Egyptian police caught and killed Alaa Abdul Raziq Atia, a violent co-conspirator, after Abdel Rahman and Stewart withdrew Rahman's support for the cease-fire, but before Atia could act on that message. This fortuity likely prevented Stewart's crime from harming victims, but "[f]ortuity has no bearing on culpability," United States v. Mitchell, 178 F.3d 904, 910 (7th Cir. 1999), nor does it mitigate to any degree the seriousness of Stewart's conduct.[14] Abdel Rahman himself was appropriately given a life sentence even though his plans to assassinate President Hosni Mubarak and to blow up bridges, tunnels, and buildings in New York City were frustrated. See Rahman, 189 F.3d at 124-126. There is no reason why fortuity should have enabled Stewart, Rahman's supporter, enabler, and co-conspirator, to be sentenced as if no terrorism crimes had ever occurred.

In finding the district court's heavy reliance on the lack of proven harm to be reasonable, neither the majority's opinion nor Judge Calabresi's concurrence has case law support, and I have found none. Judge Calabresi is reduced to observing that attempted crimes are sometimes treated differently from completed

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crime of terrorism . . . ." (emphasis in original)). In footnote 6 of his concurrence, Judge Calabresi correctly points out that Garey resulted in a downward variance from the Guidelines. Op. of J. Calabresi at **[7 n.6]**. But the district court did not reject the terrorism enhancement altogether in its § 3553 calculus as here. In applying a somewhat reduced enhancement – even for that mentally ill defendant who's crime was telephoning threats to a shopping mall - it imposed a 30 year prison sentence.

[14] Cf. United States v. Simpson, 538 F.3d 459, 464 (6th Cir. 2008) ("It cannot be . . . that a crime [of insurance fraud] spanning several years . . . is not very serious merely because none of the employer's workers happened to get hurt."); United States v. Butler, 970 F.2d 1017, 1030 (2d Cir. 1992) (Newman, J., concurring) ("Whatever sentence is ultimately imposed on [the defendant], . . . [it] should not turn on fact-finding that has little if any relevance to moral culpability.").

crimes, even when only fortuity separates the two. Op. of J. Calabresi at **[5-6]**. But how the law treats attempts is besides the point. As the majority itself recognizes, material support of terrorism is "a substantive, not inchoate, offense." Maj. Op. at **[51]**. "This is an independent crime, complete in its most serious form when the [material support] is complete and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder." Spies v. United States, 317 U.S. 492, 498-99 (1943).

Stewart completed her crime as Congress chose to define it, and the Sentencing Commission, in drafting the terrorism enhancement, elected not to mitigate its seriousness by rewarding a defendant whose crime did not ultimately result in death or serious injury with a reduced sentencing range. It is for this reason that lack of success cannot normally be a mitigating factor even though achievement of harm may be an aggravating factor. Permitting a district judge to require success in harming innocents before he will apply the terrorism enhancement in a "heartland" case is to permit that judge to disregard the fact that material support is itself a fully completed crime.

The majority states that "[f]ortuitous events are not categorically irrelevant to the determination of a just punishment nor is their consideration necessarily inappropriate." Maj. Op. at **[100]**. As a general matter, of course, I agree. In addition, I do not mean to suggest that there can never be a terrorism case in which absence of harm might be an appropriate

consideration, only that there is a very broad heartland of cases in which it should not be considered. If, for example, an incompetent terrorist satisfies the enhancement by putting a small amount of arsenic into a reservoir for New York's drinking water with every intention of killing thousands, but without understanding that the quantity is insufficient to cause harm, the complete absence of any practical possibility that the plot could cause harm may well be relevant. But, that is far from the instant case, in which Stewart's actions were designed to embolden Rahman's followers to resume a murderous jihad against scores of innocent individuals in Egypt and elsewhere. In this case, it was unreasonable for the district court to place any weight on the fortuitous and attenuated events that saved the potential victims of Stewart's crime, much less to use it to wipe out the congressionally mandated terrorism enhancement.

Judge Calabresi's attempt to defend the district court's analysis, by offering a hypothetical comparing the punishment of a terrorist who succeeds in causing harm with the punishment of one who does not misses the mark. See Op. of J. Calabresi at **[9]**. The question at issue is not whether the amount of harm can never be a factor in sentencing. It is whether the terrorist who attempts to detonate a bomb in a public place, with the intent of killing many innocent Americans, should be able to escape the terrorism enhancement altogether simply because his plan happens to fail or be foiled by authorities. The answer, as the Sentencing Commission has made clear, is no. A more persuasive

reason than the mere absence of injury must be provided by the district judge who uses that factor to eliminate the terrorism enhancement. To permit a judge to completely set aside the enhancement in a "heartland" case simply because the terrorist did not succeed, without further explanation as to why that case is sui generis, is to overlook the reality that the objective of terrorism is to kill large numbers of innocent people and that maximum deterrence needs to be achieved irrespective of success.

Actual harm is a flawed metric when determining culpability in material support prosecutions. Precisely because of the devastating consequences at stake, it is, and should be, the focus of enforcement authorities to make every effort to prevent those consequences before they occur. When enforcement authorities are successful, it is to their great credit and their efforts should in no sense lessen the deterrent effect of punishment by conferring a sentencing benefit on those whose efforts were thwarted. Indeed, the House Report accompanying the Comprehensive Antiterrorism Act of 1995, which criminalized the material support of terrorism, explained that one of the legislation's primary goals was to "enhance [law enforcement's] capability of thwarting, frustrating, and preventing terrorist acts before they result in death and destruction." H.R. Rep. No. 104-383, at 42 (1995) (emphasis added).

I fully recognize that district judges must develop ways of distinguishing whether and why one form of material support is more or less reprehensible than another, given the broad range of

conduct that the material support statute criminalizes, see 18 U.S.C. § 2339A. However, it makes little sense to have the presence or absence of resultant harm to victims be a factor in that determination. Cf. United States v. Whiteskunk, 162 F.3d 1244, 1251 (10th Cir. 1998) (finding it "unfair not to recognize and accommodate th[e] varying spectrum of culpability" when sentencing for a "broad category of conduct" (emphasis added)). Because material support providers often have been, and hopefully will continue to be, apprehended before the crimes that they foster come to fruition, the lack of physical injury is more likely to be the norm than the exception.

Accordingly, the lack of injury here was not a fact of "critical relevance . . . distinguish[ing]" Stewart's conduct "not only from that of all [her] codefendants, but from the vast majority of defendants convicted of conspiracy in federal court." Gall, 128 S.Ct. at 600. Giving the absence of harm mitigating significance thus not only fails to recognize the extreme seriousness of such crimes even without achievement of actual harm, it undermines one of § 3553(a)'s express goals: eliminating sentencing disparities. See 18 U.S.C. § 3553(a)(6); United States v. Simpson, 538 F.3d 459, 464 (6th Cir. 2008) (noting that focusing on "the defendant's culpability" instead of fortuity when sentencing "prevents arbitrary disparities" (emphasis added)). The happenstance lack of devastating injury implicit in terrorism crimes generally and Stewart's in particular simply cannot "bear the weight" the district court

assigned to it. Cavera, 550 F.3d at 191. The district court acted unreasonably by using the absence of proven harm to justify completely discarding the terrorism enhancement and to support an unwarranted mitigation of the seriousness of the crime of conviction. See 18 U.S.C. § 3553(a)(2)(A).

My colleagues in the majority also suggest that because Stewart's terrorism crimes preceded the events of September 11, 2001 her view of her own culpability might have been different than would be true after that tragic day. While such a lack of awareness may be true of the ordinary New Yorker, such attribution is ill-suited for Stewart who, as Abdel Rahman's lawyer, sat through extensive horrific evidence at his trial, including that the Islamic Group was responsible for the slaughter of scores of innocent tourists at Luxor and the Islamic Group's plans to bring New York to its knees by blowing up buildings, bridges, tunnels, and by assassinating the Egyptian President while in New York City.

b. The Absence of an Enhancement for Perjury and Obstruction of Justice

After jettisoning the terrorism enhancement in assessing the seriousness of Stewart's crime of conviction pursuant to § 3553(a)(2)(A), the district court then noted that — with this mitigation — the Guidelines would provide for a sentencing range for Stewart of either 78 to 97 months or 97 to 121 months, depending on whether the obstruction of justice enhancement applied. I join the majority's view that the district court's

failure to make any findings regarding obstruction was procedurally unreasonable. Maj. Op. at **[124]**. The district court's reason for not making such findings was that there was no point in doing so, because the terrorism enhancement took the sentence to the statutory maximum. After the district court discarded the terrorism enhancement, however, the obstruction enhancement became relevant to the Guidelines calculation. In addition, as the majority notes, it was error for the district court not to account for Stewart's potential perjury in the § 3553(a) calculus. See Cavera, 550 F.3d at 190.

c. The Absence of an Enhancement for Abuse of Trust

The majority properly faults the district court for failing to "explain how and to what extent the sentence reflected the seriousness of the crimes of conviction in light of the fact that Stewart was . . . a member of the bar when she committed them." Maj. Op. at **[121]**. The majority asks whether, in that light, "her punishment should have been greater than it was," and then suggests the obvious answer. Maj. Op. at **[121]**. I agree with the majority's criticism. As a "guardian[] of the law," a lawyer has a special obligation to "refrain from all illegal and morally reprehensible behavior." New York Code of Professional Responsibility, Preamble, EC 1-5 (effective through March 31, 2009). However, the majority does not go far enough. Stewart was not just a lawyer who committed crimes. And she did not use her professional position simply to gain access to her client and to carry his jihadist messages by criminal means, conduct that,

as noted in the previous section of this opinion reflects an extreme seriousness unreasonably overlooked by the district court. Stewart also committed her material support crimes by garnering the trust of the government, and then blatantly violating that trust — a fiduciary obligation that lies at the core of the SAMs system and that protects the right to counsel, even for convicted terrorists.

Under the Guidelines, the abuse-of-trust enhancement applies when a defendant has "abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3 (2000). As the Commentary explains, a position of trust is "characterized by professional or managerial discretion," for "[p]ersons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature," id. cmt. n.1 (2000), and "[s]uch persons generally are viewed as more culpable," id. cmt. background (2000).

The district court failed to explain why an enhancement for abuse of trust is not plainly appropriate in this case. The majority fails to fault the district court on this score because "the government did not specifically invoke section 3B1.3 in its sentencing memorandum." Maj. Op. at **[121 n.37]**. But the government explicitly argued for consideration of Stewart's abuse of trust at the sentencing hearing:

> [T]he United States Attorney's Office who was administering the SAMs trusted Ms. Stewart, put their faith in Ms. Stewart that she was

> doing what she promised to do. She considered that attorney affirmation that she signed an oath, a promise. Those are her words. And the government accepted that commitment and believed she would honor that commitment, but she violated that trust that was put in her by the United States Attorney's Office, by the Justice Department, repeatedly violated [it].

Sent'g Tr. 95. As a result, the issue was properly before the district court.

The SAMs placed trust in Stewart because she was a member of the bar appointed under the Criminal Justice Act to represent Abdel Rahman, and she made explicit affirmations to the government specifically required to curb her client's ability to continue terrorist activities. Only because of the SAMs did Stewart have private access to, and "significantly less supervision" in her contacts with, Abdel Rahman, U.S.S.G. § 3B1.3 cmt. n.1 (2000), and obtain the freedom she needed to act as his lawyer. Stewart used, or more accurately abused, the trust that the government placed in her to "facilitat[e] the commission . . . of [her] offense," id., furthering terrorist communications that put innocent lives in jeopardy. Stewart was only given access to Abdel Rahman to discuss legal matters; instead, she engaged in criminal actions that, as she conceded at trial, had nothing to do with any past, pending, or future legal proceedings and were unrelated to the rendering of legal advice. See Trial Tr. 7722 (acknowledging that Abdel Rahman's "appeals [were] exhausted, with no issue legally on the horizon").

Stewart's abuse of trust is particularly significant because it supports the arguments of those who say that our Article III courts, and the constitutional protections they afford, are not

suited to terrorist trials. See generally, e.g., Michael B. Mukasey, Civilian Courts Are No Place To Try Terrorists, Wall St. J., Oct. 19, 2009, at A21 (discussing the difficulties of trying terrorists in Article III courts). The SAMs are designed to safeguard those rights, but they must necessarily be conditioned on attorneys respecting the trust placed in them, and cannot be sustained without that trust. Stewart's conduct thus raises concerns reaching even beyond her dealings with Abdel Rahman. Her criminal acts jeopardize, in a sensitive set of cases, the accused's right to his choice of independent counsel, which is the right upon which the vindication of all of the accused's other rights, and, in a larger sense, the right to a trial by an Article III court, depends.[15]

Section 3553(a) requires a district court to consider all of the Guidelines relevant to a defendant's conduct. See 18 U.S.C. § 3553(a)(4); Cavera, 550 F.3d at 189 (requiring a district court to "conduct its own independent review of the sentencing factors, aided by the arguments of the prosecution and defense"). In sentencing Stewart, the district court mentioned "abuse of trust" as part of the litany of her crimes and noted that Stewart "abused her position as a lawyer" in order to further Abdel Rahman's terrorist quest. Sent'g Tr. 118. Yet the district

[15] See Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("The right . . . to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, [we] have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."); Powell v. Alabama, 287 U.S. 45, 69 (1932) ("Without [this right], though [a defendant] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.").

court gave no indication that it considered to any extent the depth of Stewart's abuse of trust as argued by the government, which went beyond simply abusing her position as a lawyer to gain access to Abdel Rahman. By not fully responding to the government's clear and forceful argument by considering the policy reflected in U.S.S.G. § 3B1.3,[16] and accounting for Stewart's grave abuse of trust in assessing the seriousness of Stewart's crime and imposing its sentence, the district court erred procedurally.

d. The Impact of These Errors on the Rest of the § 3553 Analysis

The district court's errors in assessing the seriousness of Stewart's crime impacted other parts of its § 3553 analysis and, for that reason, must be recognized if any remand in this case is to yield a reasonable sentence. Necessarily, the district court's unreasonable underappreciation of the gravity of Stewart's offense, evident from its reasoning despite its statements to the contrary, infected its consideration of "the need . . . to afford adequate deterrence to criminal conduct," 18 U.S.C. § 3553(a)(2), and "the need to avoid unwarranted sentence disparities," id. § 3553(a)(6), because both factors are calibrated by the seriousness of the offense at stake. More

[16] See United States v. Carty, 520 F.3d 984, 992-93 (9th Cir. 2008) (en banc) ("[W]hen a party raises a specific, nonfrivolous argument tethered to a relevant § 3553(a) factor in support of a requested sentence, then the judge should normally explain why he accepts or rejects the party's position." (citing Rita, 551 U.S. at 355-56)); see also Gall, 128 S. Ct. at 599 ("Had the prosecutor raised the issue, specific discussion of the point might have been in order . . . .").

serious crimes require greater deterrence; an unreasonably low view of a crime's severity will taint a district court's stance on whether a given sentence sufficiently deters future criminal conduct, both for the specific defendant and for the public at large. In no area can the need for adequate deterrence be greater than in terrorism cases, with their potential for devastating loss of innocent life. Similarly, an erroneous assessment of a crime's seriousness precludes accurate comparison with equally serious crimes, to avoid unwarranted disparities. Thus, although the district court's mishandling of the seriousness of Stewart's crime constitutes reversible error on its own, I believe it also infects other judgments the court made in its mandatory § 3553(a) analysis.

2. The District Court's Overwhelming Emphasis on Stewart's Age, Health, and Career

The district judge found that Stewart's "extraordinary personal characteristics . . . argue[d] strongly in favor of a substantial downward variance," Sent'g Tr. 114, and used that finding to effectively set aside the Guidelines and their import.[17] To be sure, it was appropriate, indeed required that

[17] A district court, of course, has wide discretion to impose a non-Guidelines sentence after properly calculating the appropriate Guidelines range. Gall, 128 S. Ct. at 597. But because the Guidelines are the touchstone or "starting point" for sentencing, id. at 596, the entire thrust of sentencing below or above the Guidelines is that "any deviation [is] from the Guidelines," id. at 597, and is to be justified in that context. Because a district judge "must begin [his] analysis with the Guidelines and remain cognizant of them throughout the sentencing process," id. at 597 n.6 (emphasis added), it is not permissible simply to set them aside in toto and to impose a sentence that bears no rational relationship to them as if they did not exist. See United States v. Williams, 524 F.3d 209, 215 (2d Cir. 2008) (explaining that "displacement of the Sentencing Guidelines at the threshold . . . cannot be reconciled with 18 U.S.C. § 3553(a)"). But this is precisely what the

the district judge consider Stewart's "history and characteristics" under § 3553(a)(1). But the district court abused its discretion by allowing this factor to overwhelm its consideration of "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, . . . to provide just punishment for the offense, and . . . to afford adequate deterrence to criminal conduct," 18 U.S.C. § 3553(a)(2), and by using it to justify the deep discount of 332 months in Stewart's sentence. Indeed, given the magnitude of the district court's error in evaluating the seriousness of the offense in this case, it could not reasonably determine what weight, if any, to assign to personal mitigating factors.

Although we have no specific formula for balancing the § 3553(a) factors, "unjustified reliance upon any one factor is a symptom of an unreasonable sentence," Rattoballi, 452 F.3d at 137, and here, the district judge's focus on Stewart's personal qualities exceeded the bounds of reasonableness in light of the gravity of her crimes. Whatever weight Stewart's career, age, and physical condition might reasonably warrant, these factors cannot support an unprecedentedly lenient 28-month sentence for what the district court itself termed her "extraordinarily severe criminal conduct." Sent'g Tr. 118; see supra note 3.

The imposition of a 28-month prison sentence "slighted," Taylor, 487 U.S. at 337, the extreme criminality of Stewart's

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district judge did.

offense[18] and disregarded the manifest purpose of the Guidelines regime: to avoid "unwarranted sentencing disparities," 18 U.S.C. § 3553(a)(6). See Booker, 543 U.S. at 264-65. The Guidelines "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives," Rita, 551 U.S. at 350, and Stewart's age, health, and career simply cannot justify the degree to which the district judge deviated from the Guidelines pursuant to § 3553(a).

The district court's apparent disregard of "the need to avoid unwarranted sentence disparities," 18 U.S.C. § 3553(a)(6), is particularly striking in light of the court's obligation to consider "pertinent [Commission] policy statement[s]," id. § 3553(a)(5). For example, the Commission has determined that only "an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range," U.S.S.G. § 5H1.4 (2000) (emphasis added), yet the record indicates that Stewart, despite medical issues, will receive appropriate medical care in prison, and the district judge himself acknowledged that "[m]edical care can be delivered while in prison," Sent'g Tr.

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[18] The district court treated Stewart's terrorism and fraud crimes — "particularly grave" offenses, Meskini, 319 F.3d at 92 — much more leniently than what the Guidelines recommend for bank embezzlement, see U.S.S.G. § 2B1.1(b)(6)(B) (2000) (recommending a minimum range of 51-63 months for embezzlement "affect[ing] a financial institution" and resulting in over "$1,000,000 in gross receipts"), and on par with the Guidelines recommendations for criminal trademark infringement, see U.S.S.G. § 2B5.3 (2000) (recommending a minimum range of 24-30 months for the manufacture of infringing items exceeding $120,000 in total retail value), conspiring to steal over $5,000 of car parts, see U.S.S.G. § 2B1.1(b)(1)(E), (5) (2000) (15-21 months), burgling a residence and stealing a $2,600 television, see U.S.S.G. § 2B2.1(a)(1), (b)(2)(B) (2000) (27-33 months), and possessing 1.5 grams of crack cocaine with the intent to distribute it, see U.S.S.G. § 2D1.1(c)(11) (2000) (27-33 months).

117. The district judge, of course, is not bound by Commission policy, but the record nowhere suggests that Stewart's condition was sufficiently compelling to distinguish her from others in the prison population and to warrant any leniency on that score. As for Stewart's age, the Commission has concluded that this factor "is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range[, but it] may be a reason to impose a sentence below the applicable guideline range in a case in which the defendant is elderly and infirm . . . ." U.S.S.G. § 5H1.1 (2000). Again, the district court was not bound by this statement. But the district judge's point that Stewart's sentence "will represent a greater portion of her remaining life than for a younger defendant," Sent'g Tr. 117, would apply to any older defendant, and this is not an extraordinary factor, such as being "elderly and infirm," that can justify excessive leniency. See Rattoballi, 452 F.3d at 136 n.4, 137. The district court cited both Stewart's age (67 years) and health (sleep apnea; cancer survivor with a chance of recurrence) in concluding that "[a]ny sentence of imprisonment will be particularly difficult for the defendant." Sent'g Tr. 117. Yet as the majority notes, Maj. Op. at **[26-27 n.9]**, Stewart herself apparently did not share the district court's misgivings: "I don't think anybody would say that going to jail for 28 months is anything anyone would look forward to, but as my clients have

told me, 'I can do that standing on my head.'"[19] Stewart was not "elderly and infirm," and I do not see how her age or health could reasonably contribute to such a significant variance from the Guidelines. Advancing age and treatable medical conditions are not normally a ticket to overwhelming leniency, and this case is no different from the norm in that respect.

Similarly, Stewart's career of public service, as admirable as it seemed to the district court, can only go so far. "[I]t is usually not appropriate to excuse a defendant almost entirely from incarceration because [s]he performed acts that, though in society's interest, also were the defendant's responsibility to perform and stood to benefit the defendant personally and professionally." United States v. D'Amico, 496 F.3d 95, 107 (1st Cir. 2007). The district court placed emphasis on Stewart's providing legal services to "the poor, the disadvantaged[,] and [the] unpopular over three decades," Sent'g Tr. 115, but as the district judge himself put it, "that credit does not extend to the knowing violation of the law," Sent'g Tr. 119. Yet given the severity of Stewart's conduct, this credit, which contributed heavily to a 332-month reduction from the recommended Guideline range to a 28-month sentence, goes further than the district court's explanation can bear. Giving such excessive weight to Stewart's resumé trivializes the seriousness of her crimes,

[19] Ellen Barry, Terrorist Lawyer Gets Two-Year Term, LA Times, Oct. 17, 2006, available at http://articles.latimes.com/2006/oct/17/nation/na-stewart17 (last visited Aug. 20, 2009); Katie Cornell, Wrist Slap for Smirk Jerk Terror Attorney, N.Y. Post, Oct. 17, 2006, at 4.

district court at sentencing, I conclude that Stewart's sentence is not only procedurally unreasonable, but also substantively unreasonable and an abuse of discretion. The district court's rationale for the sentence cannot "bear the weight assigned it under the totality of circumstances in the case." Cavera, 550 F.3d at 191. Indeed, I am at a loss for any rationale upon this record that could reasonably justify a sentence of 28 months imprisonment for this defendant under § 3553(a). Accordingly, in addition to the procedural flaws that I have identified, Stewart's sentence should be vacated as substantively unreasonable and resentencing required on that basis.