> [A] defendant charged with obstructing of justice for refusing to testify may, within a narrow range of unusual and extreme circumstances, be entitled to acquittal upon

296. *Id.* at 1280.

297. *Id.* at 1281.

298. *Id.* (citing United States v. Popkin, 943 F.2d 1535, 1540 (11th Cir. 1991)).

299. *Brenson*, 104 F.2d at 1279.

300. United States v. Banks, 942 F.2d 1576, 1579 (11th Cir. 1991) (acknowledging "corruptly" as "an intent to receive an unlawful benefit/advantage for oneself or another").

301. *Id.*

302. *Id.* at 1577.

303. *Id.*

> proof that his refusal was based solely upon a realistic and reasonable perception that giving testimony would result in imminent harm to the safety of the witness or members of his family.[304]

The key question that remained was "whether these issues were properly submitted to the jury."[305]

The remaining portion of the *Banks* decision illustrates where courts have generally gone astray. The relevant part of the jury instructions in the *Banks* case read:

> To endeavor to obstruct or impede the due administration of justice means to take some action for the purpose of interfering with or preventing the enforcement of the law of the land sought to be brought before the court. However, it is not necessary for the government to prove the grand jury was, in fact, prevented in any way from its role in the enforcement of the law, only that the defendant corruptly attempted to do so. . . .
>
> To act corruptly means to act knowingly and dishonestly with a specific intent to subvert or undermine the integrity of the Grand Jury proceedings.[306]

The court stated that "each of these statements is a correct statement of the law, [although] upon careful review of the charge as a whole, we are left with the firm impression that the charge was inadequate to permit the jury to give proper consideration to defendant's proffered defense to the charge."[307] The court concluded that the instructions were a correct statement of the current law and that they were inadequate. Part of this paradoxical result is that the *Banks* court believed that the instant case contained a "narrow range of unusual and extreme circumstances."[308] The court noted that Banks was "in a vulnerable position, since he was serving time in prison; that [he] was aware of instances in which 'snitches' had been murdered in that same prison. . . , [his] life had been directly threatened . . . and the home of a close family member was sprayed with machinegun fire."[309] The *Banks* decision illustrates the realization of the Eleventh Circuit that "corruptly" must have some meaning. *Banks* was cited in the Eleventh Circuit case *United States v. Pielago* for the proposition that it is "plain error where jury instruction was inadequate to permit the jury to give proper consideration to the proffered defense."[310] *Banks*, alas, has not been widely noted in federal circuits and largely ignored by the Eleventh Circuit.[311]

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304. *Id.* at 1579.

305. *Id.*

306. *Banks*, 942 F.2d at 1580.

307. *Id.*

308. *Id.* at 1579.

309. *Id.*

310. 135 F.3d 703, 722 (11th Cir. 1998) (Kravitch, J., dissenting) (citing United States v. Banks, 942 F.2d 1576, 1579–81 (11th Cir. 1991)).

311. In fact, *Pielago* is the only Eleventh Circuit case to cite it.

VII. "CORRUPTLY" WITHIN THE FEDERAL BRIBERY STATUTE, 18 U.S.C. § 201

There are few decisions where a federal court of appeals, in the context of bribery, recites the definition proposed by this Article. The times it does occur happen usually within the context of a state bribery statute brought up on appeal. For instance, in the case *Agan v. Vaughn*,[312] the Eleventh Circuit in the context of a Georgia bribery statute had no qualms about referencing Black's Law Dictionary to define "corruptly" as "importing a wrongful design to acquire some pecuniary or other advantage."[313] The *Agan* court also noted several other state decisions applying the same definition.[314] The federal appellate courts do not seem to reject this Article's proposed language when it is presented to them; the problem is that the appellate courts can only review what they receive. As the following section shows, they are not receiving under 18 U.S.C. § 201 the same definition used in 26 U.S.C. § 7212(a).[315]

A. What "People of Common Intelligence" Understand

While the position of this Article is that the federal circuits are in some disarray due to the lack of a dynamic definition of "corruptly," order exists in rare pockets throughout the federal reporters. In 1974, the Tenth Circuit decided the case *United States v. Pommerening*.[316] The appellant challenged several terms in 18 U.S.C. § 201(b) as unconstitutionally vague.[317] The court, in addressing this contention, stated that "[c]learly a person of common intelligence would understand from reading § 201(b) that giving compensation to a government official in exchange for preferential treatment is not allowed."[318] Moreover, the court explained that "[t]he ordinary person would therefore understand that giving a $5,000 automobile to a government official, in exchange for that official's influence in expediting a loan application, constitutes corruptly giving of something of value to influence an official act."[319] This case fits nicely into the set of facts that everyone would define as "corrupt," but the illustration demonstrates that many judges "know" the meaning of "corrupt," even if there are times when they just will not write.

The First Circuit, in the case *Roma Construction Company v. aRusso*,[320] encountered a case that required "corruptly" to have effect. In *aRusso*, the Roma Construction Company and an individual named Peter Zanni entered into a pre-existing development deal with two individuals in the town of Johnston, Rhode Island.[321] Zanni

312. 119 F.3d 1538 (11th Cir. 1997).

313. *Id.* at 1543 (citing BLACK'S LAW DICTIONARY 345 (6th ed. 1990)).

314. *Agan*, 119 F.3d at 1543 (citing cases from Arizona, California, and North Carolina that defined "corruptly" as "a wrongful design to acquire [some advantage]"). *Agan* also cites the Ninth Circuit opinion in *United States v. Jackson*, 72 F.3d 1370, 1375 (9th Cir. 1995), that takes notice of California's statutory definition for "corruptly" as "a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person." *Id.*

315. The definition used in the context of 26 U.S.C. § 7212(a) prosecutions is discussed *supra* at Part IV.

316. 500 F.2d 92 (10th Cir. 1974).

317. *Id.* at 97.

318. *Id.*

319. *Id.*

320. 96 F.3d 566 (1st Cir. 1996).

321. *Id.* at 568.

and Roma were unaware that their partners had "entered into an arrangement with the de facto government of the town, with aRusso [the mayor] as 'the Boss,' under which payments would be made to this enterprise in order to obtain necessary approvals."[322] Eventually, Roma and Zenni bought out their partners and learned of this preexisting deal.[323] Zenni was told that "his project was 'dead' if he did not make payments."[324] Because Zenni had "invested heavily in the project, and reasonably believ[ed] that he was dealing with a racketeering enterprise that had extorted and stolen for years during its control of the town, [he] paid up."[325] Until he sold his share three years later, Zenni continued making payments to this "de facto government . . . in order to obtain the necessary approvals."[326] Zenni then went to the FBI and later, with Roma, sued a host of people and entities for state and federal RICO violations.[327] The appellate decision is a result of the district court's dismissal of the suit because "[t]he plaintiffs here are neither innocent nor victims."[328] In determining whether there is an "innocent victim" requirement in RICO, the First Circuit grasped the elusive meaning of "corruptly."

The district court cited the Model Penal Code commentary as support for their denial of the plaintiff's defense of extortion as "correct as a matter of policy."[329] The district court also advanced other policy concerns, observing that:

> Allowing wrongdoers . . . to recover treble damages under RICO would subvert the twofold purpose of that act, to eliminate the economic incentives driving organized crime and to compensate the innocent victim. Such a result would provide no incentive for those approached by public officials for illegal payments to report such activity to law enforcement. Persons . . . could engage in bribery of public officials with full knowledge that if the bribery scheme (viewed as an effort to expedite official approval) broke down for whatever reason, they could seek a treble return on their illicit, but failed, investment, from those with whom they once illegally dealt. It would be a no loss situation for criminal activity.[330]

Both of these arguments have merit in a vacuum. Moreover, both make sound policy observations in the context of statutes with a similar structure to the Model Penal Code. The problem with both of these analyses, as the First Circuit pointed out, is that

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322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.*
326. *aRusso*, 96 F.3d at 568.
327. *Id.*
328. Roma Constr. Co. v. aRusso, 906 F.Supp. 78, 82 (D.R.I. 1995), *rev'd*, 96 F.3d 566 (1st Cir. 1996).
329. *Id.* at 81. The M.P.C. Commentary states:

> The private citizen who responds to an official's threat of adverse action by paying money to secure more favorable treatment evidences thereby a willingness to subvert the legitimate processes of government. It is not acceptable to pay . . . under-the-table compensation to a public servant, even if such payment is required in order to obtain official action rightfully due. Such conduct constitutes a degree of cooperation in the undermining of governmental integrity that is inconsistent with the complete exoneration from criminal liability.

Id. at 81–82 (quoting MODEL PENAL CODE § 240.1, commentary at 41 (1980)).
330. *See aRusso*, 906 F.Supp. at 83.

they fail to take into account the text of the Rhode Island bribery statute.[331] Further, the Model Penal Code explicitly states it does not follow Rhode Island law, so any analogy between the two concepts of bribery seems immediately suspect.[332] Moreover, the First Circuit observed that "the Model Penal Code's provision contains no requirement that a payor act 'corruptly.'"[333] The comparison between the Model Penal Code's exclusion of the term "corruptly"[334] and inclusion of "corruptly" within a statute illustrates the meaning "corruptly" must necessarily possess. The First Circuit agreed with the plaintiffs' argument that the "Model Penal Code's omission of the term 'corruptly' is no mere semantic distinction; rather, it represents a shift from the common law in expanding the scope of bribery sanctions for payors to situations in which the payor does not act corruptly."[335] The court concluded that "[t]he term 'corruptly' adds the element of corrupt intent to the crime of bribery."[336] In casting "corruptly" in a different manner than the American Law Institute, the First Circuit observed that "[t]he mens rea implicated by 'corruptly' concerns the intention *to obtain ill-gotten gain*; by contrast, the Model Penal Code converts the lack of willpower to stand up to abusive authority into a degree of culpability."[337] The intent to "obtain ill-gotten gain" represents exactly the same conduct that an intent to "obtain an unlawful advantage" does.

The case *United States v. Dorri*,[338] though largely decided upon standard of review issues, contains an excellent analysis of the purpose of the term "corruptly" in the federal bribery statute. In *Dorri*, the defendant, an employee of the Immigration and Naturalization Service, attempted to solicit money from resident aliens in exchange for green cards.[339] After an FBI wiretap disclosed this endeavor, Dorri was indicted and convicted for violation of 18 U.S.C. § 201(b)(2)(A).[340] Dorri maintained both to the FBI before trial, and during his testimony at trial, that "he had been conducting his own personal investigation . . . to prove that [the subject of his investigation] had submitted a fraudulent application and would bribe him."[341] He testified at length during the trial about this "secret, unauthorized investigation . . . [and] that he had no intent to keep the money that he had requested. . . ."[342] The issue on appeal was whether the trial judge should have offered a clarification of "corruptly" once the jury had requested it.[343] The majority, citing the timing and content of defense objections, determined that the

331. *See aRusso*, 96 F.3d at 573.

332. *Id.* (citing II MODEL PENAL CODE AND COMMENTARIES 6, n.2 (1980)).

333. *Id.* ("*Compare* R.I. Gen. Laws § 11-7-4 ('[n]o person shall *corruptly* give') (emphasis added) *with* Model Penal Code § 240.1 ("[a] person is guilty of bribery . . . if he offers, confers, or agrees to confer upon another").").

334. *See* MODEL PENAL CODE § 240.1, Comment 5 (1962) ("[U]se of the general term "corruptly" should be abandoned and the issues addressed more particularly.").

335. *aRusso*, 96 F.3d at 573.

336. *Id.*

337. *Id.* at 574 (emphasis added).

338. 15 F.3d 888 (9th Cir. 1994).

339. *Id.* at 889–90.

340. *Id.* Dorri was charged with "corruptly . . . seeking . . . anything of value . . . in return for . . . being influenced in the performance of any official act." 18 U.S.C. § 201(b)(2)(A).

341. *Dorri*, 15 F.3d at 890.

342. *Id.*

343. *Id.*

applicable standard of review was "plain error."[344] This effectively ended the defendant's day in court. There was a dissenting voice that eloquently[345] explained both the theory and practice that should underpin the term "corruptly."

The dissent began its exposition on "corruptly" by summarizing the defendant's defense: "[t]he heart of [the] defense was that he wasn't acting corruptly. He was, rather, conducting a one-man sting: He would lure [the target] into paying a bribe in order to trap her employer."[346] While noting that the defense was both "far-fetched" and "goofy," the dissent stated that "if believed by the jury [was] surely not illegal."[347] The reason that the conduct embodied in the defense would not be illegal is what makes this dissent so illuminating.

After dealing with the standard of review issues, the dissent turned to "corruptly" itself. The dissent observed that "like 'due process,' 'malice aforethought' or 'proximate cause,' [corruptly] is a concept that can't be easily captured in a single formula, as it varies too much from situation to situation."[348] Rather than give up on the concept, the dissent explained that "[t]here's certainly a core meaning to it (corruptly): Conduct is corrupt if it's an improper way for a public official to benefit from his job."[349] Thus, the issue in effect becomes what "improper" means. The dissent answered this question as well, noting that "what's improper turns on many different factors, such as tradition, context and current attitudes about legitimate rewards for particular office holders."[350] The only issue this Article has with the dissent is its treatment of the definition "intent to secure an unlawful benefit for oneself or another." The dissent dismisses this definition with the question, "What benefits are unlawful?"[351] Without being obvious, an unlawful benefit is one that is against the law. Whether federal law or common law, the term "unlawful" points to a defined area of conduct. The dissent discounts "improper" and "wrongful," citing the same question of definitional difficulty.[352] There, the footing is more sure. The terms "improper" and "wrongful" are not limited to a defined area; both terms encompass more than simply illegal or unlawful acts. Morals, ethics, and community values fit well into the terms "improper" or "wrongful." Those areas are not well-suited for criminal prosecutions without careful delineation, for as quickly as morals and community values change, so too would the law.[353]

The opinion offers an example of this distinction: "[a] judge, for instance, wouldn't be acting corruptly if he conditioned a shorter prison sentence on payment of restitution to the victim; but he would if he conditioned the lower sentence on

344. *Id.* at 891.

345. The majority cast his dissent in such terms, "We have no quarrel with the dissent's very eloquent explanation of the law of bribery." *Id.* at 892.

346. *Id.* at 892 (Kozinski, J., dissenting).

347. *Dorri*, 15 F.3d at 892.

348. *Id.* at 894.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. As Judge Kozinski noted, there might be circumstances when a court would "find[] itself defining 'corruptly' in a way that can't fairly be applied retroactively, the Due Process Clause might bar the court from applying the statute to the defendant before it." *Dorri*, 15 F.3d at 895 n.6.

defendant's cutting the judge's lawn."[354] This distinction illustrates the difference between an "unlawful" or "improper" advantage and one that is not "corrupt." In the first scenario, the judge is offering something within his power to offer: a shorter sentence, in exchange for something the other party can lawfully agree to do (perform restitution). There is nothing improper about this conduct. In the second scenario, a judge is not permitted to sentence people to assist him in gardening. A judge that traded jail time for lawn care would be seeking an improper advantage, as it is not within the scope of a judge's power to sentence offenders to his yard. The dissent surveys several different definitions of "corruptly" while noting that "[a]ttempts to cabin the definition of 'corruptly' within a single rule have proven unsatisfactory."[355] The issue with its survey of definitions for "corruptly," the dissent concludes, is that each requires additional information before becoming complete.[356] That viewpoint is not problematic, the dissent concludes, but requires the district court to "tailor[] its instruction to the facts and circumstances of this case, and clearly explain[] to the jury what, under these circumstances, would be a corrupt motive and what would be a proper one."[357] The dissent's analysis points out that the federal pattern jury instruction used in this case[358] is incapable of serving this purpose and hence is an improper jury instruction.[359] Though this explanation comes in the form of a dissent, the majority opinion did not quibble with the substance at all.[360] Dissenting opinions are no less reasonable than those of the majority; they merely have fewer votes.

B. A Lewis Carroll Offense in the Second Circuit: "Corruptly" Has Two Meanings

The Second Circuit decision *United States v. Alfisi*[361] illustrates the problem with circular definitions. In *Alfisi*, a produce wholesaler was convicted of bribery, paying unlawful gratuities, and conspiracy to commit bribery for his dealings with a USDA produce inspector.[362] Alfisi requested a jury instruction defining "corruptly" as the "specific intent to secure an unlawful advantage or benefit."[363] This definition of "corruptly" has been accepted in other circuits[364] and accepted by the Second Circuit itself within the context of 26 U.S.C. § 7212(a) (corruptly endeavoring to obstruct the

354. *Id.* Other examples included logrolling, management incentives, war decorations, and rewarding whistleblowers. *Id.*

355. *Id.*

356. *E.g.*, The dissent cited "corruptly" as "an intent to obtain an improper advantage for oneself or someone else, inconsistent with official duty and the rights of others." *Id.* (citation omitted). Analyzing this definition, the dissent observed that "whether the intended advantage is improper and whether the conduct is inconsistent with official duty are the very questions we [the court] should be answering." *Id.*

357. *Dorri*, 15 F.3d at 895.

358. The instruction read: "An act is 'corruptly' done if it is done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method with a hope or expectation of either financial gain or other benefit to one's self or to another." *Id.* at 890 (citing 2 EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 25.06 (4th ed. 1990)).

359. *Dorri*, 15 F.3d at 895 (Kozinski, J., dissenting).

360. *Id.* at 892 ("We have no quarrel with the dissent's very eloquent explanation of the law of bribery.").

361. 308 F.3d 144 (2d Cir. 2002).

362. *Id.* at 148.

363. *Id.* at 155 (Sack, J., dissenting).

364. *See supra* note 92.

administration of IRS regulations).[365] The trial court rejected Alfisi's proposed jury instruction regarding the term "corruptly," deciding instead that the term "corruptly" within the bribery statute only requires "'specific intent to influence . . . official acts . . . .'"[366] Judge Sack, writing in dissent, wryly pointed out that the majority's conception of "corruptly" merely "instructed the jury that Alfisi committed bribery if he 'directly or indirectly, *with specific intent to influence official acts* [the court's definition of "corruptly"], [gave], offer[ed] or promise[d] [some]thing of value to [a] public official *with intent to influence any official act.*'"[367] As Judge Sack acknowledged, the majority has effectively "[read] 'corruptly' out of the statute."[368]

Bribery follows obstruction of justice with the confusion among jurists as to the meaning of "corruptly." Some cases within the Section 201 sphere do begin to approach the correct meaning of corruptly, but others miss the 'forest from the trees' and have played semantic statutory interpretation games to avoid results that a correct definition of "corruptly" would certainly avoid. A classic case on this point is *United States v. Singleton*.[369] In *Singleton*, a defendant attempted to claim that an assistant United States Attorney (AUSA), by reaching a plea agreement in exchange for the testimony of another defendant, violated the bribery provision of the federal code. The majority opinion, in an interesting maneuver, held that "whoever" does not include an AUSA because, while acting as a prosecutor for the government, the AUSA *is* the government and since the United States is not a being, but an entity, Section 201 would only apply if the statute read "whatever."[370] A concurrence in *Singleton* noted that while it agreed the AUSA did not violate section 201 by offering a plea bargain in exchange for testimony, it did not agree that "whoever" did not include the United States government.[371] Judge Lucero stated in his concurrence,

> I write separately to state my disagreement with the majority's holding that the word "whoever" in 18 U.S.C. § 201(c)(2), as it is used to define the class of persons who can violate the statute, cannot include the government or its agents. The majority's interpretation would permit the conclusion that consistent with the provisions of § 201, a United States Attorney may pay a prosecution witness for false testimony.[372]

While the dissent in *Singleton* makes an effort to remove plea-bargaining for testimony from the government's available means to prosecute, a controversial matter to

365. *See* United States v. Kelly, 147 F.3d 172, 176–77 (2d Cir. 1998) ("The district court instructed the jury that[, ']To act corruptly is to act with the intent to secure an unlawful advantage or benefit either for one's self or for another.['] This is a well-accepted definition of the term 'corruptly' when used in this context."). Moreover, the *Kelly* court draws support from § 1503 and Black's Law Dictionary while defining "corruptly." *Id.*

366. *See Alfisi*, 308 F.3d at 156 (citations omitted).

367. *Id.* (emphasis in original).

368. *Id.*

369. 165 F.3d 1297 (10th Cir. 1999).

370. *See id.* at 1300 ("The United States is an inanimate entity, not a being. The word 'whatever' is used commonly to refer to an inanimate object. *See id.* at 2600 (defining 'whatever' as 'any*thing* that: every*thing* that') (emphasis added). Therefore, construing 'whoever' to include the government is semantically anomalous.").

371. *Id.* at 1303 (Lucero, J., concurring).

372. *Id.*

be sure, the majority's construction is ably demonstrated to be incorrect.[373] Judge Kelly noted that there are many inanimate beings captured by the term "whoever" by referencing the Dictionary Act.[374] While the debate between the majority, concurrence, and dissent is quite interesting, it would be quite unnecessary under a meaningful definition of "corruptly." Approaching this question via the common law definition of "corruptly," the court should have asked, "What are the duties of a government prosecutor?"[375] Having determined that the federal code both expressly and implicitly grants the viability of making deals with witnesses in exchange for testimony,[376] the court has only to ask whether what the AUSA did violated a duty. As the federal code explicitly allows government attorneys to negotiate a deal in exchange for testimony, the action involved cannot be "corrupt." The AUSA did not seek an unlawful benefit for himself or another. Without this element of the Section 201 charge satisfied, the defendant's case has no merit worthy of an appellate decision. Alas, that straightforward application of the meaning of the term "corruptly" was missing from this case; hence we received three wildly entertaining opinions on whether a government prosecutor is an inanimate object when prosecuting for the government.

Regardless of what outcome the court arrived at in *Singleton*, the stunning fact is that apparently neither the majority, dissent, concurrence, nor the Government read the federal bribery statute in its entirety. The AUSA was charged under 18 U.S.C. § 201(c)(2).[377] 18 U.S.C. § 201(d) states that, "paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law. . . ."[378] It seems like an easier road to follow is to construe a plea-bargain as a "witness fee" rather than undergo the gymnastics involved with defining an AUSA as not part of the term "whoever."[379]

VIII. PUTTING HUMPTY DUMPTY BACK TOGETHER AGAIN: HARMONIZING THE DEFINITIONS OF "CORRUPTLY"

The various federal criminal statutes that use the term "corruptly" cover a spectrum of prohibited conduct. The only definition currently employed by the federal circuits that fits each scenario in a meaningful way is that used in the context of Section 7212(a). A short review of the possible alternatives demonstrates this point. As Judge Silberman wrote in *United States v. North*,[380] a basic premise is that "the word

373. *Id.* at 1310 (Kelly, J., dissenting).

374. *Id.* The Dictionary Act is 1 U.S.C. § 1 (2000) and defines "whoever" to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . ."

375. This is a question the court actually answered by citing several federal provisions explicitly and implicitly dealing with the treatment of those whose testimony the government requires to make its case. *See Singleton*, 165 F.3d at 1306.

376. *Id.* at 1303 (Lucero, J., concurring).

377. *Id.* at 1298.

378. 18 U.S.C. § 201(d) (2000).

379. "Whoever" is defined by the Dictionary Act to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. . . ." 1 U.S.C. § 1 (2000). *Singleton* seems to mean that "individual" does not mean an Assistant United States Attorney.

380. 910 F.2d 843 (1990).

'endeavor' in the statute already requires that the defendant intend to obstruct the inquiry or proceeding [within the context of Section 1505]."[381] To demonstrate the inherent flaws in the common definitions of "corruptly" found within federal jurisprudence, a simple example will suffice. Some of the statutes that contain "corruptly" proscribe "corrupt[] endeavors."[382] As a first premise, there must be a difference between an "endeavor" and a "corrupt endeavor." An endeavor done corruptly must mean something more than a mere endeavor. If that proposition is accepted, it leaves the question of what does "corruptly" mean if not "endeavor"? Removing the phrase from a statutory mooring for the purpose of this inquiry allows for a clearer perspective. Examining the more popular suggestions, assume, *arguendo*, that "corruptly" means "with improper purpose." Under that definition, "to corruptly endeavor" means "to intend an act (i.e. endeavor) with an improper purpose." This substitution narrows the scope of "endeavor" to "endeavors done with an improper purpose." While this definition does advance an understanding of "corruptly," it does not tailor the term "purpose" in such a way as to mean anything more than to "intend an act with improper intent." The presence of "intent" twice puts the burden on the word "act" to explain what is intended. This is demonstrated by a brief move back to a statutory context.

In both sections 201(b)(1)(B) and 201(b)(1)(C), the conduct proscribed within is *already* improper. An attempt to convince a public official to commit a fraud against the United States[383] or to act in violation of their official duty[384] is already improper (unless part of a sanctioned government sting). If "corruptly" means only "with improper purpose," then it adds nothing to the bribery statute in the context of these subsections. Moreover, Section 201(b)(1)(A) demonstrates the problem with this definition of "corruptly." In section 201(b)(1)(A), the corrupt endeavor to influence an official act is prohibited. In this context, the offense could be stated as: "whoever intends with an improper purpose to influence an official act has committed bribery." The phrase "improper purpose" alone is just as vague as "corruptly." At this point, it becomes clear that if "with improper purpose" is substituted for "corruptly," we are faced with a construction that is either vague or entirely meaningless.[385] The statute would become clear if it was determined that the "improper purpose" at issue is "an effort to receive an unlawful benefit for one's self or another." Under that construction, the benefit sought must be "unlawful" to have. In the case of bribery, it is a violation of 18 U.S.C. § 201(c) to offer anything of value to a public official. Because a person intended to do that act, he sought an unlawful benefit, which means that he acted corruptly.

If the language "with improper purpose" is not enough, consider the definition "with evil or wicked intent." Our two-word phrase "corrupt[] endeavor" now means

381. *Id.* at 941 (Silberman, J., concurring *dubitante* in part and dissenting in part).

382. *See, e.g.*, 26 U.S.C. § 7212 (2000).

383. 18 U.S.C. § 201(b)(1)(B) (2000).

384. *Id.* § 201(b)(1)(C).

385. The phrase "with improper purpose" is much closer to a meaningful definition than the other definitions used amongst the circuits. It is simply too broad to have a meaningful place. Acting "with the intent to receive an improper advantage/benefit for one's self or another" is certainly part of the set of actions that have an improper purpose. It is simply more concise and meaningful.

"an intent to act with an evil or wicked intent." Like the phrase "with improper purpose," the bribery statute illustrates the futility of this definition. Attempting to convince a public official to violate his duties or to commit a fraud against the United States would be arguably "evil or wicked" already. It also seems like replacing "corruptly" with other vague terms (for example, "evil" or "wicked") does not lead to clarity.[386] Rejecting those two conceptions of the term, the circuits have created other definitions to consider. Again, "evil" and "wicked" have no fixed meaning in the jurisprudential context. The phrase "intent to receive an unlawful/improper benefit for one's self or another" does.

Federal courts have determined that "corruptly" may also mean "with intent to do what the statute prohibits." This construction of "corruptly" requires the phrase "corruptly endeavor" to mean "to intend to do what the statute prohibits." Noting that the statute on its face prohibits "corrupt[] endeavors," it seems odd to change that text to "endeavoring to endeavor." If "corruptly" cannot logically mean "with improper purpose," "with evil or wicked intent," or "with intent to intend," another meaning must be found. Having exhausted the popular but incomplete conceptions of "corruptly," the choice left is to examine the definition used by the federal circuits consistently in the context of 26 U.S.C. § 7212(a).[387]

All courts that have addressed the question of "corruptly" within Section 7212(a) have imputed to "corruptly" the meaning "an intent to receive an unlawful advantage for one's self or another."[388] Starting with our two-word phrase "corrupt[] endeavors," the explanation now states, "whoever intends to do some act (prohibited by the statute) with intent to receive an improper benefit for one's self or another." This construction has given meaning to each part of the phrase "corruptly endeavors." As Judge Kozinski pointed out in his dissent in *United States v. Dorri*, we may still have to give meaning to "improper" and perhaps "advantage."[389] Assigning meaning to a term like "improper" is not difficult; in fact, it may be as easy as referencing relevant codes of conduct. At its core, conduct that is "improper" is conduct that tends to be in violation of some sort of duty or responsibility. Those concepts, as Judge Kozinski stated, may very well differ from one case to another.[390] Regardless, the analysis for courts becomes straightforward compared to attempting to impute meaning to definitions that are often hopelessly circular when put into statutory context.

Over time, the lack of precision of language has decayed the term "corruptly." Today, many people use the term as a moral judgment for the actions of another as though it meant "improper." Yet, Congress continues to utilize the word in new

386. *See, e.g.*, Cartwright v. Maynard, 822 F.2d 1477, 1489 (10th Cir. 1987) (en banc) ("Vague terms do not suddenly become clear when they are defined by reference to other vague terms.").

387. *See supra* note 92 (collecting cases showing the nine circuits that have addressed the issue resolved it in substantially the same manner).

388. *Id.*

389. United States v. Dorri, 15 F.3d 888, 894 (9th Cir. 1994) (Kozinski, J., dissenting) ("[W]hether the intended advantage is improper and whether the conduct is inconsistent with official duty are the very questions we [the court] should be answering.").

390. *See id.* ("There's certainly a core meaning to it: Conduct is corrupt if it's an improper way for a public official to benefit from his job. But what's improper turns on many different factors, such as tradition, context and current attitudes about legitimate rewards for particular officeholders.").

statutes.[391] Therefore, the courts will eventually have to step in and replant the common law term. If the courts will not return to the English meaning of the term, Congress must codify the meaning of the term "corruptly" within the federal code as "an intent to secure an unlawful benefit for one's self or another."

391. In 2002, Congress passed the Corporate Fraud Accountability Act of 2002. This statute includes a modification to 18 U.S.C. § 1512 that uses the term "corruptly":

> (c) Whoever corruptly—
>
> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
>
> (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both."

Corporate and Criminal Fraud Accountability Act of 2002, 8 U.S.C. § 801 (2002).