
Two Steps Forward, One Step Back: How Federal Courts Took the “Fair” Out of the Fair Sentencing Act of 2010

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I. INTRODUCTION

In a rare display of bipartisan solidarity, in 2010 Congress enacted legislation to correct a judicial injustice that existed for over two decades.¹ Since 1986,² federal law has imposed stricter sentences on crack cocaine offenders than on powder cocaine offenders, despite the two substances being chemically identical.³ Under the Anti-Drug Abuse Act of 1986 (“1986 Act”), first-time possession of a small amount of crack yielded a mandatory minimum sentence of five years in prison.⁴ Meanwhile, the same offender found guilty of possessing powder cocaine would have to be in possession of 100 times that amount to receive the same five-year sentence.⁵ This scheme was known as the 100:1 sentencing ratio.⁶

The 100:1 ratio was notoriously criticized for both its undue harshness and its disparate impact on the African American community.⁷ Because crack cocaine convictions are statistically higher among African Americans—whereas powder cocaine convictions are spread across the population—this sentencing ratio inequitably affected the African American community.⁸ Congress overwhelmingly deemed this outcome unjust,⁹ and the law enforcement community acknowledged that the

1. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified at 21 U.S.C. §§ 841, 844, 960).

2. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

3. See *United States v. Watts*, 775 F. Supp. 2d 263, 267 (D. Mass. 2011).

4. See *id.* at 267-68.

5. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

6. See 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin), 2010 WL 956335, at *S1680.

7. See generally Alyssa L. Beaver, Note, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 *FORDHAM L. REV.* 2531, 2536 (2010); LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, 14 *J. GENDER RACE & JUST.* 375, 387 (2011); Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 *WASH. U. J. URB. & CONTEMP. L.* 121, 123 (1994).

8. Although African Americans make up about 30% of crack cocaine users in America, they comprise more than 80% of federal crack cocaine convictions. See 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin), 2010 WL 956335, at *S1681.

9. See, e.g., 156 CONG. REC. H6196-01 (daily ed. July 28, 2010) (statement of Rep. Hoyer), 2010 WL 2942883, at *H62023 (“The 100-to-1 disparity is counterproductive and unjust.”); see also 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of

disparity has “weakened the credibility of the entire drug enforcement system.”¹⁰

The Fair Sentencing Act of 2010 (FSA), signed by President Barack Obama on August 3, 2010, corrects this disparity by reducing, but not eliminating, the ratio between the two categories of drug offenders.¹¹ Unfortunately, due to vague legislative drafting and crafty judicial decision-making, Congress’s actions nearly failed to have the intended impact.¹² Because the FSA does not contain an express provision repealing the 1986 Act, some courts continued to apply pre-FSA sentences to defendants whose cases were pending in the pipeline when the FSA became law.¹³ That is, a legal dispute emerged over whether defendants whose criminal conduct pre-dated the FSA, but who were sentenced after its passage, should have been subject to its provisions.¹⁴ Because federal drug crimes carry a five-year statute of limitations, the number of affected defendants would continue to grow as the window for indicting offenders on pre-FSA conduct remained open.¹⁵ While this window was open, defendants were receiving sentences that Congress explicitly condemned and urgently repealed.¹⁶

Sen. Durbin), 2010 WL 956335, at *S1681; *and* 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of Sen. Leahy), 2010 WL 956335, at *S1683.

10. *See* 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin), 2010 WL 956335, at *S1681 (describing testimony given by Asa Hutchinson, former head of the U.S. Drug Enforcement Administration, during a 2009 congressional hearing).

11. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified at 21 U.S.C. §§ 841, 844, 960).

12. The legislative history of the FSA reveals that the statute was intended to be applied as soon as possible. *See, e.g.*, 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin), 2010 WL 956335, at *S1680-82. However, for reasons discussed herein, some federal judges refused to apply the statute to pending cases. *See* cases cited *infra* note 13.

13. *See, e.g.*, *United States v. Fisher*, 635 F.3d 336, 340 (7th Cir. 2011) (refusing to apply the FSA to defendant whose sentencing occurred after FSA enactment), *rev’d sub nom.* *Dorsey v. United States*, 132 S. Ct. 2321 (2012); *and* *United States v. Holcomb*, 657 F.3d 445, 452 (7th Cir. 2011); *and* *United States v. Sidney*, 648 F.3d 904, 910 (8th Cir. 2011); *and* *United States v. Tickles*, 661 F.3d 212, 214 (5th Cir. 2011) (same).

14. The United States Courts of Appeals split on this issue. *See* cases cited *infra* note 17. For more information about this dispute and for a discussion of the various arguments for applying the FSA in pipeline cases, *see generally* Douglas A. Berman, *A Few More Thoughts on Applying the FSA to Not-Yet-Sentenced Defendants*, SENTENCING L. & POL’Y BLOG (Dec. 1, 2010), http://sentencing.typepad.com/sentencing_law_and_policy/2010/12/a-few-more-thoughts-on-applying-the-fsa-to-not-yet-sentenced-defendants.html.

15. *See* *United States v. Dixon*, 648 F.3d 195, 202 (3d Cir. 2011).

16. *See* *Dixon*, 648 F.3d at 202.

The United States Courts of Appeals split on the issue of whether the FSA should be applied to pipeline cases.¹⁷ In a 5-4 decision handed down in June 2012, the United State Supreme Court resolved the circuit split, finding that defendants sentenced after the FSA's passage should be subject to the new minimums regardless of when their crime occurred.¹⁸ In accordance with this decision, this Comment will set forth the major arguments for why, based on the purpose and legislative history of the FSA, the statute must be applied to all defendants sentenced after its passage. This Comment will also discuss questions left unanswered by the Supreme Court and areas of the law needing further reform.

Part II of this Comment will examine the background of the 100:1 sentencing ratio and the defunct rationale behind its enactment. It will then discuss the reversal of public opinion on the comparative dangerousness of crack cocaine and the efforts to reform the sentencing disparity. Next, Part II will detail the FSA's legislative history. Finally, Part II will review the split among the courts of appeals and the subsequent Supreme Court decision.

Part III of this Comment will examine the major arguments for why the FSA should apply to all sentences after its enactment, regardless of when the criminal conduct took place. Specifically, Part III will conclude that, in accordance with the Supreme Court's recent decision, Congress did not intend to preserve the old sentencing scheme through the General Saving Statute.¹⁹ Further, it will argue that the goals of sentencing are not met by refusing to apply the FSA to pipeline cases. Part III will also observe that, if the FSA is ambiguous as to when its provisions take effect, the rule of lenity requires the ambiguity be construed in the defendant's favor.²⁰ Finally, Part III will discuss future areas of sentencing reform.

17. Compare *United States v. Douglas*, 644 F.3d 39, 44 (1st Cir. 2011) (holding that the FSA should be applied to defendants sentenced after November 1, 2010, the date that the new Sentencing Guidelines went into effect); and *United States v. Rojas*, 645 F.3d 1234, 1236 (11th Cir. 2011), (holding that the FSA should be applied to defendants sentenced after the bill became law on August 3, 2010, even if their crime preceded that date), *vacated, reh'g en banc granted*, 659 F.3d 1055 (11th Cir. 2011); and *United States v. Dixon*, 648 F.3d 195, 202 (3d Cir. 2011), with *Fisher*, 635 F.3d at 340 (refusing to apply the FSA to defendant whose sentencing occurred after enactment); and *Holcomb*, 657 F.3d at 452; and *Sidney*, 648 F.3d at 910; and *Tickles*, 661 F.3d at 215 (same).

18. See *Dorsey v. United States*, 132 S. Ct. 2321, 2336 (2012).

19. See, e.g., 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin), 2010 WL 956335, at *S1681-*82; see also 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of Sen. Leahy), 2010 WL 956335, at *S1683.

20. See *United States v. Douglas*, 644 F.3d 39, 44 (1st Cir. 2011); see also *United States v. Holcomb*, 657 F.3d 445, 460 (7th Cir. 2011). The rule of lenity is a canon of

II. BACKGROUND

A. *The Crack Cocaine “Epidemic” of the 1980s and Congress’s Response to a National Media Frenzy*

Although cocaine usage dates back to the 16th century,²¹ the drug known as “crack cocaine,” or “crack,” was first created in Los Angeles in 1981.²² Crack is sometimes referred to as “cocaine base”²³ and is produced through a relatively simple process of dissolving powder cocaine into a mixture of water and either ammonia or baking soda.²⁴ This mixture is then boiled until it forms a solid, which is dried and broken into pieces called “rocks.”²⁵ The drug’s name is derived from the crackling sound it makes when smoked.²⁶ Because crack yields an immediate high, is easy to produce, and is very inexpensive,²⁷ it quickly became associated with inner-city gang violence.²⁸

As crack debuted on street corners, fear of the drug and its propensity to incite violence quickly began to surface in the nation’s mainstream media.²⁹ During the 1980s, the homicide rate among 13- to 17-year-old African Americans almost quintupled;³⁰ child neglect cases increased,³¹ and mania surrounding the “crack baby” epidemic overtook news headlines.³² In 1985, the *New York Times* became the first major news organization to use the term “crack cocaine” in a front-page article about the dangers of the drug.³³ Soon thereafter, the public was shocked

statutory construction, holding that ambiguities in criminal statutes should be resolved in favor of the defendant. *See Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010).

21. *See* Beaver, *supra* note 7, at 2536.

22. *See id.* at 2538.

23. *See id.* at 2540.

24. *See* NAT’L DRUG INTELLIGENCE CTR., U.S. DEP’T OF JUST., NDIC PRODUCT NO. 2003-L0559-005, CRACK COCAINE FAST FACTS (2003) *available at* <http://www.justice.gov/ndic/pubs3/3978/index.htm#produced>.

25. *See id.*

26. *See* Beaver, *supra* note 7, at 2540.

27. *Id.* at 2538 (noting the price of a vial of crack in the mid-1980s ranged \$3 to \$20).

28. *See* Stephen Dubner & Steven D. Levitt, *Up in Smoke*, N.Y. TIMES, Aug. 7, 2005, <http://www.nytimes.com/2005/08/07/magazine/WLN103706.html> (noting that, by 1985, usage had doubled among Latinos and African Americans).

29. *See* Davis, *supra* note 7, at 387.

30. *See* Dubner & Levitt, *supra*, note 28.

31. *See* *United States v. Watts*, 775 F. Supp. 2d 263, 267 (D. Mass. 2011).

32. *See id.*; *see also* Davis, *supra* note 7, at 387 (“During the intense media coverage about crack cocaine, mainstream media warned that children who were exposed to crack in vitro were time bombs . . . [h]eadlines warned: ‘Drug Babies Invade Schools. . . .’”).

33. *See* Beaver, *supra* note 7, at 2539.

by the 1986 cocaine-related death of Len Bias, who was the Boston Celtics' first-round NBA draft pick.³⁴

Major news outlets declared a nationwide crack cocaine epidemic.³⁵ In September 1986, CBS broadcasted a two-hour special, "48 Hours on Crack Street," in which ten news correspondents, including Dan Rather and Diane Sawyer, took to the streets of the New York metropolitan area in an attempt to investigate the drug trade.³⁶ They questioned teenagers about drug use, observed addicts writhing in hospital emergency rooms, and spoke with families during therapy sessions.³⁷ President Ronald Reagan and First Lady Nancy Reagan also joined the fray, warning Americans during a television appearance that crack was a part of drug dealers' plan "to steal our children's lives. . . ."³⁸

Congress reacted quickly to the public outcry by enacting the Anti-Drug Abuse Act of 1986 containing severe penalties targeting crack cocaine offenders.³⁹ Under the 1986 Act (as amended in 1988), a defendant convicted of simple possession⁴⁰ of five grams of crack⁴¹ was subject to a mandatory minimum sentence of five years in prison.⁴² By comparison, a defendant convicted of possessing 500 grams⁴³ of powder cocaine was subject to the same five-year mandatory sentence.⁴⁴ Likewise, possession of 500 grams of crack resulted in a mandatory ten-year sentence; yet, a defendant would need to possess five *kilograms* (*i.e.*, 5,000 grams) of powder cocaine to trigger the same mandatory minimum.⁴⁵ That is, the 1986 Act established a 100:1 cocaine-to-crack ratio required to trigger the mandatory minimums.⁴⁶

34. See Davis, *supra* note 7, at 381.

35. See Beaver, *supra* note 7, at 2539.

36. See John Corry, *TV Reviews; CBS on "Crack Street,"* N.Y. TIMES, Sept. 4, 1986, <http://www.nytimes.com/1986/09/04/arts/tv-reviews-cbs-on-crack-street.html> (critiquing the program as somewhat sensationalistic and lacking in substance).

37. See *id.*

38. Davis, *supra* note 7, at 382.

39. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

40. A defendant is charged with "simple possession" when he is arrested for having a relatively small quantity of drugs on his person that is presumably for personal use and not for distribution. See 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin), 2010 WL 956335, at *S1681 ("For this one form of narcotics, persons who were found in simple possession of crack cocaine literally faced years in prison for that possession without any evidence that they were selling it or involved in any other way.").

41. Five grams is approximately one teaspoon, representing 10 to 50 doses of crack. See *United States v. Watts*, 775 F. Supp. 2d 263, 267-68 (D. Mass. 2011).

42. See Davis, *supra* note 7, at 384.

43. Approximately two cups; or 2,500 to 3,500 doses. See *Watts*, 775 F. Supp. 2d at 267-68.

44. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

45. See *id.*

46. See *Watts*, 775 F. Supp. 2d at 267.

In addition to the 100:1 ratio, the 1986 Act resulted in several other unprecedented penalties.⁴⁷ For example, sentencing a first-time offender to five years in prison for simple possession had been unheard of, as “simple possession of any other controlled substance by a first-time offender—including powder cocaine—is a misdemeanor offense punishable by a *maximum* of one year in prison.”⁴⁸ Furthermore, prior convictions drastically affected the mandatory minimums: two prior drug convictions and possession in excess of 50 grams of crack yielded a mandatory sentence of life without parole.⁴⁹

The assumption underlying the 100:1 sentencing ratio was that crack was comparatively more dangerous than powder cocaine.⁵⁰ However, even those who voted for the 1986 Act admit today that this assumption was false.⁵¹ Examining the circumstances surrounding the passage of the 1986 Act illustrates how this false theory materialized.⁵² First, during the drafting stages, legislators relied heavily upon a supposed “narcotics expert” who testified before Congress about the hazards of crack.⁵³ The expert stated that, in his opinion, possession of twenty grams of crack cocaine was “just as dangerous as having one thousand grams of powder cocaine.”⁵⁴ Later, this expert was shown to have falsified credentials.⁵⁵ In addition to relying on dubious testimony, Congress arrived at the sentencing scheme through what some scholars have called “political one-upmanship” that arbitrarily increased the ratio

47. See Davis, *supra* note 7 at 384 (“In 1988 . . . Congress amended the crack provisions to add a five-year mandatory minimum for simple possession . . . making crack the only drug in which first-time offenders would receive at least a five-year mandatory minimum.”).

48. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, EXECUTIVE SUMMARY, at v (1995) [hereinafter 1995 REPORT].

49. See *Watts*, 775 F. Supp. 2d at 267-68.

50. Beaver, *supra* note 7, at 2546 (listing Congress’s five justifications for the 100:1 ratio: “(1) the addictive quality of crack cocaine, (2) that crack cocaine was associated with violent crime, (3) that the use of crack cocaine among pregnant women posed threats to children in utero (4) that more young people were using crack cocaine, and (5) . . . the low cost of crack. . . .”); see also THE SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING 3 (2010), available at <http://www.sentencingproject.org/doc/publications/dpCrackBriefingSheet.pdf> (“The drug was considered a social menace more dangerous than powder cocaine in its physiological and psychotropic effects.”).

51. See 155 CONG. REC. S10488-01 (daily ed. Oct. 15, 2009) (statement of Sen. Durbin), 2009 WL 3319524, at *S10490-91 (“[W]e have learned a great deal in the last 20 years. We now know the assumptions that led us to create this disparity were wrong.”).

52. See, e.g., Beaver, *supra* note 7, at 2533-34.

53. See *id.* at 2534 (discussing the rise and fall of police narcotics expert Johnny St. Valentine Brown, Jr.).

54. See *id.*

55. See *id.*

from 50:1 to 100:1.⁵⁶ Evidence in the congressional record shows that the ratio might have materialized, in part, due to a schoolyard-like contest over which political party could be toughest on drugs.⁵⁷

In practice, the 1986 Act disproportionately affected African American offenders by sentencing them to substantially longer prison terms than Caucasians⁵⁸ for offenses involving “chemically identical” substances.⁵⁹ Research conducted in 2009 shows that this sentencing scheme caused average sentences for crack offenses to be over two years longer than for powder cocaine offenses.⁶⁰

Further, in its 2007 Report to Congress on Cocaine and Federal Sentencing Policy, the United States Sentencing Commission (the “Commission”)⁶¹ found that the penalties exaggerated the harmfulness of crack cocaine compared to powder cocaine, as well as the seriousness of crack cocaine in general.⁶² The Commission also found that these severe penalties were most often inflicted on low-level minority offenders, rather than the major drug traffickers Congress intended to target.⁶³

Gradually, it became clear that the drug epidemic was not all that it was “cracked” up to be, and scholars have refuted the original justifications for the ratio.⁶⁴ For these reasons, the sentences inflicted

56. See Davis, *supra* note 7, at 383.

57. See *id.* at 383 n.46 (“House Subcommittee on Crime counsel Eric Sterling described the process of the hearings as resembling an auction house. . .”).

58. See Lowney, *supra* note 7, at 123 (“Because Black and Latino cocaine users are more likely to use cocaine in the crack form than are White cocaine-users, they are more likely to be subject to the stricter penalties.”).

59. See *United States v. Watts*, 775 F. Supp. 2d 263, 267 (D. Mass. 2011).

60. See FEDERAL CRACK COCAINE SENTENCING, *supra* note 50.

61. The U.S. Sentencing Commission was established in 1984 and is a seven-member independent agency of the judicial branch. See Beaver, *supra* note 7, at 2550. The role of the Sentencing Commission is to: guide federal sentencing judges through the issuance of the Federal Sentencing Guidelines, advise Congress in creating effective crime policies, and evaluate the effectiveness of sentencing schemes through statistical analysis. See generally Beaver, *supra* note 7, at 2550.

62. See U.S. SENTENCING COMM’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at 8 (2007) [hereinafter 2007 REPORT].

63. See *id.*

64. See Beaver, *supra* note 7, at 2571-72. The author rejects the five justifications given by Congress for the 100:1 ratio:

Crack cocaine is not unilaterally more addictive than powder cocaine. . . .
Violent crime is not confined to the distribution of crack cocaine. . . .
Grounding a disproportionate ratio in the effect of the drug on pregnant women does not comport with the demographic most often arrested for the use and distribution of crack cocaine. Ninety percent of the prison population currently serving enhanced sentences for crack-cocaine-related crimes is male. . . . The notion that young people are prone to crack cocaine more than any other form of cocaine is not grounded in statistics, even at the time the Act was adopted. . . . Regulating a drug based on its cost is a patently misguided approach.

pursuant to the 1986 Act have been widely criticized by the judiciary,⁶⁵ academics, and community interest groups such as Human Rights Watch and the American Civil Liberties Union.⁶⁶

B. A Reform Bill More Than Two Decades in the Making: The Fair Sentencing Act of 2010

Calls to reform crack cocaine sentencing and to eliminate the sentencing disparity were not unheeded.⁶⁷ In fact, members of Congress introduced legislation to reduce the ratio in almost all consecutive years between 1993 and 2009.⁶⁸ In addition, the Sentencing Commission issued reports to Congress recommending a reduction in the ratio in 1995,⁶⁹ 1997,⁷⁰ 2002,⁷¹ and 2007.⁷² In 2007, the Sentencing Commission promulgated an amendment to the Federal Sentencing Guidelines⁷³ that reduced sentence ranges for crack offenders, but left untouched the mandatory minimums, that could only be amended by Congress.⁷⁴ Notably, the Sentencing Commission voted to make this amendment retroactive, allowing nearly 20,000 prisoners to petition the courts for small sentence reductions.⁷⁵

Id.

65. See *United States v. Watts*, 775 F. Supp. 2d 263, 269 (D. Mass. 2011) (collecting cases).

66. See 2007 REPORT, *supra* note 62, app. C, at C1-C.

67. See Kyle Graham, *Sorry Seems to be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 767 (2011).

68. For example, Senator Jeff Sessions (R-AL) remarked during debates on the FSA: “I have offered legislation for almost a decade that would substantially improve the sentencing process in a way that I think is fair and constructive. . . .” See 155 CONG. REC. S10488-01 (daily ed. Oct. 15, 2009) (statement of Sen. Sessions), 2009 WL 3319524, at *S10492; see also Graham, *supra* note 67, at 767.

69. See 1995 REPORT, *supra* note 48.

70. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at 9 (1997) (recommending reducing the threshold quantity ratio to between 5:1 and 15:1).

71. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, at viii (2002) (recommending reducing the ratio to 20:1).

72. See 2007 REPORT, *supra* note 62, at 9.

73. The U.S. Sentencing Commission first promulgated the Federal Sentencing Guidelines in 1987. See Gilles Bissonnette, “Consulting” the Federal Sentencing Guidelines After Booker, 53 UCLA L. REV. 1497, 1505 (2006). Using the Guidelines, federal judges examine many factors to determine appropriate individualized sentences. See *id.* at 1506-09. The Guidelines were written with an aim to create a more honest and uniform system by transferring power from federal judges to the Sentencing Commission. See *id.* at 1507.

74. See Graham, *supra* note 67, at 791 (noting that the Sentencing Guidelines Amendment 207 adjusted the base level offense down, reducing the average sentence for a crack offense from just over ten years, to just under nine years).

75. See *United States v. Watts*, 775 F. Supp. 2d 263, 270 (D. Mass. 2011).

In April 2009, President Barack Obama's administration expressed a desire to end the sentencing disparity.⁷⁶ The following month, the House of Representatives held a subcommittee hearing to discuss the issue of reforming crack sentencing and to consider five proposed bills.⁷⁷

Soon after, on October 15, 2009, Senator Richard Durbin (D-IL), who voted *for* the 1986 Act 20 years earlier, introduced the "Fair Sentencing Act of 2009."⁷⁸ He called it "an act to restore fairness to Federal cocaine sentencing."⁷⁹ Rising to introduce his bill, Senator Durbin stated, "Right now, our cocaine laws are based on a distinction between crack and powder cocaine which cannot be justified."⁸⁰ As drafted, the bill would have created an equal 1:1 ratio between quantities of crack and powder cocaine.⁸¹ However, some members of Congress continued to believe that crack was more dangerous than cocaine, and the 1:1 ratio was rejected.⁸² Congress reached a bipartisan compromise at a ratio of approximately 18:1, and the Fair Sentencing Act of 2010 (FSA) passed the Senate by unanimous consent on March 17, 2010.⁸³ President Barack Obama signed the bill on August 3, 2010.⁸⁴ Under the FSA, possession of 28 grams of crack cocaine triggers a mandatory minimum

76. See Gary Fields, *Shorter Sentences Sought for Crack*, WALL STREET J., Apr. 30, 2009, <http://online.wsj.com/article/SB124101257332168605.html#articleTabs=article>.

77. See *Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity? Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2009).

78. See 155 CONG. REC. S10488-01 (daily ed. Oct. 15, 2009) (statement of Sen. Durbin), 2009 WL 3319524, at *S10490-91:

I have cast thousands of votes as a Member of the House of Representatives and the Senate. . . . But there was one vote I cast more than 20 years ago which I regret . . . those of us who supported the law establishing this disparity had good intentions. We followed the lead and advice of people in law enforcement. We wanted to address this crack epidemic that was spreading fear and ravaging communities. But we have learned a great deal in the last 20 years. We now know the assumptions that led us to create this disparity were wrong.

Id.

79. See 155 CONG. REC. S10488-01 (daily ed. Oct. 15, 2009) (statement of Sen. Durbin), 2009 WL 3319524, at *S10490.

80. See *id.*

81. See Beaver, *supra* note 7, at 2556 ("Senator Dick Durbin of Illinois has enlisted four other senators, one of whom voted in favor of the Act in 1986, in cosponsoring the Fair Sentencing Act of 2009, which institutes a one-to-one ratio for crack and powder cocaine sentencing.")

82. See, e.g., 156 CONG. REC. H6196-01 (daily ed. July 28, 2010) (statement of Rep. Smith), 2010 WL 2942883, at *H6197 ("Crack cocaine is associated with a greater degree of violence than most other drugs. Crack offenders are also more likely to have prior convictions and lengthier criminal histories than powder cocaine offenders."); see also Graham, *supra* note 67, at 793.

83. See *S. 1789: Fair Sentencing Act 2010*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s111-1789> (last visited Jan. 26, 2012).

84. See *id.*

sentence of five years,⁸⁵ while possession of 280 grams triggers a mandatory minimum of ten years.⁸⁶ Additionally, the five-year minimum sentence for simple possession of crack cocaine was eliminated.⁸⁷

C. *The Debate Over Pipeline Cases*

The FSA reduces the sentencing disparity for offenders whose illegal conduct occurs after its enactment date; however, a debate emerged in the legal community⁸⁸ and in Congress⁸⁹ over whether the FSA should be applied “partially retroactively” to cases that were pending in the pipeline when the bill was signed.⁹⁰

The retroactivity of a statute repealing a federal criminal penalty is governed by 1 U.S.C. § 109, known as the General Saving Statute,⁹¹ which states: “The repeal of any statute shall not have the effect to release or extinguish any penalty . . . incurred under such statute unless the repealing Act shall so expressly provide. . . .”⁹² However, the Supreme Court has held that the repealing act need not contain an explicit provision of retroactivity, and the Saving Statute “cannot justify a disregard of the will of Congress as manifested. . . .”⁹³ Further, the Saving Statute may be overridden when the new statute “can be said by fair implication or expressly to conflict with § 109.”⁹⁴ Therefore, where a new statute lacks an express retroactivity provision, evidence of legislative intent may override the Saving Statute if the “necessary implication” is that Congress did not intend for the old penalty to be preserved by the Saving Statute.⁹⁵

85. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, § 2 (2010) (codified at 21 U.S.C. § 841(b)(1)(B)(iii)).

86. See *id.*

87. See *id.* § 3 (codified at 21 U.S.C. § 844(a)).

88. See, e.g., *United States v. Douglas*, 644 F.3d 39, 44 (1st Cir. 2011) (finding that the legislative intent behind the FSA merits retroactive application in certain instances). *But see United States v. Sidney*, 648 F.3d 904, 910 (8th Cir. 2011) (refusing application in pipeline cases because the plain language of the statute does not provide for retroactivity).

89. A bill to make the FSA fully retroactive has recently been introduced by Rep. Robert Scott (D-VA) in the House of Representatives and is currently being considered by the House Committee on the Judiciary, Subcommittee on Crime, Terrorism and Homeland Security. See *H.R. 2316: Fair Sentencing Clarification Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h112-2316> (last visited Oct. 13, 2012).

90. See *United States v. Holcomb*, 657 F.3d 445, 446 (7th Cir. 2011).

91. 1 U.S.C. § 109 (2006).

92. *Id.*

93. *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908).

94. *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659 n.10 (1974).

95. See *United States v. Dixon*, 648 F.3d 195, 199 (3d Cir. 2011).

The text of the FSA does not contain an express retroactivity provision.⁹⁶ In fact, the FSA does not mention when Congress intended federal judges to begin applying the new mandatory minimums.⁹⁷ However, Congress did direct the Sentencing Commission to promulgate new Federal Sentencing Guidelines (the “Guidelines”) consistent with the FSA as soon as possible and not later than 90 days after the signing of the bill.⁹⁸ In response, the Sentencing Commission duly amended the Guidelines so that the sentence ranges recommended by the Guidelines correspond to the new mandatory minimums.⁹⁹ This amendment went into effect on November 1, 2010.¹⁰⁰

In June 2011, the Sentencing Commission voted to apply the Guidelines amendment retroactively.¹⁰¹ Notably, the Commission stated that its vote did not give retroactive effect to the mandatory minimums in the FSA because “[o]nly Congress can make a statute retroactive.”¹⁰² That is, defendants sentenced under the higher ranges set forth by the previous set of Federal Sentencing Guidelines may petition courts for a reduced sentence;¹⁰³ but the Commission’s decision to apply the amendment retroactively is irrelevant to defendants who were subject to the congressionally imposed mandatory minimums.¹⁰⁴ Although the Guidelines are “effectively advisory,”¹⁰⁵ and federal judges are free to depart from them at their discretion,¹⁰⁶ mandatory minimums are “legislatively prescribed prison term[s]” that eliminate judicial

96. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified at 21 U.S.C. §§ 841, 844, 960).

97. See *id.*

98. See *id.* § 8 (directing the Sentencing Commission to write new guidelines “as soon as practicable, and in any event, not later than 90 days after the date of enactment of this Act. . .”).

99. See Notice of a Temporary, Emergency Amendment to Sentencing Guidelines and Commentary, 75 Fed. Reg. 66,188 (Oct. 27, 2010); U.S.S.G. supp. to app. C, amend. 748 (Supp. 2010) (amending U.S.S.G. § 2D1.1(c)) (effective Nov. 1, 2010).

100. See *id.*

101. See Press Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Votes Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively (June 30, 2011) [hereinafter Sentencing Commission Press Release].

102. See *id.*; see also U.S. DEP’T OF JUST., OFFICE OF THE DEPUTY ATT’Y GEN., MEMORANDUM FOR ALL FEDERAL PROSECUTORS (July 1, 2010), available at <http://www.justice.gov/oip/docs/revised-sentencing-guidelines-odag.pdf> (stating that the Sentencing Commission’s decision to make the Guidelines retroactive does not make the statutory provisions of the FSA retroactive).

103. See Sentencing Commission Press Release, *supra* note 101.

104. See Press Release, Families Against Mandatory Minimums, Frequently Asked Questions About the 2011 Retroactive Crack Guideline Amendment, at 4 (July 8, 2011) [hereinafter FAQ Press Release].

105. United States v. Booker, 543 U.S. at 220, 245 (2005).

106. See *id.* at 264 (stating that district courts are not bound by the Guidelines but must take them into account when sentencing).

discretion.¹⁰⁷ Therefore, defendants whose offenses triggered the old mandatory minimums under the 1986 Act may not petition courts for a sentence reduction based on the newly-retroactive Guidelines.¹⁰⁸

The application of the FSA is further complicated by the fact that the statute has several potential degrees of retroactivity that hinge upon where a defendant was located in the judicial system when the statute was enacted.¹⁰⁹ For organizational purposes, cases involving retroactive application of the FSA can be grouped into two categories: (1) “pipeline” cases, involving not-yet-sentenced defendants who were in the pipeline when the FSA was enacted,¹¹⁰ and (2) already-sentenced defendants, including those whose cases were pending on appeal, as well as those already serving time in prison, when the FSA was signed.¹¹¹ Generally, no debate exists among the courts on whether the FSA applies to the second category of already-sentenced defendants.¹¹² In Attorney General Eric Holder’s July 15, 2011 “Memorandum for All Federal Prosecutors,” he stated, “The eleven courts of appeal that have considered the issue agree that the new penalties do not apply to defendants who were sentenced prior to August 3.”¹¹³ Courts considering the first category of cases arrived at opposite conclusions,

107. See Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 13 (2010).

108. See FAQ Press Release, *supra* note 104, at 4.

109. When considering whether the FSA should apply, courts examined several temporal factors, including: when the defendant’s offensive conduct occurred, when the defendant was initially sentenced, and where the case sits in the appeals process with respect to the passage of the FSA. See, e.g., *United States v. Holcomb*, 657 F.3d 445, 446-47 (7th Cir. 2011) (describing two “waves” of defendants seeking retroactivity: (1) defendants whose appeals were pending on August 3, 2010, and (2) defendants who were sentenced on or after August 3, 2010); see also *United States v. Acoff*, 634 F.3d 200, 202 (2d Cir. 2011) (refusing to apply the FSA to an already-sentenced defendant and reasoning that “[t]he fact that Acoff . . . had not yet exhausted his appeals when the FSA came into force does not change our analysis”).

110. See, e.g., *United States v. Douglas*, 644 F.3d 39 (1st Cir. 2011); see also *United States v. Dixon*, 648 F.3d 195 (3d Cir. 2011); *United States v. Tickle*, 661 F.3d 212 (5th Cir. 2011); *United States v. Fisher*, 635 F.3d 336, 340 (7th Cir. 2011), *rev’d sub nom. Dorsey v. United States*, 132 S. Ct. 2321 (2012); *United States v. Sidney*, 648 F.3d 904 (8th Cir. 2011); *United States v. Rojas*, 645 F.3d 1234 (11th Cir. 2011), *vacated, reh’g en banc granted*, 659 F.3d 1055 (11th Cir. 2011); *United States v. Watts*, 775 F. Supp. 2d 263 (D. Mass. 2011); *United States v. Jones*, No. 5:09-CR-377-FL, 2011 WL 5119064 (E.D.N.C. Oct. 27, 2011).

111. See, e.g., *United States v. Acoff*, 634 F.3d 200 (2d Cir. 2011); see also *United States v. Carradine*, 621 F.3d 575 (6th Cir. 2010); *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010).

112. See U.S. DEP’T OF JUST., OFFICE OF THE ATT’Y GEN., MEMORANDUM FOR ALL FEDERAL PROSECUTORS (July 15, 2011), available at <http://www.fd.org/docs/crack-cocaine/Holder-FSA-memo-7-15-11.pdf> [hereinafter HOLDER MEMO].

113. See *id.*

and the courts of appeals split on the issue of whether the FSA applied to pipeline cases.¹¹⁴

D. The Circuit Split and the United States Supreme Court Decision in Dorsey v. United States

Of the six circuit courts of appeals to consider the issue of whether the FSA applies to pipeline cases, the First, Third, and Eleventh Circuits held that it does apply.¹¹⁵ The United States Attorney General also expressed his agreement with these courts and stated that it is the policy of the Department of Justice (DOJ) to pursue application of the FSA to pipeline cases.¹¹⁶ Conversely, the Fifth, Seventh, and Eighth Circuits have held that the FSA does not apply to pipeline cases.¹¹⁷ In a recent 5-4 decision, the Supreme Court resolved this split, reversing the Seventh Circuit and holding that the FSA applies in pipeline cases.¹¹⁸

1. Circuits Finding the FSA Applicable to Pipeline Cases: First, Third, and Eleventh Circuit Courts of Appeals

In *United States v. Douglas*,¹¹⁹ the First Circuit affirmed a district court's ruling that the FSA applied to William Douglas, who had not

114. Compare *Douglas*, 644 F.3d at 44 (holding that the FSA should be applied to defendants sentenced after November 1, 2010, the date that the new Sentencing Guidelines went into effect); and *Rojas*, 645 F.3d at 1236 (holding that the FSA should be applied to defendants sentenced after the bill became law on August 3, 2010, even if their conduct occurred before that date); and *Dixon*, 648 F.3d at 202; with *Fisher*, 635 F.3d at 340 (refusing to apply the FSA to defendant whose sentencing occurred after enactment); and *Holcomb*, 657 F.3d at 452 (same); and *Sidney*, 648 F.3d at 910 (same); and *Tickles*, 661 F.3d at 215 (same).

115. See *Douglas*, 644 F.3d at 44; see also *Dixon*, 648 F.3d at 202; *Rojas*, 645 F.3d at 1234.

116. See HOLDER MEMO, supra note 112. Notably, during the months immediately following the FSA's enactment, some federal prosecutors argued that pipeline defendants were still subject to the old minimums. See, e.g., *Douglas*, 746 F. Supp. 2d at 226 n.29 (Judge Hornby, noting in his opinion: "At oral argument, I did inquire of the Assistant U.S. Attorney whether his argument was a matter of individual . . . discretion or the position of the Department of Justice, and he replied that he understood it to be the policy of the Department of Justice."). The memo circulated by Attorney General Holder in July 2011 thus caused an unusual result, as some federal prosecutors were forced to flip-flop their position mid-sentencing, to argue that the new minimums should in fact apply to pipeline cases. See, e.g., *Tickles*, 661 F.3d at 215 (noting that the U.S. Attorney filed a supplemental brief to request resentencing in accordance with the FSA); see also *Holcomb*, 657 F.3d at 445. See generally Douglas A. Berman, *Only a Year Late, AG Holder Sees Light and Reverses Course on FSA Pipeline Sentencing Issue*, SENTENCING L. & POLICY BLOG (July 15, 2011) (discussing the Attorney General's memorandum).

117. See *Tickles*, 661 F.3d at 215; see also *Fisher*, 635 F.3d at 340; *Holcomb*, 657 F.3d at 452; *Sidney*, 648 F.3d at 910.

118. *Dorsey v. United States*, 132 S. Ct. 2321 (2012).

119. *Douglas*, 644 F.3d at 39.

been sentenced as of November 1, 2010,¹²⁰ although his drug offense occurred in 2009.¹²¹ Douglas pled guilty to conspiracy to distribute and possession with intent to distribute more than 50 grams of crack cocaine.¹²²

Under the mandatory minimums in effect at the time of Douglas's offense, possession of this amount of crack triggered a mandatory minimum of ten years in prison.¹²³ Under the FSA, this quantity of crack (over 28 grams) triggers a mandatory minimum of only five years, and considering other sentencing factors, yields a Guidelines range for Douglas between six-and-a-half to eight years in prison.¹²⁴

In finding the FSA applicable to Douglas, the First Circuit rejected the Government's argument that the federal Saving Statute preserved the old mandatory minimums and, in doing so, affirmed the district court's finding that Congress had overridden the Saving Statute by "fair implication."¹²⁵ Specifically, the First Circuit reasoned that Congress's intent in enacting the FSA was to impose fairer sentences: "Congress, having ordered the new 18:1 guidelines to apply no later than November 1, 2010, would not have wanted its end . . . frustrated by requiring judges to continue applying the old 100:1 minimums where the conduct predated the statute."¹²⁶ The court noted, however, that the Government's argument was not without merit, and that Congress may have purposely left the matter to be dealt with by the Saving Statute.¹²⁷ Nonetheless, the court found that "the imposition *now* of a minimum sentence that Congress has *already* condemned as too harsh makes this an unusual case . . . it is likely that *Congress* would wish to apply the new minimums to new sentences."¹²⁸ Finally, the court reasoned that the rule of lenity, which applies to penalties as well as definitions of crimes, also lends support to Douglas' contentions.¹²⁹

120. The court chose November 1, 2010, as the relevant date (as opposed to the August 3, 2010 enactment date) because this was the date that Congress intended the new guidelines embodying the 18:1 ratio would come into effect. *See id.* at 43.

121. *See id.*

122. *See id.* at 40.

123. *See id.* at 41.

124. *See id.*

125. *See Douglas*, 644 F.3d at 42-43 ("Their reasoning is that Congress intended that when the new guidelines embodying the 18:1 ratio came into effect, defendants would be sentenced under the new guidelines, and use of the pre-FSA mandatory minimums . . . would defeat this intention.").

126. *See id.* at 43.

127. *See id.* ("Nothing would have been easier than for Congress to provide that the new mandatory minimums should take effect on a specific date . . . or to provide that any sentence under the new guidelines should also be governed by the new mandatory minimums.").

128. *See id.* at 44.

129. *See id.*

Likewise, in *United States v. Dixon*,¹³⁰ the Third Circuit held that the FSA applied to defendants who committed crimes before the FSA became law but were sentenced afterwards.¹³¹ On March 19, 2010, Dixon pled guilty to conspiring to distribute 51 grams of crack cocaine between November 2007 and December 2008.¹³² Congress passed the FSA prior to Dixon's sentencing hearing, which took place on October 25, 2010.¹³³ Under the FSA, Dixon faced a mandatory minimum of five years in prison.¹³⁴ If the FSA did not apply, then he was subject to the harsher minimum of ten years.¹³⁵ The Third Circuit, reversing the decision of the Middle District of Pennsylvania, concluded that Congress intended for defendants like Dixon to have the benefit of the FSA, and, thus, it did not intend to preserve the mandatory minimum penalties of the 1986 Act.¹³⁶

The Third Circuit articulated three main reasons for its decision.¹³⁷ First, the court reasoned that Congress's emergency directive to the Sentencing Commission to promulgate a Guideline amendment as soon as possible demonstrates Congress's intent to have the FSA apply to sentences handed down as of its effective date.¹³⁸ The court noted that the Sentencing Reform Act of 1984 directs district courts to apply the Guidelines that are in effect on the date the defendant is sentenced.¹³⁹ As a result, the court reasoned that Congress knew "the amended Guidelines would apply at the date of sentencing, regardless of when the offense occurred."¹⁴⁰ The court stated that opponents of this view have failed to explain "why Congress would direct new Guidelines to be employed on an emergency basis, yet at the same time would desire that the Guidelines have a diminished impact due to the continued application of the old mandatory minimums."¹⁴¹ Further, the court noted that the statute of limitations for drug offenses is five years and that refusing to apply the FSA to defendants like Dixon essentially means a defendant could be indicted on August 2, 2015 and be sentenced under the old mandatory minimums.¹⁴²

130. *United States v. Dixon*, 648 F.3d 195 (3d Cir. 2011).

131. *See id.* at 196.

132. *See id.*

133. *See id.* at 198.

134. *See id.*

135. *See id.*

136. *See Dixon*, 648 F.3d at 198.

137. *See id.* at 200-02.

138. *See id.* at 200.

139. *See id.* at 201.

140. *Id.*

141. *Id.*

142. *See Dixon*, 648 F.3d at 202.

Second, the *Dixon* court pointed out that Congress directed the Sentencing Commission to study the effects of the FSA and to produce a report in the coming years.¹⁴³ If the FSA only applied to post-August 3, 2010 conduct, the court reasoned, it would often be inapplicable during this period and would limit the ability of the Commission to produce a thorough report.¹⁴⁴

Finally, the court pointed to the title and purpose of the FSA, which Congress stated is to “restore fairness” to sentencing.¹⁴⁵ Refusing to apply the FSA, the court reasoned, is “fundamentally unfair.”¹⁴⁶

Similarly, in *United States v. Rojas*,¹⁴⁷ Carmelina Vera Rojas pled guilty to conspiring with intent to distribute 50 grams or more of crack and two counts of distributing five grams or more of crack.¹⁴⁸ Her conduct triggered a pre-FSA mandatory minimum sentence of ten years.¹⁴⁹ Remarkably, her sentencing was scheduled for August 3, 2010: the same date that the FSA became law.¹⁵⁰ Anticipating this change in the law, the district court granted a continuance to determine whether the FSA should apply to Rojas.¹⁵¹ Ultimately, the district court decided that the FSA did not apply to Rojas, and, in September of 2010, Rojas was sentenced to ten years in prison.¹⁵²

On appeal, the Eleventh Circuit reversed the district court, holding that the FSA did apply to Rojas.¹⁵³ Like the First and Third Circuits, the Eleventh Circuit reasoned that the necessary and fair implication from the FSA is that “Congress intended the Act to apply to all sentencings going forward, because a contrary conclusion would be logically inconsistent and would achieve absurd results. . . .”¹⁵⁴ The court stated that Congress’s grant of emergency authority to the Sentencing Commission to promulgate new Guidelines as soon as possible indicated its intent to apply the FSA immediately.¹⁵⁵ Further, the court noted that, with respect to the Saving Statute, circuit precedent holds that a new statute should apply to cases pending on the enactment date unless

143. *See id.*

144. *See id.*

145. *See id.*

146. *Id.* at 203.

147. *United States v. Rojas*, 645 F.3d 1234 (11th Cir. 2011), *vacated, reh’g en banc granted*, 659 F.3d 1055 (11th Cir. 2011).

148. *See id.* at 1236.

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. *See Rojas*, 645 F.3d at 1240.

154. *See id.* at 1239.

155. *See id.*

serious injustice would result.¹⁵⁶ The court concluded that, in Rojas' case, the fair result is to apply the FSA because Congress clearly wished to put a stop to unfair sentencing practices as soon as possible.¹⁵⁷

2. Circuits Finding the FSA Is Not Applicable to Pipeline Cases

In *United States v. Tickles*,¹⁵⁸ the Fifth Circuit declined to apply the FSA to two defendants who were both sentenced via pre-FSA mandatory minimums to ten years' imprisonment.¹⁵⁹ Each of the defendants' illegal conduct preceded the FSA, but both were sentenced following its passage.¹⁶⁰

While both cases were pending on appeal, the United States Attorney's Office filed supplemental briefs reversing its position that the FSA did not apply to these cases, and requesting that the cases be remanded for sentencing in accordance with the new minimums.¹⁶¹ This supplemental filing was done pursuant to the July 2011 directive from the DOJ, instructing all U.S. Attorneys to seek application of the FSA in pipeline cases.¹⁶² Notably, despite the fact that both parties before the court urged application of the FSA, the Fifth Circuit nonetheless refused to apply the new mandatory minimums and affirmed the ten-year sentences.¹⁶³ The court reasoned that the Saving Statute applied because the FSA does not contain an express provision of retroactivity.¹⁶⁴

Finally, the court explained that prior circuit precedent, *United States v. Doggins*, influenced its decision.¹⁶⁵ In *Doggins*, the Fifth Circuit held that the FSA could not be retroactively applied to a defendant who had been sentenced prior to its enactment.¹⁶⁶ However, Judge Carl Stewart filed a dissenting opinion in *Tickles* and distinguished *Tickles* from *Doggins* because *Doggins* did not govern pipeline cases.¹⁶⁷

156. *See id.*

157. *See id.* at 1240.

158. *United States v. Tickles*, 661 F.3d 212 (5th Cir. 2011).

159. *See id.* at 213-14. The court considered two cases jointly because they presented the same issue of FSA retroactivity. *Id.* Defendant Tickles was convicted by a jury for possession with intent to distribute 50 grams of crack. *Id.* The other defendant, Gibson, pled guilty to possession with intent to distribute five grams of crack, along with other drug charges. *Id.*

160. *See id.*

161. *See id.* at 214.

162. *See* HOLDER MEMO, *supra* note 112 (urging all federal prosecutors to seek application of FSA in sentencing proceedings of pipeline cases).

163. *See Tickles*, 661 F.3d at 215.

164. *See id.*

165. *United States v. Doggins*, 633 F.3d 379 (5th Cir. 2011); *Tickles*, 661 F.3d at 214.

166. *See Doggins*, 633 F.3d at 384.

167. *See Tickles*, 661 F.3d at 215 (Stewart, J., dissenting).

Judge Stewart argued that Congress intended for courts to apply the FSA immediately, and this intent overrides the Saving Statute.¹⁶⁸

The issue of the FSA's application to pipeline cases was litigated frequently before the Seventh Circuit, and, in each decision, the court held that it does not apply.¹⁶⁹ In *United States v. Fisher*,¹⁷⁰ the court considered the cases of Anthony Fisher and Edward Dorsey.¹⁷¹ Fisher pled guilty in February 2010 to conspiracy to distribute over 50 grams of crack.¹⁷² He was sentenced to ten years in June 2010 but argued at his February 2011 appeal that his sentence should be reduced because the FSA was enacted while his appeal was pending.¹⁷³ The Seventh Circuit found, pursuant to its prior holding in *United States v. Bell*,¹⁷⁴ that the FSA was not retroactive, and did not apply to defendants such as Fisher who were sentenced prior to the bill's enactment.¹⁷⁵

The second defendant, Dorsey, presented a different issue for the court, as he was sentenced about one month *after* the FSA's passage.¹⁷⁶ Dorsey pled guilty to possession of more than five grams of crack with intent to distribute.¹⁷⁷ Because of a prior felony conviction, his offense also triggered a ten-year mandatory minimum under the old scheme.¹⁷⁸ In urging application of the FSA to his case, Dorsey argued that Congress's intent was to implement the new minimums as soon as possible and that the relevant date for application of the FSA was therefore his sentencing date, not the date of his offense.¹⁷⁹ The court expressly rejected this argument, stating, "We believe that if Congress wanted the FSA or the Guideline amendments to apply to not-yet sentenced defendants convicted on pre-FSA conduct, it would have at least dropped a hint to that effect. . . ."¹⁸⁰ The court refused to apply the FSA and further stated that the relevant date for sentencing is the date of the underlying criminal conduct.¹⁸¹ Nonetheless, the court opined on the

168. *See id.* at 216 (finding that the FSA's title, preamble, and substance all point to Congress's clear intent to apply the statute immediately).

169. *See, e.g.,* *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010); *see also* *United States v. Fisher*, 635 F.3d 336, 340 (7th Cir. 2011), *rev'd sub nom.* *Dorsey v. United States*, 132 S. Ct. 2321 (2012); *United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011).

170. *See Fisher*, 635 F.3d at 338.

171. *See id.*

172. *See id.*

173. *See id.*

174. *United States v. Bell*, 624 F.3d 803, 815 (7th Cir. 2010).

175. *See Fisher*, 635 F.3d at 338.

176. *See id.* at 339.

177. *See id.*

178. *See id.*

179. *See id.*

180. *Id.* at 339-40.

181. *See Fisher*, 635 F.3d at 340.

injustice of the result: “We have sympathy for the two defendants here, who lost on a temporal roll of the cosmic dice. . . .”¹⁸²

Finally, the *Fisher* court noted that it would be willing to apply the FSA in cases where the defendant’s criminal conduct “straddled” August 3, 2010.¹⁸³ If a defendant committed criminal acts both before and after the enactment date, he or she could take advantage of the FSA.¹⁸⁴ But, the court reasoned, Dorsey’s conduct occurred two years prior and thus his argument was unavailing.¹⁸⁵

The Eighth Circuit joined the other circuits discussed herein and found the FSA inapplicable to pipeline cases in *United States v. Sidney*.¹⁸⁶ In *Sidney*, the defendant pled guilty in December 2009 to possession with intent to distribute 50 grams or more of crack.¹⁸⁷ After receiving several continuances, Sidney was sentenced on January 13, 2011, to the pre-FSA mandatory minimum of ten years.¹⁸⁸ In arguing that the FSA should be applied to his case, Sidney relied on the position articulated by the First Circuit in *Douglas*.¹⁸⁹ Namely, that the “necessary implication” of the FSA was that the old minimums should no longer be used, and that the Saving Statute was overridden.¹⁹⁰ In particular, Sidney pointed to the fact that Congress directed the Sentencing Commission to promulgate Guideline changes on an emergency basis as a sign that the new statute should be implemented as soon as possible.¹⁹¹ Sidney concluded that applying the newly retroactive Guidelines, but not the reduced mandatory minimums, created an inconsistency that Congress could not have intended.¹⁹²

The court rejected the necessary implication argument, reasoning that no inconsistency existed because mandatory minimums always control where they require longer sentences than the Guidelines.¹⁹³ The court cited circuit precedent, *United States v. Smith*,¹⁹⁴ to explain that the pertinent question for purposes of the Saving Statute is whether Congress wanted to exempt the FSA from the statute.¹⁹⁵ The court reasoned that, because the Saving Statute requires explicit language for such an

182. *Id.*

183. *See id.*

184. *See id.*

185. *See id.*

186. *United States v. Sidney*, 648 F.3d 904, 910 (8th Cir. 2011).

187. *See id.* at 906.

188. *See id.*

189. *See id.* at 908.

190. *See id.*

191. *See id.* at 907.

192. *See Sidney*, 648 F.3d at 907.

193. *See id.* at 908.

194. *United States v. Smith*, 632 F.3d 1043 (8th Cir. 2011).

195. *See Sidney*, 648 F.3d at 909-10.

exemption, absence of this specific language necessitates a finding that the Saving Statute governs.¹⁹⁶ Therefore, the court found the FSA inapplicable to Sidney.¹⁹⁷

3. The United States Supreme Court Decision in *Dorsey v. United States*

In *Dorsey v. United States*, the Supreme Court resolved the circuit split discussed herein and considered the consolidated cases of Edward Dorsey—discussed *supra*—and Corey Hill, both from the Seventh Circuit.¹⁹⁸ Hill was sentenced in December of 2010 to the mandatory ten-year minimum for selling 53 grams of crack in 2007.¹⁹⁹ By a 5-4 decision, the Court vacated the Seventh Circuit’s holding that the FSA did not apply to petitioners, announcing the rule that any defendant sentenced after August 3, 2010 must be sentenced under the FSA, regardless of when their criminal conduct occurred.²⁰⁰

The majority gave several reasons for its holding.²⁰¹ First, like the First, Third, and Eleventh Circuits, the Court found that the Saving Statute allows Congress to apply a new statute’s penalties without expressly repealing the old one.²⁰² Second, the Court observed that the Sentencing Reform Act, which created the U.S. Sentencing Commission, states that courts should apply the Guidelines in effect on the date of sentencing.²⁰³ Moreover, the Court reasoned that the FSA’s language implies that Congress intended to follow that guiding principle.²⁰⁴ Applying the old mandatory minimums, the Court observed, “would create sentencing disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent.”²⁰⁵ Finally, like the First and Third Circuits, the Court reasoned that using the old mandatory minimums alongside the new Sentencing Guidelines “would make matters worse by creating new anomalies. . . .”²⁰⁶ That is, the old mandatory minimums would trump the new Guidelines ranges for

196. *See id.* at 908 (“In the end, the fact remains that Congress could easily have included a single sentence in the FSA to give it retroactive effect, but for whatever reason it did not do so. It is not within the province of this court to do so now.”).

197. *See id.*

198. *Dorsey v. United States*, 132 S. Ct. 2321 (2012).

199. *Id.* at 2323.

200. *Id.* at 2336.

201. *Id.* at 2331-35.

202. *Id.* at 2324.

203. *Id.*

204. *See Dorsey*, 132 S. Ct at 2324.

205. *Id.*

206. *Id.* at 2324-25.

some offenders but not for others.²⁰⁷ Based on these considerations, the Court vacated the Seventh Circuit's rulings, holding that defendants sentenced after August 3, 2010, must be sentenced under the FSA.²⁰⁸

III. ANALYSIS

As discussed in Part II, the circuit courts of appeals split over whether the FSA should apply to not-yet-sentenced defendants whose conduct predates the statute.²⁰⁹ The U.S. Attorney General and three circuits agreed that judges should apply the FSA to pipeline cases.²¹⁰ Three other circuits and numerous district courts around the country rejected that interpretation.²¹¹ The Supreme Court, recently weighing in, held that the FSA should be applied to pipeline cases.²¹²

This Part will argue that *Dorsey v. United States* was correctly decided: the FSA should be applied to defendants who have not received an initial sentence, even if their conduct predates the FSA. Further, this Part will contend that the *Dorsey* decision illustrates aspects of federal sentencing law that merit reform. This Part will begin by contending that the Saving Statute argument, employed by circuits refusing to apply the FSA, is unavailing. Specifically, this section will argue that the fair implication from Congress, as evidenced through the plain language of the FSA and its legislative history, is that Congress did not intend the penalties of the 1986 Act to be preserved. Second, this Part will argue that the goals of sentencing are not met by denying the FSA to pipeline cases. Third, this Part will contend that, where a statute is ambiguous, the rule of lenity dictates that the ambiguity should be resolved in the defendant's favor. In this case, the rule favors applying the FSA to pending cases.²¹³ Finally, this Part will explore the implications of the *Dorsey* decision on the future of federal sentencing law.

207. *Id.*

208. *Id.* at 2336.

209. *See supra* Part II.D.

210. *See* HOLDER MEMO, *supra* note 112.

211. *See* *United States v. Tickle*, 661 F.3d 212, 215 (5th Cir. 2011); *see also* *United States v. Fisher*, 635 F.3d 336, 340 (7th Cir. 2011), *rev'd sub nom.* *Dorsey v. United States*, 132 S. Ct. 2321 (2012); *United States v. Holcomb*, 657 F.3d 445, 452 (7th Cir. 2011); *United States v. Sidney*, 648 F.3d at 910 (8th Cir. 2011); *United States v. Jones*, No. 5:09-CR-377-FL, 2011 WL 5119064, at *4 (E.D.N.C. Oct. 27, 2011); *United States v. Bryant*, No. 5:10-cr-73-KSF, 2011 WL 5245252, at *11 (E.D. Ky. Nov. 2, 2011); *United States v. Ellis*, No. 3:09-cr-35-01, 2011 WL 6888536, at *3 (N.D.W.Va. Dec. 30, 2011).

212. *Dorsey*, 132 S. Ct. 2321 (2012).

213. *See Holcomb*, 657 F.3d at 460 (Williams, J., dissenting) (“[T]o the extent [the FSA] is unclear, we should keep the rule of lenity in mind too. . . . That rule favors applying the FSA in all sentencings after its passage.”); *see also* *United States v. Douglas*, 644 F.3d 39, 44 (1st Cir. 2011) (“[T]he rule of lenity, applicable to penalties as

A. *The FSA Overrides the Saving Statute by Fair Implication*

The U.S. Supreme Court has held that the Saving Statute can be overridden by a fair implication of the will of Congress.²¹⁴ Here, the fair implication from Congress is clear: legislators anticipated that the FSA would undo the 100:1 ratio and restore fairness to federal cocaine sentencing.²¹⁵ Specifically, Congress intended to repeal the old sentencing ratio immediately.²¹⁶ This intent is discernible in both the plain language of the FSA and the statements of legislators who authored the bill.²¹⁷

1. The Plain Language of the FSA Indicates that it Should Apply to Pipeline Cases

The plain language of the FSA expresses Congress's belief that crack sentencing laws urgently needed to change and, therefore, the old penalties should not be preserved by the Saving Statute.²¹⁸ First, in Section Eight of the FSA, Congress provided emergency authority to the Sentencing Commission to promulgate new Guidelines consistent with the FSA as soon as possible.²¹⁹ Courts have reasoned that, because Congress explicitly instructed that judges apply the revised Guidelines, it also intended the new mandatory minimums to be used as soon as possible.²²⁰ In other words, it would be irrational for judges to use revised FSA-consistent Guidelines, while simultaneously imposing pre-FSA mandatory minimums that yield sentences double or even triple the recommended Guideline range.²²¹

well as the definition of crimes, adds a measure of further support to [the defendant].”); Letter-Brief of Douglas A. Berman, Professor of Law, Ohio State University Moritz College of Law, as Amicus Curiae Supporting Defendants [at 2], *United States v. Santana et al.*, 761 F. Supp. 2d 131 (S.D.N.Y. 2011) (No. 09-CB-1022), available at <http://sentencing.typepad.com/files/fsa-application-letter-from-dab.pdf> [hereinafter Berman Letter Brief] (“[I]f a reasonable doubt persists on whether the FSA is to apply in pending cases, this interpretive ambiguity should be resolved in favor of the defendant in accord with the rule of lenity.”).

214. See *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465 (1908); see also *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653 (1974).

215. See *United States v. Tickles*, 661 F.3d 212, 215-16 (5th Cir. 2011) (Stewart, J., dissenting).

216. See 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin), 2010 WL 956335, at *S1680-82.

217. See *infra* Part III.A.1-2.

218. See *Holcomb*, 657 F.3d at 456 (Williams, J., dissenting); see also *United States v. Dixon*, 648 F.3d 195, 198, 202 (3d Cir. 2011).

219. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified at 21 U.S.C. §§ 841, 844, 960).

220. See *Dixon*, 648 F.3d at 201.

221. See *id.* at 201; see also *Holcomb*, 657 F.3d at 462 (Posner, J., dissenting).

A simple but compelling example demonstrates why Congress likely intended to have the FSA applied alongside the revised Guidelines. Anthony Clardy, one of four defendants denied a rehearing *en banc* in *United States v. Holcomb*,²²² was convicted of possessing 13.1 grams of crack.²²³ Clardy's pre-FSA mandatory minimum sentence, which the court imposed, was ten years.²²⁴ The revised, FSA-compliant Guidelines range for his offense was between two-and-a-half to three years.²²⁵ In fact, under the FSA, the amount of crack he possessed is insufficient to trigger a mandatory minimum.²²⁶ Thus, the sentence imposed was 224-300 percent greater than the recommended Guideline range for his offense, an outcome that Judge Richard Posner termed "perverse."²²⁷ Although the majority in *Holcomb* justified this disparity by observing that, by definition, mandatory minimum sentences trump recommended Guidelines ranges, the majority did not venture to explain how Congress could have intended this absurd result.²²⁸ More likely, Congress did *not* intend such a result, but rather intended the new Guidelines and the FSA to apply to all defendants sentenced after its passage.

Congress's intent to apply the FSA to pipeline defendants is also apparent from its directive in Section Ten to the Sentencing Commission to produce a report on the impact of the new ratio within five years.²²⁹ As noted by the Third Circuit, if the FSA only applies to post-August 3, 2010 conduct, then the number of defendants who will be arrested, convicted, and sentenced before the 2015 deadline would likely not make for a comprehensive report.²³⁰ The FSA would be inapplicable for a large portion of the relevant period.²³¹

2. The Legislative History of the FSA Confirms that Congress Anticipated it Would Apply to Pipeline Cases

In addition to the plain language of the statute, legislators' statements in the congressional record reveal that they intended to repeal

222. *United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011).

223. *See id.* at 459 (Williams, J., dissenting).

224. *See id.*

225. *See id.*

226. *See id.* at 462 (Posner, J., dissenting).

227. *See id.*

228. *See Holcomb*, 657 F.3d at 449 (majority opinion).

229. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, § 10 (2010) ("Not later than 5 years after the date of enactment of this Act, the United States Sentencing Commission . . . shall study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act. . . .").

230. *See* *United States v. Dixon*, 648 F.3d 195, 202 (3d Cir. 2011).

231. *See id.*

the current crack-cocaine ratio immediately.²³² Just before the Senate unanimously passed the FSA, Senator Richard Durbin (D-IL), an original sponsor of the bill, expressed his belief that the FSA would repeal the existing unjust sentencing laws:

This is the first time the Senate Judiciary Committee has ever reported a bill to reduce the crack-powder disparity, and if this bill is enacted into law, it will be the first time since 1970-40 years ago—that Congress has *repealed a mandatory minimum sentence*. . . . Every day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust. . . . If this bill is enacted into law, it will *immediately* ensure that every year, thousands of people are treated more fairly in our criminal justice system.²³³

Following these remarks by Senator Durbin, Senator Patrick Leahy (D-VT), Chairman of the Senate Judiciary Committee, expressed similar views:

[T]his bill . . . helps to ensure that our system will no longer affect many minority and urban communities more harshly than offenders who use drugs in the suburbs and corporate offices. . . . After more than 20 years, the Senate has finally acted on legislation to correct the crack-powder disparity and the harm to public confidence in our justice system it created. . . . I urge the House to act quickly so that the President can sign this historic legislation into law.²³⁴

Statements made during proceedings in the House of Representatives reflect a similar sense of urgency.²³⁵ Congressman Daniel Lungren (R-CA), who had helped to write the 1986 Act, called the FSA a “tough but fair” and “well-crafted bill.”²³⁶ He candidly admitted that the 100:1 ratio was arbitrary, saying: “We initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-1. We didn’t really have an evidentiary basis for it, but that’s what we did. . . .”²³⁷ Following this statement, Congressman

232. See Berman Letter Brief, *supra* note 213; see also Letter from Richard Durbin, U.S. Sen., and Patrick Leahy, U.S. Sen., to Eric Holder, U.S. Att’y Gen. (Nov. 17, 2010), available at <http://sentencing.typepad.com/files/fair-sentencing-act-ag-holder-letter-111710.pdf> [hereinafter Durbin-Leahy Letter].

233. See 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin), 2010 WL 956335, at *S1681.

234. See 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of Sen. Leahy), 2010 WL 956335, at *S1683.

235. See 156 CONG. REC. H6196-01 (daily ed. July 28, 2010) (statement of Rep. Scott), 2010 WL 2942883, at *H6202.

236. See 156 CONG. REC. H6196-01 (daily ed. July 28, 2010) (statement of Rep. Lungren), 2010 WL 2942883, at *H6202.

237. See *id.*

Bobby Scott (D-VA) reminded the House, “[W]e are not blaming anybody for what happened in 1986, but we are fixing what we have learned through years of experience.”²³⁸ Lastly, Congressman Steny Hoyer (D-MD) surveyed the bipartisan support for the FSA:

The 100-to-1 disparity is counterproductive and unjust. That’s not just my opinion, but the opinion of a bipartisan U.S. Sentencing Commission, the Judicial Conference of the United States, the National District Attorneys Association, the National Association of Police Organizations, the Federal Law Enforcement Officers Association, the International Union of Police Associations, and dozens of former Federal judges and prosecutors. They have seen firsthand the damaging effects of our unequal sentencing guidelines up close, and they understand the need to change them. That’s what this is about. The Fair Sentencing Act does that.²³⁹

Even several months after its passage, legislators continued to focus their attention on the FSA.²⁴⁰ In November 2010, after observing the confusion in the judicial branch, Senators Durbin and Leahy wrote a pointed letter to Attorney General Eric Holder urging application of the FSA to pipeline cases.²⁴¹ Expressing their disagreement with the DOJ’s policy of seeking pre-FSA sentences in pipeline cases, the Senators wrote: “Our goal in passing the Fair Sentencing Act was to restore fairness to Federal cocaine sentencing as soon as possible.”²⁴² Closing their correspondence, the Senators declared, “[J]ustice requires that defendants not be sentenced for the next five years under a law that Congress has determined is unfair.”²⁴³

This conclusion from Senators Durbin and Leahy raises a final persuasive point for why Congress did not intend the Saving Statute to apply to the FSA.²⁴⁴ If the statute applies, it would preserve the pre-FSA minimums for several years to come.²⁴⁵ Because the statute of limitations for drug offenses is five years, a defendant could be indicted for pre-August 3, 2010 conduct until August 2, 2015.²⁴⁶ If courts continued employing the reasoning of the Fifth, Seventh, and Eighth Circuits, a defendant indicted on pre-August 3, 2010 conduct could be

238. See 156 CONG. REC. H6196-01 (daily ed. July 28, 2010) (statement of Rep. Scott), 2010 WL 2942883, at *H6202.

239. See 156 CONG. REC. H6196-01 (daily ed. July 28, 2010) (statement of Rep. Hoyer), 2010 WL 2942883, at *H6203.

240. See Durbin-Leahy Letter, *supra* note 232.

241. See *id.*

242. See *id.*

243. See *id.*

244. See *United States v. Dixon*, 648 F.3d 195, 202 (3d Cir. 2011).

245. See Durbin-Leahy Letter, *supra* note 232.

246. See *Dixon*, 648 F.3d at 202.

sentenced to a prison term that Congress deemed fundamentally unfair years earlier.²⁴⁷ In their letter to the Attorney General, Senators Durbin and Leahy called this sequence of events “absurd” and “obviously inconsistent with the purpose of the Fair Sentencing Act.”²⁴⁸ Based on the widespread sense of bipartisan urgency expressed by Congress in undoing the old ratio, this result would be nonsensical and clearly contrary to Congress’s wishes.

Despite this plethora of legislative intent, courts refusing to apply the FSA to pipeline cases determined that this history fails to communicate a necessary implication to override the Saving Statute.²⁴⁹ These courts stated that, if Congress wanted the statute to be retroactive, it would have said so explicitly.²⁵⁰ However, the Second Circuit has suggested a reason for this congressional silence: “It seems likely that simple congressional inattention produced this result . . . when Congress decided against making the provisions of the FSA *fully* retroactive, it may simply have overlooked the distinguishable, and much smaller, category of past offenders who are still being sentenced for pre-FSA crimes.”²⁵¹

In sum, both the plain language of the statute and its legislative history indicate that Congress intended to repeal the old mandatory minimums and replace them with the provisions of the FSA.²⁵² Pursuant to Supreme Court precedent, this “fair implication” is sufficient to override the Saving Statute, even where Congress omits express language repealing the old penalties.²⁵³

B. Denying the FSA to Pipeline Defendants Fails to Further the Goals of Sentencing

In addition to relying on the Saving Statute, courts refusing to apply the FSA to pipeline cases argued that a defendant should be sentenced under the law as it existed on the date of his criminal conduct, rather than

247. *See id.*

248. *See* Durbin-Leahy Letter, *supra* note 232.

249. *See, e.g.,* United States v. Holcomb, 657 F.3d 445 (7th Cir. 2011); *see also* United States v. Sidney, 648 F.3d 904 (8th Cir. 2011); United States v. Jones, No. 5:09-CR-377-FL, 2011 WL 5119064, at *4 (E.D.N.C. Oct. 27, 2011) (“This court is hesitant to read in by implication anything not obvious in the text of the FSA.”).

250. *See* United States v. Fisher, 635 F.3d 336, 340 (7th Cir. 2011), *rev’d sub nom.* Dorsey v. United States, 132 S. Ct. 2321 (2012); *see also* Jones, 2011 WL 5119064, at *4.

251. United States v. Acoff, 634 F.3d 200, 205 (2d Cir. 2011) (Lynch, J., concurring).

252. *See* Berman Letter Brief, *supra* note 213.

253. *See* Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 659 n.10 (1974); *see also* Great N. Ry. Co. v. United States, 208 U.S. 452, 465 (1908).

the date of his sentencing.²⁵⁴ Although these courts provided sparse formal reasoning for *why* this should be so, at least two sentencing policy concerns can be identified in this argument.²⁵⁵ First, courts may wish to encourage reliance in sentencing.²⁵⁶ Second, courts may prefer to sentence defendants according to principles of deterrence and desert, rather than drawing arbitrary lines based on the amount of time it takes a defendant to process through the criminal justice system.²⁵⁷ However, for reasons discussed below, neither of these concerns justify denying the new FSA sentences in pipeline cases.

First, courts may insist on using the date of criminal conduct as the relevant date for sentencing to preserve a defendant's reliance interests in his sentence.²⁵⁸ The principle of reliance suggests that individuals make decisions about their criminal conduct based on existing law.²⁵⁹ Mandatory minimums are one example of a reliable sentencing scheme.²⁶⁰ That is, "[t]he theory behind these laws was that if potential felons knew in advance that the penalty for certain crimes was a long prison sentence or death, they would think very carefully and refrain from violating the law."²⁶¹ Therefore, a court trying to preserve a defendant's reliance interest in his sentence should theoretically impose the punishment in place on the date of his criminal offense.²⁶²

In keeping with the principle of reliance, federal courts have shown reluctance to sentence pipeline defendants under the FSA because the

254. See, e.g., *Sidney*, 648 F.3d at 906 ("[T]he timing of the sentence is immaterial . . . the controlling factor is the date on which the crime was committed."); see also *Holcomb*, 657 F.3d at 447 ("Nothing depends on the sentencing date, which reflects how long it took to catch a criminal, and the state of the district judge's calendar. . .").

255. See *Holcomb*, 657 F.3d at 450-52; see also *Jones*, 2011 WL 5119064, at *5.

256. See *Holcomb*, 657 F.3d at 450-52 (discussing the issue of reliance in sentencing and its relevance to the FSA application date).

257. See, e.g., *Jones*, 2011 WL 5119064, at *5 ("Fairness cannot be achieved if a defendant could obtain a better sentence simply by pushing back the date of sentencing in order to receive the benefit of a favorable change in the law, regardless of when the defendant's conduct took place."); see also *Holcomb*, 657 F.3d at 447 ("Nothing depends on the sentencing date, which reflects how long it took to catch a criminal, and the state of the district judge's calendar, rather than principles of deterrence or desert.").

258. See *Holcomb*, 657 F.3d at 450 ("People who distributed cocaine before the 2010 Act expected to be subject to the old penalty structure. . .").

259. See Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2160 (1996) ("Individuals should be able to rely on existing law when ordering their affairs. Clear legal obligations maximize and individual's freedom of action.").

260. See Christopher Mascharka, Comment, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 947-48 (2001).

261. See *id.*

262. See Krent, *supra* note 259, at 2160.

statute had not yet been enacted when the criminal conduct occurred.²⁶³ For example, when discussing the issue of reliance in *Holcomb*, the Seventh Circuit proclaimed: “People who distributed cocaine before the 2010 Act expected to be subject to the old penalty structure; their behavior cannot be changed by a later drop in sentences.”²⁶⁴

Although reliance may be a valid policy concern where the statute in question retroactively increases a defendant’s punishment,²⁶⁵ its relevance to the application of the FSA is arguably limited.²⁶⁶ Certainly, the law does not conflict with a defendant’s constitutional rights by subsequently *reducing* his expected sentence.²⁶⁷ Further, the concept of reliance has been criticized in the legal community as being “largely a fiction.”²⁶⁸ Scholars argue that few offenders are likely to understand statutory requirements without legal help, and very few are likely to predict with any accuracy what their sentence would be if convicted.²⁶⁹ Further, federal judges routinely apply the law as it exists on the date of sentencing and not as it existed when the criminal conduct occurred.²⁷⁰ The Sentencing Reform Act instructs that the Guidelines apply to all defendants sentenced after the Guidelines are promulgated, regardless of when the crime occurred.²⁷¹ As a companion to the Guidelines, the FSA should likewise be applied to all sentences after its passage.²⁷² Accordingly, as Judge Posner noted in his dissent in *Holcomb*, reliance concerns cannot justify a refusal to apply the FSA to pipeline cases.²⁷³

263. See *Holcomb*, 657 F.3d at 450.

264. See *id.*

265. Laws that retroactively increase a defendant’s punishment or that impose a punishment on previously innocent behavior are prohibited under the Ex Post Facto Clause of the federal Constitution. See U.S. CONST. art. I, § 9, cl. 3; see also Krent, *supra* note 259, at 2146-47 (discussing the prohibition against ex post facto laws).

266. See *Holcomb*, 657 F.3d at 462-63 (Posner, J., dissenting) (“There is no reliance interest in punishing these defendants under the old law.”).

267. See Krent, *supra* note 259, at 2146 (explaining that the purpose of the Ex Post Facto Clause is to prevent governments from enacting laws prohibiting conduct that was lawful when undertaken, or that increases a punishment after the fact).

268. See *id.* at 2161-63 (criticizing the concept of reliance in the criminal context as being unrealistic).

269. See *id.* at 2161.

270. See 18 U.S.C. § 3553(a)(4)(A)(ii) (2010); see also *Holcomb*, 657 F.3d at 462 (Posner, J., dissenting) (“Sentencing guidelines are applicable to all sentencings that occur after they are promulgated regardless of when the crimes for which the sentences are being imposed were committed.”).

271. See 18 U.S.C. § 3553(a)(4)(A)(ii) (2010); see also *Holcomb*, 657 F.3d at 462 (Posner, J., dissenting).

272. See *United States v. Dixon*, 648 F.3d 195, 201 (3d Cir. 2011); see also *United States v. Rojas*, 645 F.3d 1234, 1239 (11th Cir. 2011), *vacated, reh’g en banc granted*, 659 F.3d 1055 (11th Cir. 2011).

273. See *Holcomb*, 657 F.3d at 462-63 (Posner, J., dissenting).

A second policy concern underlying courts' refusal to apply the FSA to pipeline defendants is that traditional sentencing goals of deterrence and desert should dictate punishment, rather than the amount of time it takes a defendant to process through the criminal justice system.²⁷⁴ These courts reason that pipeline defendants should not be given the benefit of the FSA solely because their sentencing occurred after August 3, 2010.²⁷⁵

This reasoning is flawed, however, because research has shown that the goals of deterrence and desert have limited application in the realm of drug sentencing.²⁷⁶ First, drug dealers tend to think mostly in terms of the short term, and therefore are not as likely to be deterred by long mandatory sentences.²⁷⁷ Additionally, "[d]rug addiction diminishes the user's appropriate response to negative stimuli. . . . It follows that it is nonsensical to attempt to deter this group through severe mandatory sentences."²⁷⁸ In fact, the Federal Judicial Center's assessment of the impact of mandatory minimum drug sentences found that these penalties have very little, if any, impact.²⁷⁹ Finally, the argument that defendants "deserve" the severe pre-FSA sentences is unavailing, as Congress has explicitly deemed the pre-FSA sentences to be *too* harsh to be deserved by anyone.²⁸⁰ Thus, there exists no colorable reason to refuse to apply the FSA to pipeline defendants under the principles of deterrence and desert.

Finally, although courts expressed an aversion to drawing an arbitrary line for the effective date of the FSA, a certain amount of line drawing is inevitable.²⁸¹ Accordingly, if judges must engage in line

274. See, e.g., *United States v. Jones*, No. 5:09-CR-377-FL, 2011 WL 5119064, at *5 (E.D.N.C. Oct. 27, 2011) ("Fairness cannot be achieved if a defendant could obtain a better sentence simply by pushing back the date of sentencing in order to receive the benefit of a favorable change in the law, regardless of when the defendant's conduct took place."); see also *Holcomb*, 657 F.3d at 447.

275. See, e.g., *Holcomb*, 657 F.3d at 452 ("It would be weird to conclude that, the longer it takes to issue an indictment, or the better the offender at evading capture, and hence the later the sentencing date, the lower the sentence.").

276. See Mascharka, *supra* note 260, at 947-49.

277. See *id.* at 949.

278. See *id.* at 947.

279. See *id.*

280. See, e.g., 156 CONG. REC. H6196-01 (daily ed. July 28, 2010) (statement of Rep. Hoyer), 2010 WL 2942883, at *H6203.

281. See *United States v. Holcomb*, 647 F.3d 445, 457 (7th Cir. 2011) (Williams, J., dissenting). Judge Williams discusses the issue of drawing an arbitrary line:

It is true that with a line drawn at the date of effect, there will be instances where persons who pled guilty early on in their cases or who did not try to evade capture do not benefit from the new mandatory minimums, unlike others who committed a crime on the same day or even were involved in the same criminal activity. But a line must be drawn somewhere. We cannot avoid that. To draw the line at conduct, when Congress's whole point was to get rid of

drawing, they should give as much weight as possible to the will of Congress.²⁸² Here, the will of Congress, as manifested in the congressional record, is to have judges apply the FSA as soon as possible.²⁸³ As Judge Williams reasoned in *Holcomb*, “Congress gets to draw the line, and it drew it at its passage.”²⁸⁴

C. *If the Statute is Ambiguous, the Rule of Lenity Favors Applying the FSA to Pending Cases*

Although the text of the FSA and its legislative history indicate that it should apply in pipeline cases, the fact that the circuit courts of appeals and the U.S. Attorney General disagreed on the issue is an indication that, at the very least, the statute is ambiguous.²⁸⁵ When a criminal statute is ambiguous, courts commonly apply the rule of lenity.²⁸⁶ The rule of lenity is a canon of statutory construction dictating that any ambiguity in a criminal statute should be resolved in favor of the defendant.²⁸⁷

In this case, the ambiguity is the application date of the FSA, and resolving it in favor of the defendant yields a finding that the new, lower mandatory minimums should apply to all defendants sentenced after its passage.²⁸⁸

D. *The Debacle over the FSA and the Dorsey Decision Demonstrate Federal Sentencing Law Still Requires Reform to Avoid Disparities*

Even after the Supreme Court’s apt decision in *Dorsey*—which found the FSA applies to all defendants sentenced after August 3, 2010—sentencing disparities will be prevalent among those serving time for crack cocaine convictions. First, it should be noted that although the FSA drastically reduced the sentencing ratio between crack and powder cocaine, it did not fully eliminate it. Currently, defendants convicted of crack cocaine offenses will still serve longer prison terms than those convicted of powder cocaine offenses. Second, defendants sentenced on or before August 2, 2010, were still subject to the old 100:1 ratio and

unjust 100:1-based sentences, and to do so right away, would mean that “the legislative mind will be set at naught.”

Id. (quoting *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465 (1908)).

282. *See id.*

283. *See* 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of Sen. Leahy), 2010 WL 956335, at *S1683; *see also* Durbin-Leahy Letter, *supra* note 232.

284. *Holcomb*, 647 F.3d at 457.

285. *See id.* at 460 (Williams, J., dissenting).

286. *See* *United States v. Skilling*, 130 S. Ct. 2896, 2932 (2010).

287. *See id.*

288. *See* *United States v. Douglas*, 644 F.3d 39, 44 (1st Cir. 2011).

currently may not petition the courts for a sentence reduction.²⁸⁹ Based on Congress's findings, these defendants are no less entitled to a sentence reduction than those who had the good fortune to have a sentencing date in late August 2010. It seems the only way to avoid sentencing disparities entirely would be to make the FSA fully retroactive—a suggestion that surely causes district courts around the country to cringe at the thought of a massive influx of filings.

In a world without mandatory minimums where federal judges had more discretion in sentencing, the difference between serving ten years in prison and 15 months may not simply be one's sentencing date. Thus, the saga of the FSA and the *Dorsey* decision indicate that further reforms are needed if mandatory minimums are to remain a component of federal sentencing law. In particular, if Congress is going to continue *legislating* sentences for drug offenders, a strong need exists for a fair and efficient method of dealing with statutory sentence reductions. The current system falls far short of ensuring fairness and predictability in sentencing.

IV. CONCLUSION

The Fair Sentencing Act is an important piece of compromise legislation designed to correct over two decades of unjust federal crack cocaine sentencing law.²⁹⁰ The U.S. Courts of Appeals split evenly on the issue of whether the FSA should be applied to pipeline cases,²⁹¹ and the U.S. Supreme Court recently stepped in to resolve the dispute.²⁹² The First, Third, and Eleventh Circuits agreed that the best way to ensure fairness in the Fair Sentencing Act was to apply it to all defendants sentenced after its passage, even if their crime occurred before August 3, 2010.²⁹³ In contrast, the Fifth, Seventh, and Eighth Circuits adhered to a strict textual reading of the statute, holding that it could only apply to

289. Some defendants have already begun petitioning courts for a reduction, only to find their request denied. See *United States v. Robinson*, No. 12-1391, 2011 WL 3990741 (7th Cir. Sept. 7, 2012) (affirming district court's denial of defendant's motion to reduce his 20-year-sentence because he was sentenced in 2005).

290. See 156 CONG. REC. S1680-02 (daily ed. Mar. 17, 2010) (statement of Sen. Leahy), 2010 WL 956335, at *S1683.

291. Compare *Douglas*, 644 F.3d at 44; and *United States v. Rojas*, 645 F.3d 1234, 1236 (11th Cir. 2011), *vacated, reh'g en banc granted*, 659 F.3d 1055 (11th Cir. 2011); and *United States v. Dixon*, 648 F.3d 195, 202 (3d Cir. 2011); with *United States v. Fisher*, 635 F.3d 336, 340 (7th Cir. 2011), *rev'd sub nom. Dorsey v. United States*, 132 S. Ct. 2321 (2012); and *United States v. Holcomb*, 657 F.3d 445, 452 (7th Cir. 2011); and *United States v. Sidney*, 648 F.3d 904, 910 (8th Cir. 2011); and *United States v. Tickle*s, 661 F.3d 212, 214 (5th Cir. 2011).

292. See *Dorsey v. United States*, 132 S. Ct. 2321 (2012).

293. See *Douglas*, 644 F.3d at 44; *Rojas*, 645 F.3d at 1236; *Dixon*, 648 F.3d at 202.

defendants whose crime occurred *after* enactment.²⁹⁴ The Supreme Court sided with the former and ruled in June 2012 that the FSA indeed applies to all defendants sentenced after August 3, 2010.²⁹⁵

Although Congress did not include an express provision repealing pre-FSA penalties, the legislative history and the plain language of the FSA make clear that Congress intended the new penalties to apply immediately, regardless of when the criminal conduct took place.²⁹⁶ Further, although some courts contend that sentencing policy goals should guide criminal penalties—rather than a bright-line rule based on the sentencing date—these goals have little, if any, impact on defendants sentenced by the FSA.²⁹⁷ If the FSA is ambiguous as to whether it applies in pipeline cases, the rule of lenity dictates that this ambiguity is to be resolved in the defendant's favor.²⁹⁸ Finally, although the Supreme Court resolved the issue of who can take advantage of the FSA's new mandatory minimums, reforms are needed if mandatory minimums are to remain a pillar of federal sentencing law.

294. See *Fisher*, 635 F.3d at 340; see also *Holcomb*, 657 F.3d at 452; *Sidney*, 648 F.3d at 910; *Tickles*, 661 F.3d at 215.

295. *Dorsey v. United States*, 132 S. Ct. 2321 (2012).

296. See *Douglas*, 644 F.3d at 43.

297. See *Krent*, *supra* note 259, at 947-49.

298. See *Douglas*, 644 F.3d at 44.