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WHITE-COLLAR CRIME, SOCIAL HARM, AND PUNISHMENT: A CRITIQUE AND MODIFICATION OF THE SIXTH CIRCUIT'S RULING IN *UNITED STATES V. DAVIS*

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INTRODUCTION

The Supreme Court, in *United States v. Booker*, found the United States Sentencing Guidelines ("Guidelines") unconstitutional, uprooting nearly twenty years of structured sentencing in federal courts.[1] As a result of this uprooting, judges now have much greater discretion in sentencing.[2] Appellate review of sentencing decisions, however, limits this discretion by requiring district courts to impose only reasonable sentences. An important issue thus emerges regarding the appropriate amount of consideration and deference appellate courts should afford when reviewing sentences for reasonableness.[3] Although courts have recognized that the

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[1] *See* United States v. Booker, 543 U.S. 220, 245 (2005) (finding that 18 U.S.C. §§ 3553(b)(1) and 3742(e) (2000) were unconstitutional and that the Federal Sentencing Guidelines were "effectively advisory" rather than mandatory); *see also* David J. D'Addio, *Sentencing After* Booker*: The Impact of Appellate Review on Defendants' Rights*, 24 YALE L. & POL'Y REV. 173, 176 (2006) ("[T]he Guideline 'range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in' what remains of the Sentencing Reform Act." (quoting *Booker*, 543 U.S. at 298–300 (Stevens, J., dissenting in part))); Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in* Booker *and* Fanfan, 33 PEPP. L. REV. 615, 616 (2006) ("After almost twenty years of structured sentencing in federal courts, judicial discretion has been restored and prosecutorial power has been curtailed.").

[2] *See* Jordan, *supra* note 1, at 620 (arguing that *Booker* "restores the constitutional balance of power between the three branches of government" by allowing district courts greater discretion in sentencing).

[3] *See id.* at 673 (arguing that some circuits "are missing the point" as regards to the appropriate level of deference to afford sentences).

reasonableness standard used for reviewing sentences is limited[4] and fairly well-defined,[5] it admittedly lacks precision.[6] This lack of precision necessitates that appellate courts perform careful, fact-sensitive review of sentences to ensure that the sentences further the aims of the criminal justice system.

Fact-sensitive appellate review takes on heightened significance in the context of white-collar crime,[7] because district

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[4] *See, e.g.*, United States v. Smith, 445 F.3d 1, 3 (1st Cir. 2006) (emphasizing that "[t]he sentencing court's discretion remains constrained by 18 U.S.C. § 3553(a) (2000)"), *quoted in* United States v. Rattoballi, 452 F.3d 127, 132 (2d Cir. 2006).

[5] *See, e.g.*, *Rattoballi*, 452 F.3d at 133 ("[W]hile reasonableness admits to a range, not a point, it also is a concept that implies boundaries, even if those boundaries provide for some latitude.") (citations and internal quotation marks omitted).

[6] *See* United States v. Cunningham, 429 F.3d 673, 679 (7th Cir. 2005) (acknowledging that reasonableness amounts to "a range, not a point").

[7] *See generally* J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME 1–3 (2002). The term "white-collar crime" was first popularized by criminologist and sociologist Edwin Sutherland who defined white-collar crime as a crime "committed by a person of respectability and high social status in the course of his occupation." *Id.* at 1. The United States Department of Justice provides the following alternative definition of white-collar crime to this "somewhat outdated" socio-economic definition provided by Sutherland:

> [N]onviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having a special technical and professional knowledge of business and government, irrespective of the person's occupation.

Id. at 1–2 (quoting BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY 215 (2d ed. 1981)).

Strader, however, believes that even this definition is unsatisfactory and suggests that white-collar crime may be defined:

> as crime that does *not*: (a) necessarily involve force against a person or property; (b) directly relate to the possession, sale, or distribution of narcotics; (c) directly relate to organized crime activities; (d) directly relate to such national policies as immigration, civil rights, or national security; or (e) directly involve "vice crimes" or the common theft of property.

Id. at 2; *see also* STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 5 (1988) ("[T]he central ingredients [of white-collar crimes] are that they are non-violent, economic crimes . . . that are committed by persons in traditionally 'white-collar' jobs."). At least two qualifications are necessary in regard to these general definitions. First, these definitions obfuscate "the actual physical or violent consequences of white-collar crime," such as the effects of unsafe environmental practices and physical harm that can result from deprivation of economic resources. *See* BRIAN K. PAYNE, INCARCERATING WHITE-COLLAR OFFENDERS: THE PRISON EXPERIENCE AND BEYOND 6–8 (2003). It is necessary to understand the violent nature of white-collar crime notwithstanding the traditional definitions above. Second, because of the nature of

courts confront a "sentencing world [that] is particularly complicated."[8] I infer the complicated nature of sentencing white-collar criminals, in part, from the number of post-*Booker* white-collar sentences that appellate courts have remanded for resentencing. In point of fact, several appellate courts have recently vacated, over "vigorous dissent,"[9] sentences of white-collar criminals—those who use economic clout "as a weapon and shield to defraud others and make[] it difficult to detect and punish the fraud"[10]—because they found the sentences unreasonable.[11] Recently, in *United States v. Davis*,[12] the Court of Appeals for the Sixth Circuit vacated a sentence of one day in prison imposed on a defendant convicted of two counts of bank fraud where the recommended Guideline range was thirty to thirty-seven months.[13]

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the lead case being reviewed in this Comment, this paper concerns itself primarily with what is called "control fraud," rather than, for example, crime involving environmental degradation or unsafe products. *See infra* note 9 and accompanying text.

[8] WHEELER, *supra* note 7, at 18.

[9] *See, e.g.*, United States v. Davis, 458 F.3d 491, 500–01, 504 (6th Cir. 2006) (Keith, J., dissenting) (describing the court's reversal of a sentence of a white-collar criminal as a "complete miscarriage of justice" and raising concerns about "establish[ing] a precedent whereby this Court is micromanaging the sentencing process and second guessing the district court's determination after presiding over the hearings").

[10] WILLIAM K. BLACK, THE BEST WAY TO ROB A BANK IS TO OWN ONE: HOW CORPORATE EXECUTIVES AND POLITICIANS LOOTED THE S&L INDUSTRY 1 (2005) (defining "control fraud"). Although white-collar crime includes crimes involving, for example, unsafe products and environmental degradation, this Comment uses the term in a more restricted sense.

[11] *See, e.g.*, *Davis*, 458 F.3d at 492–93 (reversing sentence of one day in prison of a defendant convicted of two counts of bank fraud where the recommended Guidelines range was 30 to 37 months); United States v. Wallace, 458 F.3d 606, 607 (7th Cir. 2006) (vacating sentence of three years of probation plus a $2,000 fine for defendant convicted of wire fraud where the recommended Guidelines range was 24 to 30 months); United States v. Thurston, 456 F.3d 211, 212, 220 (1st Cir. 2006) (vacating sentence of three months imprisonment of a defendant convicted of conspiring to defraud Medicare of over five million dollars where the recommended Guidelines range was 60 months); United States v. Crisp, 454 F.3d 1285, 1286–87 (11th Cir. 2006) (reversing sentence of defendant convicted of making false statements to a financial institution that included five-hour incarceration term where the recommended Guidelines range was 24 to 30 months); United States v. Rattoballi, 452 F.3d 127, 128–29 (2d Cir. 2006) (vacating sentence of defendant convicted of conspiracy to rig bids and conspiracy to commit mail fraud of one year of home confinement and five years of probation where the recommended Guidelines range was 27 to 33 months).

[12] 458 F.3d at 491.

[13] *Id.* at 492–93.

The *Davis* court convicted the defendant, William Davis, of two counts of bank fraud.[14] Davis, part owner and president of Fries Correctional Equipment of Kentucky, Inc., omitted $100,000 of debt from a financial statement submitted to a local bank as part of an application for a renewed line of credit.[15] After Fries Correctional defaulted on the loan, the bank filed a civil action against Davis.[16] During a deposition in the civil action, Davis claimed that he no longer owned several securities listed in a financial statement, but this claim conflicted with other financial statements.[17] Shortly thereafter, Davis and his wife declared bankruptcy and the federal government notified Davis that it intended to initiate criminal proceedings against him.[18] The bank had failed to recover $600,000 from Davis at the time his bankruptcy ended.[19] The government indicted Davis in December of 1999, and a jury convicted him of two counts of bank fraud, which related to the omission of the $100,000 debt from a financial statement provided to the bank and the false statements made during the deposition.[20]

Although the district court initially sentenced Davis in 2003 using the mandatory Guidelines, the Sixth Circuit remanded the case for resentencing in 2005 under the Post-*Booker* advisory Guideline sentencing scheme.[21] On remand, the district court determined that Davis's criminal history category of (I) and his offense level of (19) generated an advisory Guideline range of thirty to thirty-seven months.[22] The court then applied 18 U.S.C.§ 3553(a) factors[23] before sentencing Davis to one day in

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[14] *Id.* at 492.
[15] *Id.* at 493.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 493–94.
[22] *Id.* at 494.
[23] *Id.* 18 U.S.C § 3553(a) provides in relevant part:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (a) to reflect the seriousness of the offense, to promote respect for

prison for each of the two bank-fraud counts to be served concurrently, one year of home confinement, three years of supervised release, and 100 hours of community service.[24] The district court provided several justifications for varying from the Guideline range, including Davis's age of seventy years, his status as a retired social security recipient, his relationship with his grandchildren, and the lapse of fourteen years between the time of the commission of the offenses and the date of sentencing.[25] Moreover, the district court found that Davis no longer posed a danger to the public, that the sentence effectively deterred and rehabilitated Davis, and that the sentence would not promote disrespect for the law.[26]

On review, a split Sixth Circuit reversed the sentence and remanded for resentencing, holding that the imposition of one-day of incarceration, one-year of home confinement, three years of supervised release, and 100 hours of community service was unreasonable.[27] The *Davis* court, while focusing heavily on the "extraordinary variance" of 99.89%, rested its ruling primarily on

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the law, and to provide just punishment for the offense;
(b) to afford adequate deterrence to criminal conduct;
(c) to protect the public from further crimes of the defendant; and
(d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established [and recommended by the Sentencing Guidelines] . . .
(5) any pertinent policy statement . . . issued by the sentencing commission . . .
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2000).

[24] *Davis*, 458 F.3d at 495.

[25] *Id.* at 494.

[26] *Id.*

[27] *See id.* at 495, 500. As noted in *Davis*, courts have distinguished between procedural and substantive unreasonableness. *Id.* at 495. This valuable distinction, recognized by other circuits, *see, e.g.*, United States v. Rattoballi, 452 F.3d 127, 131–32 (2d Cir. 2006), differentiates substantively unreasonable sentences from procedurally unreasonable sentences, such as where a district court fails to appreciate the non-mandatory nature of the guidelines, fails to correctly calculate the sentencing range under the guidelines, or fails to consider the § 3553(a) factors. *Davis*, 458 F.3d at 495. This Comment, like the case under review, focuses only on substantive unreasonableness.

three findings.[28] First, the court concluded that "the 14-year gap between Davis's crimes and his second sentencing hearing . . . does not support such a dramatic variance (and indeed may not support a variance at all)."[29] Second, the court noted that although "a district court may account for a defendant's age at sentencing, . . . Davis's age [of seventy did not] warrant[] a one-day sentence."[30] Third, the court highlighted that "the sentence represent[ed] the most extreme variance possible, leaving no room to make reasoned distinctions between Davis's variance and the variances that other, more worthy defendants may deserve."[31] In addition to these reasons, the court appeared hesitant to allow the district court to exacerbate disparities between white-collar criminal and nonwhite-collar criminal sentences, "[o]ne of the central reasons for creating the sentencing guidelines," by handing down a one-day sentence for a defendant convicted of bank fraud.[32]

The court, nonetheless, reached its conclusion over "vigorous[] dissent."[33] Judge Keith, in his dissenting opinion, expressed that he was "saddened and distressed by the majority's opinion," which he described as "a complete miscarriage of justice."[34] Judge Keith argued that "[r]egrettably, the majority's holding, finding Davis's sentence substantively unreasonable, strips the district court of its power to issue a reasonable sentence in accordance with the now advisory sentencing guidelines."[35] In particular, Judge Keith noted that the court's failure to provide "proper deference" was based on a "formulaic assessment of how much the sentence varie[d] from the advisory

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[28] *See Davis*, 458 F.3d at 496–500.

[29] *Id.* at 497. Although the court noted that "[d]elays between the time a crime is committed and the time a guilty defendant serves his sentence of course should not be casually ignored," the question confronting the court was "whether the delay supplies an independent reason for such a marked deviation from the advisory guidelines range." *Id.*

[30] *Id.* at 498.

[31] *Id.* at 499.

[32] *See id.* (citations omitted) ("One of the central reasons for creating the sentencing guidelines, moreover, was to ensure stiffer penalties for white-collar crime and to eliminate disparities between white-collar sentences and sentences for other crimes. A one-day sentence for this bank fraud conviction necessarily slights this worthy goal.").

[33] *See id.* at 505 (Keith, J., dissenting) ("The district court, in my judgment, has not abused its discretion. I therefore vigorously dissent.").

[34] *Id.* at 500.

[35] *Id.* at 501.

guideline[s]."[36] Judge Keith argued that the court should have deferred to the district court's consideration of individualized factors, such as Davis's age, the fourteen years between the offense and sentencing, the non-violent nature of the crime, Davis's lack of criminal activity since the time of the offense, Davis's status as an unemployed, bankrupt, social security recipient, and Davis's move to another state where he could be with his children and grandchildren.[37] Given these factors and the necessity of yielding to district court discretion to impose individualized sentences, Judge Keith would have affirmed the sentence, rather than establish a precedent by which courts "micromanag[e] the sentencing process."[38]

Judge Keith argued compellingly that the court's eagerness to distill the reasonableness inquiry into a numbers game represents an unhealthy trend in the development of post-*Booker* reasonableness review of sentences of white-collar criminals. The court's rationale seems to violate the spirit of *Booker*, which sought to restore balances of power after the Guidelines diminished judicial influence in favor of increased prosecutorial power.[39] Notwithstanding Judge Keith's observations, the *Davis* court did correctly find the sentence unreasonable, because the sentence does not further the aims of the criminal justice system.

In reviewing the *Davis* court's ruling, this Comment will suggest that courts rely more heavily on the social harm caused by white-collar crime when imposing sentences, in place of numerical variance, to ensure that the spirit of *Booker* flourishes. Reference to social harm as a basis for punishment will likely further the goal of striking a balance between the excessive deference afforded judges prior to the promulgation of the Guidelines and a return to the rigid and perfunctory application of Guideline sentences. This Comment will also urge courts to refrain from over-reliance on numerical variance between sentences imposed and suggested Guideline sentences. In place of an algebraic analysis, courts should openly evaluate social harm, and, where applicable, use social harm as a basis for

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[36] *Id.* at 501–02.

[37] *Id.* at 502–03.

[38] *Id.* at 504–05.

[39] *See* Jordan, *supra* note 1, at 626 ("Efforts to eliminate disparity in sentencing have resulted in an incursion on the independence of the federal judiciary, a transfer of power from the judiciary to prosecutors and a proliferation of unjustifiably harsh individual sentences.").

finding nominal sentences imposed on white-collar criminals unreasonable. Toward these ends, Part I briefly defines reasonableness review. Part II analyzes the *Davis* opinion, highlights the decision's flawed approach to reasonableness review, and advocates for the reinvigoration of retribution for social harm as a primary basis for sentencing white-collar criminals.

I. REASONABLENESS REVIEW

In addition to finding the Federal Sentencing Guidelines unconstitutional, the *Booker* court created a more flexible approach to sentencing, utilizing a "practical" and "familiar" standard of reasonableness.[40] Courts have distinguished procedural reasonableness from substantive reasonableness,[41] and this Comment, like the *Davis* court, deals only with substantive reasonableness—whether the length of a sentence is reasonable in light of the factors outlined in 18 U.S.C. § 3553(a) and other statutory concerns.[42] Put differently, substantive reasonableness review concerns whether "a sentence [is] sufficient, but not greater than necessary, to comply with the purposes set forth in [§ 3553(a)(2)]."[43]

In crafting the reasonableness standard, the court in *Booker* sought to strike a balance between "a return to wholly discretionary sentencing" and the negligible discretion that existed under the mandatory Guidelines.[44] As courts have noted, "review for reasonableness, though deferential, will not equate to

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[40] *See* United States v. Booker, 543 U.S. 220, 224 (2005) (Stevens, J., delivering the opinion of the Court in part). Although some commentators have raised concerns that "[u]nfortunately, Justice Breyer failed to define a 'reasonable' sentence in an advisory Guideline regime," and that "few [circuit courts] have provided concrete guidance to lower courts," *see* D'Addio, *supra* note 1, at 177, as the Supreme Court has recognized, "the term 'unreasonable' is no doubt difficult to define . . . [but] it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning," United States v. Wallace, 458 F.3d 606, 610 (7th Cir. 2006) (internal quotation marks omitted) (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000)); *see also Booker*, 543 U.S. at 262–63 (Breyer, J., delivering the opinion of the Court in part) ("[W]e think it fair . . . to assume judicial familiarity with a 'reasonableness' standard.").

[41] *See supra* note 28.

[42] *See, e.g.*, United States v. Rattoballi, 452 F.3d 127, 131–32 (2d Cir. 2006); *see also supra* note 22.

[43] 18 U.S.C. § 3553(a) (2000).

[44] *Rattoballi*, 452 F.3d at 132.

a 'rubber stamp'" and "admits to a range, not a point."[45] Reasonableness review involves more than just "ensuring that district courts appreciate their sentencing discretion and issue mechanically correct sentences."[46] It also "will permit appellate courts to minimize sentencing disparities between and among district courts" and "eliminate unwarranted disparities circuit-wide."[47]

Two additional points should be kept in mind with regard to the reasonableness standard. First, many circuits have attempted to balance the antagonistic interests of deference and adherence to the Guidelines by applying proportionality review[48] or by presuming the reasonableness of the Guidelines.[49] This Comment suggests that courts avoid mechanical, numerical review of district court sentences. Second, reasonableness review

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[45] *See, e.g., id.* at 132–33 (internal quotation marks omitted) (noting that the concept of reasonableness "implies boundaries, even if those boundaries provide some latitude").

[46] United States v. Davis, 458 F.3d 491, 495 (6th Cir. 2006).

[47] *Id.* at 495–96.

[48] A majority of circuits have adopted the view that if "the district court independently chooses to deviate from the advisory guidelines range," then "the farther the judge's sentence departs from the guidelines sentence[,] the more compelling the justification based on factors in section 3553(a) must be." *Davis*, 458 F.3d at 496 (internal quotation marks omitted) (quoting United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005)); *accord* United States v. Simpson, 430 F.3d 1177, 1187 n.10 (D.C. Cir. 2005); *see also* United States v. Martin, 455 F.3d 1227, 1235 (11th Cir. 2006); United States v. Cage, 451 F.3d 585, 594 (10th Cir. 2006); United States v. Smith, 445 F.3d 1, 4 (1st Cir. 2006); United States v. Lazenby, 439 F.3d 928, 932 (8th Cir. 2006); United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006); United States v. Duhon, 440 F.3d 711, 715 (5th Cir. 2006). *But see Rattoballi*, 452 F.3d at 134–35:

> While we have yet to adopt this [proportionality] standard [of review] as a rule in this circuit, and do not do so here, we emphasize that our own ability to uphold a sentence as reasonable will be informed by the district court's statement of reasons (or lack thereof) for the sentence that it elects to impose.

Id.

[49] *See, e.g., Davis*, 458 F.3d at 496 ("When the district court issues within-guidelines sentence—when the independent views of the sentencing judge and the Sentencing Commission align—we apply a presumption of reasonableness to the sentence."); *Rattoballi*, 452 F.3d at 133 ("We appreciate that the guidelines are still generalizations that can point to outcomes that may appear unreasonable to sentencing judges in particular cases." (internal quotation marks omitted)). The Supreme Court is poised to consider "the appropriateness of the presumption of reasonableness that some courts of appeals apply to sentences that fall within the range recommended by the U.S. Sentencing Guidelines." *Supreme Court Will Confront Tough Issues Related to Federal Sentencing After* Booker, 80 CRIM. L. REP. 155 (2006).

takes on special significance in the context of white-collar crime where competing tendencies exist.[50] On the one hand, judges tend to view white-collar criminals more sympathetically than others and the impact of white-collar crime as more difficult to measure.[51] On the other hand, judges wish to avoid giving the impression that they confer special treatment on white-collar criminals.[52] These competing tendencies may result in inconsistencies in sentencing and frustrate attempts to explain sentencing decisions.

II. THE *DAVIS* RULING

A. *The* Davis *Court Reached the Correct Result for the Wrong Reasons*

The *Davis* court correctly vacated Davis's unreasonable sentence, but did so for incorrect reasons. In reaching the decision, the court should have avoided overemphasizing the size of the sentence's deviation from the advisory Guideline range, because overemphasis on numerical deviation encourages non-individualized, mechanical application of the Guidelines and shifts the balance of powers too greatly toward the legislature and prosecutors. This does not mesh with the spirit of *Booker* and creates problems in the context of white-collar crime. A better approach would have included greater exploration of the social harm caused by Davis's acts.

The *Davis* court too eagerly distilled the reasonableness inquiry into a numbers game.[53] As an initial matter, the court

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[50] *See* David L. Hudson, Jr., *Coming Down Heavy on Light Sentences: 11th Circuit Rejects Short Jail Terms for White-Collar Criminals*, A.B.A. J. E-REPORT, July 21, 2006, *available at* 5 No. 29 ABAJEREP 1 (Westlaw) (quoting authorities stating that "[n]ationwide there is a trend for courts to be tougher on white-collar crimes" and that white-collar criminals "tend to be more sympathetic and the impact of the crimes harder to measure").

[51] *Id.*

[52] *Id.*

[53] *See Davis*, 458 F.3d at 497–500. In support of its reasoning, the *Davis* Court cited the following passage from an article by James G. Carr, Chief Judge of the District Court for the Northern District of Ohio:

> [A] critical factor that must be taken into account when evaluating how well or properly judges exercise their discretion when departing from the Guideline range . . . [is] the extent to which judicially initiated departures are outside the applicable range. There is a sizable difference between a 10 or 20 percent variance from a Guideline minimum or maximum and a

overemphasized the amount that the sentence deviated from the advisory Guideline range by repeatedly highlighting that the sentence imposed by the district court varied by 99.89% from the advisory Guideline range. Second, the court's adoption of proportionality review, which requires that the further the judge's sentence departs from the Guideline range the more compelling the justification must be, seems to replace deferential review of sentences with an algebraic formula that discourages district courts from issuing non-Guideline sentences, even where such sentences seems appropriate.[54]

Other circuits have been more sensitive to pitfalls of a numerical approach to reasonableness. For example, the Seventh Circuit, in *United States v. Wallace*, noted:

> We are reluctant to distill the reasonableness inquiry into a numbers game that relies only on a numerical or percentage line for reductions. The percentage reductions will always seem larger if the overall number is a smaller one: 24 months less than a possible sentence of 25 months would be a 96%

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variance of 50, 60, or 80 percent.

Id. at 500 (quotation marks omitted) (quoting James G. Carr, *Some Thoughts on Sentencing Post*-Booker, 17 FED. SENT'G REP. 295, 296 (2005)).

The Court continued:

> No doubt, the district court retains ample discretion to grant Davis a variance on this record. And it will have an opportunity to do so on remand. But, for the reasons given, even the most animated application of the parsimony requirement—that the district court impose "a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in" § 3553(a)(2)—cannot justify a one-day sentence in this case. To rule otherwise, we respectfully submit, would intimate that reasonableness review is a theory, not a practice, and would fairly leave litigants wondering what downward (or upward) variances exceed a district court's discretion is a 99.89% downward variance on less-than extraordinary facts lies within that discretion.

Id.

[54] As Judge Keith noted in his dissent:

> The majority also reduces the evaluation of the district court's sentence to a formulaic assessment of how much the sentence varies from the advisory guideline range to determine whether the defendant's sentence is unreasonable. In engaging in this mechanical assessment, the majority starts this Court down the path of the pre-*Booker* days where the district courts were bound by an algebraic application of the guidelines. This precedent will inevitably lead to the district courts feeling reluctant to ever impose a sentence below the advisory guideline range for fear of reversal at the appellate level.

Id. at 502 (Keith, J., dissenting).

> reduction; 24 months less than a possible sentence of 240 months would be a 10% reduction.[55]

As the *Wallace* court hints at, proportionality review inappropriately restricts sentencing judges, because it tends to allow numbers to trump the factors relevant to sentencing and to diminish reference to the principles of punishment that underscore the Guidelines. Bear in mind two points. First, in practice, the use of proportionality review requires that district courts avoid significantly deviating from the Guidelines except under extraordinary circumstances. The circumstances surrounding most crimes, especially white-collar crimes, are likely to be anything but extraordinary—by any reasonable definition. Certainly, the district court in *Davis* relied on ordinary circumstances: his advanced age, his family, his limited finances, and the non-violent nature of the offense. But punishment may still be justified—or lack justification—by a totality of ordinary circumstances.[56] Proportionality review does not allow this aggregation. Second, proportionality review allows prosecutors to argue appropriateness of sentences based on percentage of variance instead of having to justify the punishment based on relevant factors and circumstances and the aims of punishment. This shifts power to prosecutors and away from judges. These two points illustrate how proportionality review eviscerates the individualized consideration mandated by *Booker*.

Appellate courts should replace proportionality review and encourage district courts to determine whether punishment of an individual satisfies the goals of retribution, deterrence, incapacitation, and rehabilitation. An approach emphasizing these goals decreases the likelihood of imposing unnecessary punishment. It also reduces the likelihood of a return to

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[55] United States v. Wallace, 458 F.3d 606, 613 (7th Cir. 2006). Despite this sensitivity, the *Wallace* court still used a proportionality review to determine the reasonableness of the sentence. *See id.*

[56] For example, in the recent case *United States v. Jones*, 460 F.3d 191 (2d Cir. 2006), the Second Circuit appears to have taken this approach where the court affirmed the reasonableness of a sentence that substantially deviated from the Guidelines range. *Id.* at 193–94. The court affirmed the sentence based on the defendant's consistent work ethic, support of his wife and son, assistance and support for other members of his family, the loss of his father, his attempt at college, and other similar, ordinary characteristics. *Id.*

draconian elements of the sentencing Guidelines[57] while allowing judges leeway to give individualized sentences. In the context of white-collar crime, this approach allows the judiciary to focus on the goals of retribution and avoid the return of excessive prosecutorial power. If the current view of sentencing deems individual consideration of criminals essential, then a non-algebraic, holistic exploration of individual circumstances—with a critical eye towards understanding the social harm caused by the defendant, the culpability of his or her actions, and the likelihood that a particular defendant, and others similarly situated, will be adequately deterred from this future conduct—will tend to be more just.

B. *The* Davis *Court Should Have Placed Greater Emphasis on Harm Caused*

The *Davis* court failed to adequately address the social harm caused by Davis's actions. The severity of the social harm, like that caused by so many white-collar crimes, alone justified finding the sentence unreasonable. Many commentators and judges continue to deny or devalue the social harm caused by white collar crime, despite popular and congressional recognition.[58] Although the *Davis* court noted that "[o]ne of the central reasons for creating the sentencing guidelines . . . was to ensure stiffer penalties for white-collar crime and to eliminate disparities between white-collar sentences and sentences for other crimes," it only acknowledged the social harm caused by Davis's actions in the limited context of deterrence.[59] Instead of relegating social harm to the realm of deterrence, courts such as *Davis* should use social harm as an independent basis for finding nominal sentences of white-collar criminals unreasonable.

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[57] *See* Jordan, *supra* note 1, at 657.

[58] *See, e.g.*, *Davis*, 458 F.3d at 503 (Keith, J., dissenting) ("More importantly, [Davis's] fraud conviction was not a crime of violence."); Paul Rosenzweig, *Sentencing of Corporate Fraud and White Collar Crime*, HERITAGE FOUND., Mar. 26, 2003, http://www.heritage.org/Research/Crime/test032403.cfm ("But it is fair to wonder whether equating corporate fraud with murder or treason truly captures the 'just desert' component of criminal law.").

[59] *See Davis*, 458 F.3d at 498–99 ("While the district court indicated that this sentence would serve the goals of societal deterrence, it is hard to see how a one-day sentence for a lucrative business crime satisfies that goal.") (citation omitted).

1. Harm Caused by White-Collar Crime and the Recognition of Harm as Justification for Punishment

Yes, as through this world I've wandered
I've seen lots of funny men;
Some will rob you with a six-gun
And some with a fountain pen.[60]

Woody Guthrie's folk-lesson rings true. White-collar crimes cause substantial social harm by undermining the economy,[61] exacerbating poverty and the wealth divide, eroding trust,[62] and depriving individuals of time and resources, both physical and economic.[63] Courts should consider these serious social harms when determining individual sentences and when reviewing those sentences for reasonableness.

Although judges often express the view that white-collar crime lacks violence and identifiable victims,[64] this belief tends to obscure the severity of the harm caused by white-collar crimes. A deeper understanding of the social harm caused by white-collar crime, however, helps clarify the general, popular abhorrence of white-collar crime. This deeper understanding draws attention away from general deterrence as the sole or primary rationale for substantial sentences of incarceration for white-collar criminals, and towards the retributive aspects of sentencing white-collar criminals.

Courts have routinely failed to adequately identify and properly analyze the harm caused by white-collar crime. Identifying these failures helps reveal social harm—the "negation, endangering, or destruction of an individual, group, or

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[60] WOODY GUTHRIE, *Pretty Boy Floyd, on* STRUGGLE (Sanga Music, Inc. 1958), *available at* http://www.woodyguthrie.org/Lyrics/Pretty_Boy_Floyd.htm.

[61] *See, e.g.*, BLACK, *supra* note 10, at 5–6. As William K. Black notes: "Waves of control fraud[] produce bubbles that must collapse. [Lending continues, which delays collapse], thus hyperinflating the bubble. The bigger the bubble and the longer it continues, the worse the problems it causes." *Id.* Black further explains that "waves of control fraud will create, inflate, and extend bubbles." *Id.* at 6.

[62] *See* PAYNE, *supra* note 7, at 77–79 ("Perhaps one of the most significant consequences of white-collar crime is the erosion of trust that occurs.").

[63] *See id.* at 75 (identifying three specific types of losses individuals experience as a result of white-collar offenses as "physical deprivations, economic deprivations, and time deprivations").

[64] *See* WHEELER ET AL., *supra* note 7, at 64 (emphasizing that judges tend to view white-collar crime as unique due to absence of violence and that "[o]nly rarely d[o] a judge's comment[s] indicate any possible similarity between white-collar crimes and violent crimes").

state interest which was deemed socially valuable"[65]—as an independent basis for punishment. Perhaps courts often fail to recognize the social harm caused by white-collar crime because the economic nature of the crimes conceals the victims. Yet the social harm white-collar crimes cause can be measured for the purpose of punishment, even if—like other non-white-collar crimes—not with exact precision.[66] Moreover, the severity of the social harm caused by a particular white-collar crime can be evaluated by reference to four categories: (1) the amount of monetary loss, (2) the "spread" of the events over time and place, (3) the nature of the victim, and (4) the presence and nature of violation of trust.[67] This sort of a detailed consideration of social harm caused by the white-collar crime provides a more substantial basis for punishment than a mere algebraic formula or over-reliance on general deterrence.

2. The *Davis* Court

Accordingly, the *Davis* court should have considered the social harm of Davis's acts as a basis for finding Davis's sentence unreasonable. This consideration of the social harm caused by the bank frauds would have appropriately reflected society's belief and Congress's pronouncement that white-collar criminals *deserve* substantial sentences. It also would have signaled a shift in sentencing white-collar criminals from reliance only on deterrence to reliance on social harm. Such a shift in judicial analysis would, hopefully, further undermine the erroneous belief that incarceration is not the most effective way to deter white-collar crime and reinforce the general, popular view that white-collar crimes cause widespread and serious social harm.

In any event, an understanding of the nature of criminal law, which seeks to punish harm caused to society, not merely harm to individuals, demands using this paradigm.[68] The

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[65] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 122 (4th ed. 2006).

[66] For example, society may appropriately punish a drunk driver who weaves on the highway, but averts an accident, by reference to endangerment and apprehension, even if these socially undesirable effects cannot be quantified. *See id.* at 121.

[67] *See* WHEELER ET AL., *supra* note 7, at 66.

[68] *See generally* DRESSLER, *supra* note 65, at 121–22.

> Because crimes are public wrongs, however, we may describe the harm caused in a criminal case as a "social harm."
>
> . . . .

atomistic perception that harm caused by white-collar crimes amounts to merely an aggregate of harms caused to individuals should be replaced with a view that society suffers an injury each time a person afforded privilege, power, and prestige uses his or her elevated position in society in such a manner that negates, endangers, or destroys a socially recognized interest.

The *Davis* court, rather than relying on an algebraic analysis, should have placed greater emphasis on the social harm caused by the bank frauds. The court should have highlighted that the sentence was unreasonable not simply because of the size of the deviation and because a one-day sentence is unlikely to deter future criminal conduct, but also because of the social harm caused to society by Davis's action. The court should have at least considered: (1) the harm Davis caused to the bank and the community, including the $600,000 dollars the bank lost, (2) Davis's repeated dishonesty to the bank and the court, (3) the nature of the community, bank, and court that Davis sought to defraud, and (4) the lack of respect towards the community and the judicial system evinced by his actions. This social harm alone justifies punishment greater than a one-day sentence.

CONCLUSION

The switch from a mandatory Guideline scheme to an advisory Guideline scheme shifted the balance of power in sentencing by placing greater discretion in sentencing judges. Appellate courts play a significant role in ensuring that the aims of the criminal justice system are met while deferring to sentencing courts. In fulfilling this role, appellate courts should look to theories of punishment and the Guideline factors when evaluating the reasonableness of sentences. This focus is much more sensible than evaluating non-Guideline sentences in terms of numerical deviations, which increases the likelihood of non-individualized sentences and creates an overly technical restraint on sentencing judges.

> Society values and has an interest in protecting people and things. . . . Society is wronged when an actor invades *any* socially recognized interest and diminishes its value. Specifically, "social harm" may be defined as the "negation, endangering, or destruction of an individual, group or state interest which was deemed socially valuable."

Id. (footnotes omitted).

This is especially so in the context of white-collar crime. Judges tend to think of white-collar crime as non-violent or victimless. As a result, they may struggle to find bases for vacating unreasonably low sentences of white-collar criminals—or in general imposing more substantial sentences. Accordingly, circuit courts may overemphasize general deterrence and numerical variance when evaluating sentences. In *Davis*, the court took this approach and declared a sentence of one-day incarceration unreasonable, with little, if any, consideration of the social harm that resulted from the criminal activity.

By reviewing *Davis*, this Comment highlights the importance of social harm as a basis for punishment of white-collar criminals in hopes of encouraging appellate and district courts to genuinely consider the seriousness of white-collar crime. By focusing on social harm, courts reaffirm that sentencing of white-collar criminals is not a draconian method that uses individuals as examples. Courts will also decrease the likelihood that a common law of sentencing will develop in which adversaries debate percentages, rather than reasons for punishment, when arguing for a given sentence. Finally, this focus gives true expression to the general, popular view that white-collar criminals deserve punishment.