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THE CASE FOR RETROACTIVE CRIMINAL SENTENCING REFORMS:

A Legal Memorandum

About Impact for Equity

Impact for Equity is a public interest law and policy center that has been at the front lines of social justice in the Chicago region and Illinois for over 55 years. Known for its innovative and effective advocacy for racial and economic equity, today Impact for Equity is deeply engaged in advancing systemic change in housing and the criminal legal system.

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EXECUTIVE SUMMARY

Overly severe criminal penalties remain a pervasive problem in the criminal legal system. They reflect unfair prejudices and misunderstandings of deterrence and recidivism from the "tough-on-crime" era of the 1980s and 1990s. Punitive laws—such as truth-in-sentencing, mandatory minimums, and three-strikes laws—spawned mass incarceration and excessive sentences. Now, thousands of people continue to serve overly long sentences. Many laws have been passed to reduce sentence lengths, and thus, the number of people incarcerated. But, because these laws tend to only apply prospectively, the thousands of people who were impacted by punitive sentencing structures are being left behind. State legislatures—including the Illinois legislature—may, and previously have, alleviated these harsh penalties with retroactive criminal sentencing reforms.

This memorandum will illustrate how and why the Illinois legislature is able to pass retroactive criminal sentencing reforms without violating principal constitutional challenges such as the Ex Post Facto Clause, Separation of Powers doctrine, the Contract Clause, and the Crime Victims' Rights Clause.

A law that is "retroactive" applies to people incarcerated before the law was passed. A law that is "prospective" applies to people incarcerated after the law was passed. This memorandum will discuss retroactive legislative enactments and amendments that seek to effectively reduce the time spent in prison notably by expanding opportunities for sentence credit, parole, release, or resentencing. These laws will be referred to as "retroactive criminal sentencing reforms."

Retroactive criminal sentencing reforms will powerfully impact the people who were harshly sentenced and prompt a meaningful step towards decarcerating Illinois.

DISCUSSION

I. Ex Post Facto Clause

Legislation is not per se unconstitutional merely because it is retroactive.[1] In the criminal context, the legislature's power to enact retroactive laws is limited by the prohibition against ex post facto laws. The United States (U.S.) and Illinois Constitutions expressly prohibit ex post facto laws. U.S. Const. art. I, § 10; Ill. Const. 1970, art. I, § 16. Criminal laws are considered ex post facto if they 1) apply to an event before its enactment and 2) disadvantage the person impacted by the law. *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). The Ex Post Facto Clause ensures people have a "fair warning" about the effect of criminal statutes and restricts the State in passing "potentially vindictive legislation." *Id*. The legislature cannot enact laws that would impose a punishment for an act that was not punishable at the time or impose an additional punishment for the same act. *Id*. at 28. Illinois courts construe the constitution's Ex Post Facto Clause as identical to the federal constitution. *Barger v. Peters*, 163 Ill. 2d 357, 360 (Ill. 1994) ("[T]his court has long interpreted our own constitutional provision in step with Supreme Court pronouncements."); *People v. Pepitone*, 128 N.E.3d 1219, 1223 (Ill. App. 2019) ("Our Supreme Court has interpreted the Illinois ex post facto provision in step with the United States Supreme Court's pronouncements.") (citing *People v. Cornelius*, 213 Ill. 2d 178, 207 (Ill. 2004)).

In *Weaver v. Graham*, a Florida criminal statute retroactively reduced the number of monthly sentence credits available, consequently adding an additional penalty to those who were already incarcerated before the enactment of the provision. *Weaver*, 450 U.S. at 33. In effect, the reduction in credits lengthened the defendant's prison sentence. *Id*. The Florida statute would thereby make the punishment worse for the crime committed before its enactment; a clear violation of the Ex Post Facto Clause. *Id*. at 35-36. The Supreme Court voided the law, explaining that it could have applied retroactively had it not worked to the detriment of incarcerated individuals. *Id*. at 25. For instance, if the law were retroactive, but it increased instead of decreased the opportunity for sentence credit, it would benefit—not punish—those incarcerated and thus, would be constitutional. *See, e.g.*, 730 ILCS 5/3-6-3 (a retroactive law allowing day-for-day credit for certain programs offered inside of Illinois Correctional Centers).

[1] 2 Sutherland, Statutory Construction sec. 41.03, at 249 (4th ed. 1973); DeMars, Retrospectivity and Retroactivity of Civil Legislation Reconsidered, 10 Ohio N.U.L.Rev. 253, 267 (1983); Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv.L.Rev. 692, 694 (1960); *see* Greenblatt, Judicial Limitations on Retroactive Civil Legislation, 51 Nw.U.L.Rev. 540, 550 (1956).

Similarly, in *Barger v. Peters*, the Illinois Supreme Court held that Public Act 88-311 abridged an existing opportunity for an earlier release for people incarcerated between 1990 and 1993 by stripping them of sentence credit and therefore violated the ex post facto prohibition of the Federal and Illinois Constitutions. *Barger*, 163 Ill. 2d at 363. The court explained that "punishment" under the Ex Post Facto Clause extends to the "actual time that such a person spends in prison." *Id*. at 362. The court expanded on *Weaver*, clarifying that the law at issue was not changing the sentence imposed on the defendant, but instead, changing the actual time spent incarcerated. *Id*. Ultimately, as a general rule, any legislation that curtails the "possibility of reducing actual prison time" increases the consequences of that crime. *Id*.

So, although retroactive criminal sentencing reforms will apply to events before their enactment, if there is no disadvantage to the person impacted by the statute —such as increasing their time spent in prison—there is no ex post facto violation. Therefore, retroactive criminal sentencing reforms do not necessarily violate the Ex Post Facto Clause simply because they apply to an event that occurred before the law's enactment.

II. Statutory Interpretation

The legislature shall clearly state their intent that a bill applies retroactively. The U.S. Supreme Court established the federal retroactivity analysis in *Landgraf v. USI Film Products*. First, the legislature must make their intent clear that the law applies retroactively. *Landgraf v. USI Film Prods*., 511 U.S. 244, 268 (1994). Making their intent clear assures the Court that the legislature determined the benefits outweigh the potential for unfairness. *Id*. Absent a constitutional prohibition, the Court must follow the legislature's intent and apply the law retroactively. *Id*. Constitutional prohibitions include increasing criminal liability[2] or due process violations. *See, e.g., McGinley v. Madigan*, 366 Ill. App. 3d 974, 986–87 (Ill. App. Ct. 2006) (finding a tax amendment clearly intended to apply retroactively and did not offend Illinois or Federal due process); *People v. Atkins*, 217 Ill. 2d 66, 72 (Ill. 2005) (finding a residential burglary amendment could not be applied retroactively because it "expose[d] defendant to conviction of an additional crime"); *People v. Harris*, 69 Ill. App. 3d 118, 124 (Ill. App. Ct. 1979) (holding that the legislative amendments cannot be given retroactive effect because an "increase in possible penalty would operate as an ex post facto law and be violative of the constitutional prohibition against such laws").

[2] *See* Section I. Ex Post Fact Clause.

Second, if there is no stated intent of the law's temporal reach, the Court must determine "whether the statute would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280.

The Illinois Supreme Court adopted the U.S. Supreme Court's retroactivity test in *Commonwealth Edison Company v. Will County Collector*, beginning with whether the legislative intent is clear that the statute provides for retroactive application. *See Commonwealth Edison Co. v. Will Cnty. Collector*, 749 N.E.2d 964, 970 (Ill. 2001). The best evidence of the legislative intent is the language itself. *See Perry v. Dep't of Fin. & Prof'l Regul.*, 106 N.E.3d 1016, 1033 (Ill. 2018). Illinois courts have consistently validated the plain language of the legislature to apply amendments retroactively. *See, e.g., Lazenby v. Mark's Constr. Inc.*, 236 Ill. 2d at 95 (Ill. 2010), ("Section 9(f) states that '[t]his Section applies to all causes of action that have accrued, will accrue, or are currently pending.'"); *Doe A. v. Diocese of Dallas*, 234 Ill. 2d at 407 (Ill. 2009), ("Section 13–202.2(e) specifically provides that the 2003 amendment applies to actions pending when the changes took effect."); *Commonwealth Edison Co.*, N.E.2d at 974, ("[S]ection 9-107 expressly validates levies adopted "either before, on or after the effective date."); *Hayashi v. Ill. Dep't of Fin. & Prof'l Regul.*, 388 Ill. Dec. 878, 885 (Ill. 2014) ("The only reasonable interpretation of the phrase, 'has been convicted' is to refer to individuals convicted of certain offenses before or after the Act's effective date.").

Illinois no longer progresses to step two of the *Landgraf* test: whether a change impairs the party's rights that they possessed when they acted, increases the party's liability for past conduct, or imposes new duties with respect to the transactions already completed. *See Perry*, 106 N.E.3d at 1031 (Ill. 2018); s*ee Caveney v. Bower*, 797 N.E.2d 596 (Ill. 2003). Instead, section four of the Illinois Statute on Statutes[3] provides a default approach. *Id*. Without clear legislative intent of the statute's temporal reach, the court discerns whether the amendment is procedural or substantive. *Perry*, 106 N.E.3d at 1033. Per section four, if the amendment is procedural, it may apply retroactively, but if it is substantive, it will apply prospectively. *Caveney*, 797 N.E.2d at 603; *People v. Glisson*, 202 Ill. 2d 499-506-07 (Ill. 2002). Thus, a statute either clearly indicates its temporal reach, or the reach is determined by section four of the Statute on Statutes. *Id*.

[3] 5 ILCS 70/4 (West 2016). "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act."

This test also applies in the criminal context. *See*, *e.g.*, *People v. Brown*, 485 Ill. Dec. 431, 437-38 (Ill. 2024) (uses the *Landgraf* analysis to hold that the amendments to the recidivism statute did not apply retroactively because the legislature expressly delayed the implementation date); *People v. Easton*, 123 N.E.3d 1074, 1078 (Ill. 2018) (uses the *Landgraf* and *Commonwealth* analysis to determine that the amendment governing appeal procedures for criminal defendants may apply[4] retroactively because without clear temporal reach, section four of the Statute on Statutes default rule requires procedural statutes to apply retroactively); *People v. Hunter*, 422 Ill. Dec. 791, 796-801 (Ill. 2017) (uses the *Landgraf* analysis to determine that the amendment changing the criminal offenses and age requirements for automatic transfer of juvenile to adult court could not apply retroactively to this case because although it is procedural, the defendant's proceedings had concluded and would result in "creating new proceedings for the sole purpose of applying a procedural statute that postdates his trial and sentence"); *People ex rel. Alvarez v. Howard*, 72 N.E.3d 34 (Ill. 2016) (uses the *Landgraf* and *Commonwealth* analysis to hold that the amendment changing the age requirement for transfer to adult court did not state a temporal reach, but was a procedural amendment and therefore, applied retroactively to the pending case under section 4 of the Statute on Statutes); *Hayashi*, 388 Ill. Dec. 878, 886-87 (Ill. 2014) (applies *Landgraf* and *Commonwealth* to hold that the Act revoking health care licenses for certain criminal convictions only applied prospectively because the legislature made their intent clear that the provision applied only after the Act's effective date); *Atkins*, 217 Ill. 2d. at 71-73 (uses the *Landgraf* and *Commonwealth* analysis to hold that the amendments to the residential burglary requirements do not apply retroactively because the legislature did not state their temporal reach and section four the Statute on Statute's requires that substantive amendments apply prospectively); *People v. Wilson*, 407 Ill. Dec 84, 89-90 (Ill. App. Ct. 2016) (uses the *Landgraf* and *Commonwealth* analysis to determine that the Act requiring mitigating factors to be considered for defendants sentenced under 18 applied prospectively because the legislature clearly stated its temporal reach with the implementation language of "on or after the effective date"). Thus, the court shall apply a criminal statute retroactively when the legislature makes it clear that is their intent or when there is no temporal reach indicated, but section four of the Statute on Statutes requires a retroactive application.

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[4] Section four of the Statute on Statutes "proceedings thereafter" provision has been understood to extend to ongoing proceedings "so far as practicable." *People v. Hunter*, 422 Ill. Dec. 791, 799 (Ill. 2017); 5 ILCS 70/4 (West 2016). In this case, the defendant's post-plea proceedings were completed for over a year before the new rule was amended so there were no ongoing proceedings for the rule to retroactively apply. *People v. Easton*, 123 N.E.3d 1074, 1080 (Ill. 2018).

III. Separation of Powers Doctrine

The Illinois General Assembly would not violate the Separation of Powers doctrine by enacting retroactive legislation to effectively reduce sentence lengths. The Illinois Constitution's Separation of Powers provision states, "The legislative, executive, and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. 1970, art. II, § 1. The Governor has the power to grant "reprieves, commutations and pardons." *Id*. at art. V, § 12. These powers belong to the governor alone and may not be vested in another officer or body. *People ex rel. Madigan v. Snyder*, 208 Ill. 2d 457, 478 (2004). The judicial power rests in the supreme, appellate, and circuit courts. Ill. Const. 1970, art. VI, § 1. This power encompasses the procedural administration of the courts and the adjudication and application of the law. *People v. Bainter*, 126 Ill. 2d 292, 303 (Ill. 1989). The legislature is vested with the power to enact laws; they may declare and define conduct constituting a crime and determine the nature and extent of criminal penalties. *People v. Sharpe*, 216 Ill. 2d 481, 490 (2005). This power cannot infringe on the power of the courts, otherwise, the court will strike down legislation that "significantly burdens or otherwise curtails the inherent constitutionally granted authority of the judiciary." *People v. Davis*, 93 Ill. 2d 155, 161 (Ill. 1982).

Critics of retroactive criminal sentencing reforms may argue that these types of laws encroach on the governor's right to clemency. This argument will likely fail because an Illinois court has never held that a statute reducing sentence lengths are an impermissible commutation of that sentence that would infringe on the executive branch's clemency powers. A governor's clemency power may constitutionally coexist with the legislature's authority to create new sentence modifications to reduce criminal penalties via statute.

Additionally, the legislative and judiciary branches often overlap and interact without issue. The court will share "concurrent power" with the legislature in some instances. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 439 (Ill. 1997). The Illinois Supreme Court has upheld several legislative enactments pertaining to judicial practice that do not conflict with the judiciary's power. *Bainter*, 126 Ill.2d at 303. For instance, the court in *Rowe v. Raoul* clarifies that although the judiciary sets bail, it is not an exclusive power of the branch and has long been regulated by the legislature. *Rowe v. Raoul*, 223 N.E.3d 1010 ¶ 47-48. The court concludes, "[i]f the legislature could reconsider bail over the course of so many years, it could do so again [] without offending separation of powers principles." *Id*. The following sections will further explain how courts have previously determined whether the legislature is encroaching on the powers of the judiciary or the executive branch.

A. *Revestment Doctrine*

Critics may argue that the only pathway to modify a criminal sentence 30 days or more after the court imposed it is through executive clemency or revestment. Typically, the trial court loses jurisdiction to hear a case 30 days after the final judgment is entered. *Bailey*, 378 Ill. Dec at 594. The revestment doctrine is an exception to this rule. *Id*. A court may retain jurisdiction if the both the prosecution and the defense (1) actively participate in the subsequent proceedings; (2) without objection to the untimeliness of the late filing; and (3) assert positions that make the proceedings inconsistent with the merits of the prior judgment and support the setting aside of at least part of the judgment. *People v. Kaeding*, 98 Ill. 2d 237, 241 (1983). Simply put, this doctrine generally applies when both parties act as if the court did not lose jurisdiction and they agree to change any part of the final order. For example, jurisdiction was revested in *People v. Keading* when both parties filed untimely, post-judgment motions seeking to alter the prior judgment. *Id*. Conversely, in *People v. Bailey*, active participation without objection was not enough to satisfy the requirement since both parties did not assert positions that were inconsistent with the merits of the prior judgment. *Bailey*, 378 Ill. Dec. at 599. The revestment doctrine is narrow and only applies when parties are in court proceedings reopening final judgements. Thus, this doctrine does not preclude other mechanisms created by statute.

B. *Finality in Illinois*

Finality is a common law principle establishing that once a case is over, the final judgment should be left undisturbed. *See* "Final-Judgment Rule," Black's Law Dictionary (12th ed. 2014). Finality raises separation of powers and due process concerns because it introduces jurisdiction issues. Critics of retroactive legislation may argue that the court lacks jurisdiction to reconsider a case 30 days after the final judgment. However, the Illinois Supreme court has recognized that certain circumstances require finality to "take a backseat to other fundamental considerations." *People v. Bailey*, 378 Ill.Dec 591, 594 (Ill. 2014).

In *People v. Bainter*, the court analyzed whether the legislature impermissibly revested the circuit court with jurisdiction over final judgments in criminal cases and encroached upon the judiciary's power over sentencing. *Bainter*, 126 Ill. 2d at 296-97 (Ill. 1989). Typically, the trial court may only modify a sentence within 30 days of their final decision; this is a "modern-day adaptation of the common law rule." *Id*. at 303-304. The court clarified that the 30-day rule is not a constitutional mandate and is susceptible to amendment by the legislature. *Id*. at 304. In fact, the legislature has revested the circuit courts with jurisdiction over final judgments many times. *Id*. (citing many examples).

The court stated, "special circumstances may arise in which the interests of finality are lessened, and the circuit court should be revested with jurisdiction over a previously determined matter." *Id*. at 305. The court ultimately held the legislature did not encroach upon the inherent powers of the judiciary by allowing Bainter to seek resentencing under the statute. *Id*.

Additionally, Public Act 102-0099 created the Illinois Resentencing Task Force, composed of judges, prosecutors, elected officials, and defense attorneys, to analyze how resentencing can reduce the prison population. The report explained, "The legislature has the power to prescribe a process by which the judiciary has jurisdiction to revisit a sentence at a later date. In addition, because this process would be subject to standards set by the legislature, it is separate and distinct from the Governor's clemency power."[5] Thus, the legislature has the authority to create new pathways for judicial review long after a final result of a case is reached. And, many notable examples exist. For instance, innocence claims can be filed at any time per the Illinois Post-Conviction Act. *See* 725 ILCS 5/122-1. The legislature amended the quasi-criminal Relief from Judgments Act to allow an individual to seek resentencing if either 1) evidence of domestic violence or gender-based violence against the petitioner was not presented or if 2) evidence of postpartum depression and psychosis were not considered at the original sentencing hearing or guilty plea proceedings. *See* 735 ILCS 5/2-1401. The legislature passed the Joe Coleman Medical Release Act, a fully retroactive bill, which permits the Prisoner Review Board to grant release for those with terminal illnesses. *See* 730 ILCS 5/3-3-14. The legislature created a path to resentencing by allowing the State's Attorney to file a petition for resentencing to the defendant's county. *See* 725 ILCS 5/123. Circuit courts may terminate a defendant's probation at any time. *See* 730 ILCS 5/5-6-2(c). Circuit courts may revoke a sentence of periodic imprisonment at any time. *See* 730 ILCS 5/5-7-2.

In sum, the Illinois General Assembly may create new justiciable matters by enacting legislation that creates rights and duties, and thus, new resentencing opportunities. *See People v. Castleberry*, 2015 IL 116916, ¶15.

C. *Finality at the Federal Level*

At the federal level, which Illinois courts are likely to find instructive,[6] the Supreme Court has stated that Congress does not infringe on the judicial branch by passing retroactive sentencing legislation. *See Dorsey v. United*, 567 U.S. 260, 280 (2012).

[5] Illinois Sentencing Policy Advisory Council, *Resentencing Taskforce Final Repor*t, 20 (2022), https://spac.illinois.gov/publications/reports.html. (last visited August 11, 2026).
[6] *See, e.g., Stachler v. Bd. of Educ. of City of Chicago*, 2023 IL App (1st) 221092, ¶ 34 ("This court often looks to analogous federal law for guidance.") (citing examples).

Congress used this power when passing the U.S. Sentencing Reform Act of 1984; the Act allows defendants to petition the court for a reduced sentence. 18 U.S.C. § 3582(c)(2) ("In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission…the court may reduce the term of imprisonment."). This Act has remained operative for over thirty years without a challenge that the statute is an impermissible commutation of a defendant's sentence. More recently, Congress passed the First Step Act of 2018, making the Fair Sentencing Act of 2010 fully retroactive. Pub. L. 115-391, 115th Congress (2018). This law authorized district courts to impose a reduced sentence "as if" the amendments existed "at the time the covered offense was committed." *Id.* The Supreme Court upheld this law, explaining that the term "as if" signified the First Step Act's central goal was to make the changes in the Fair Sentencing Act retroactive. *Concepcion v. United States*, 597 U.S. 481, 497 (2022). This case demonstrates how finality concerns are expressly overcome when the legislature makes their intent clear that the stated purpose is to reopen final judgments.

In sum, the governor's clemency powers, the judiciary's sentencing powers, and the legislature's authority to create justiciable matters and statutory routes to effectively modify sentence lengths may all constitutionally coexist.

IV. Contract Clause

Retroactive sentencing reforms do not violate the Illinois Constitution's Contract Clause. The Contract Clause of the Illinois Constitution provides that "[n]o … law impairing the obligation of contracts … shall be passed." Ill. Const. 1970, art. I, § 16. The federal Contract Clause "does not prohibit States from repealing or amending statutes generally, or from enacting legislation with retroactive effects." *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17 (1977). Illinois courts interpret the Illinois Contracts Clause the same as the federal Contracts Clause. *See Sanelli v. Glenview State Bank,* 108 Ill. 2d 1, 29 (1985) ("for the same reasons that apply to the contract clause of the Federal Constitution, we hold that retroactivity is valid under the Illinois Constitution."). In *Allied Structural Steel Co. v. Spannaus*, the U.S. Supreme Court introduced a multi-part inquiry to analyze whether the State abridged the contractual relationship substantially without a public purpose. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 243 (1978).

This inquiry was then adopted by the Illinois Supreme Court in *Sanelli v. Glenview*, and later, boiled down to a four-part balancing test to prove the contract clause was violated: (1) a contractual obligation exists, (2) the legislation impairs that obligation, (3) the impairment is substantial, and (4) the impairment is not reasonable nor necessary to serve an important public purpose. *See Sanelli*, 108 Ill.2d at 29; *see also Bricklayers Union Local 21 v. Edgar*, 922 F.Supp. 100, 105 (N.D. Ill. 1996); *see also Consiglio v. Dep't of Fin. & Prof'l Regul.*, 2013 IL App (1st) 121142, ¶ 37. However, if there is no contract or the impairment is not substantial, the inquiry ends and there is no Contract Clause violation. *Bricklayers Union Local 21*, 922 F.Supp. at 105.

A. *Contractual Obligation*

An enforceable contract requires offer, acceptance, and consideration. *All Am. Roofing, Inc. v. Zurich Am. Ins. Co.*, 404 Ill. App. 3d 438, 449 (2010). "Consideration" is "bargained-for exchange" where one party suffers a detriment while the other receives a benefit. *Id.* A sentencing order does not establish an enforceable contract because there is no agreement or consideration; only the sentenced party has an obligation to serve their sentence. *See "*Contract," Black's Law Dictionary (12th ed. 2024) (defining "contract" as, "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law"). Because a sentencing order is not a contract, no contractual obligation exists, and the inquiry would end here. *See Bricklayers Union Local 21*, 922 F.Supp. at 105.

a. Plea Agreements

For those with plea agreements, the contractual obligation analysis may be different. Whether a plea agreement is governed by contract law differs depending on the type of plea.[7] "Fully negotiated" pleas involve a plea of guilty in exchange for the State's dismissal of charges and a specific sentencing recommendation. *People v. Lumzy*, 191 Ill. 2d 182, 185 (Ill. 2000). Fully negotiated pleas are generally governed by the rules of contract law. *People v. Evans*, 174 Ill. 2d 320, 332 (Ill. 1996). However, the application of contract law principles may require some tempering when they run afoul of due process concerns. *Id*. at 327.

[7] "Open," or "blind," pleas do not include any obligations from the State and are therefore not treated as contracts. *People v. Evans*, 174 Ill. 2d 320, 332 (Ill. 1996). In these situations, both parties (the State and the defendant) are able to argue for any sentence permitted by the sentencing statute and the court exercises their discretion in determining the sentence. *People v. Lumzy*, 191 Ill. 2d 182, 185 (Ill. 2000).

Illinois courts will look to the "four corners" of the plea and engage in a fact-based inquiry as to whether it is a fully negotiated plea agreement. *See People v. Wells*, 240 N.E.3d 521 (Ill. 2024). In *People v. Wells*, the court determined that the clear term of receiving exactly "54 days" of sentencing credit constituted a complete and final expression of the parties' agreement; therefore, the plea was considered "fully negotiated" and Wells could not receive additional sentencing credit for the time spent on home detention. *Id.* at 526.

Nevertheless, the legislature may still grant those with negotiated pleas additional opportunities to seek sentence modifications under a statute. *See People v. Wells*, 473 Ill. Dec. 560, 571 (Ill. 2023) ("If the legislature had intended to provide sentencing relief to defendants who had fully negotiated guilty plea agreements, we believe it would have used language that plainly expressed such a purpose"); *see*, *e.g.*, 735 ILCS 5/2-1401(b-5) ("This subsection (b-5) applies to all eligible convictions, including, but not limited to, if the judge renders the sentence based on a negotiated plea agreement."). In the types of plea agreements where contract law governs, a defendant seeking to challenge their sentence in court would first be required[8] to move to withdraw their guilty plea. *People v. Diaz*, 249 Ill. Dec 1, 6 (Ill. 2000). Otherwise, allowing the defendant to seek reconsideration of their sentence without withdrawing the guilty plea "unfairly binds the State to the terms of the plea agreement while giving the defendant the opportunity to avoid or modify those terms." *Id.*

Even if a defendant entered into a plea agreement that would be governed by contract principles and the legislation did not grant a pathway to seek relief, the retroactive law may still apply to them under the fourth element of the Contracts Clause inquiry.

B. *Important Public Purpose*

The U.S. Supreme Court has stated that a law impairing contract obligations may still be constitutional "if it is reasonable and necessary to serve an important public purpose." *U.S. Trust Co. of New York*, 431 U.S. at 25. Courts will generally defer to the legislature's judgment of necessary and reasonable legislation to serve an important public purpose. *Consiglio*, 2013 IL App (1st) 121142, ¶ 38 (citing *Energy Reserves Group, inc. V. Kansas Power & Light Co.*, 459 U.S. 400, 412-13 (1983). The U.S. Supreme Court has stated that remedying broad, general social and economic issues are seen as an important public purpose. *Allied Structural Steel Co.*, 438 U.S. 234, at 247.

[8] Note, there may be retroactive criminal sentencing reforms where a defendant is not challenging their sentence in court so a withdrawal of a guilty plea or a retrial may not be necessary.

Courts will limit their deference to the legislature if the State is a party to the contract, and there is a possibility that the State impaired the contract out of self-interest. *Id.* In *Consiglio*, the court gave less deference to the legislature because the State was a party to the contract and acted out of self-interest, but still came to the conclusion that the impairment—a law that revoked health care licenses—was reasonable and necessary to protect the public from health care workers convicted of certain crimes. *Id.* at 40.

Further, the courts will likely find retroactive criminal sentencing reforms to be necessary and reasonable to serve an important public purpose. The possibility to reduce the length of a sentence motivates rehabilitation, gives people an opportunity to show who they have become while incarcerated, and promotes reunification. These reforms address broad social issues, including, our nation's history of disproportionately incarcerating Black people. If all people with plea agreements were excluded from retroactive criminal sentencing reforms, it would exclude over 90% of cases and would result in a very small impact on the prison population.[9] To make any sizeable difference in decarcerating Illinois, we must start by reducing the prison population. Retroactive legislation is not only reasonable, but absolutely necessary.

C. *The Injured Party*

Lastly, it is unlikely the court will ever reach the merits of a Contract's Clause challenge because the clause does not afford the same protections to states or state-created entities. The Contracts Clause of the U.S. Constitution is a limit on state power, not a tool for the state to enable against individuals. *U.S. Trust Co. Of New York*, 431 U.S. at 14 (1977). In *City of Worcester v. Worcester Consolidated Street Railway Company*, the U.S. Supreme Court invalidated a municipality's contract violation claim because it is a state entity and would prevent the legislature from dealing with public matters. *City of Worcester v. Worcester Consolidated St. Ry. Co.*, 196 U.S. 539, 552 (1905). The Court went on to explain the municipality exists because of the legislature exercising their power to create it. *Id*. at 549. The legislature could terminate the existence of the municipal corporation at any time since "the city is the creature of the state." *Id*. at 549; *see also Tippecanoe County v. Lucas*, 93 U. S. 108, 114 (1876) ("Municipal corporations are mere instrumentalities of the state, for the convenient administration of government; and their powers may be qualified, enlarged, or withdrawn at the pleasure of the legislature.'"). Ultimately, "the powers of counties, cities, and towns are subject to the legislative control of the state creating them." *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 520 (1879).

[9] Illinois Sentencing Policy Advisory Council, *supra* note 5.

States' attorneys would be the party challenging a retroactive reform. State's attorneys' powers are established by state statute, so they are a state-created entity. *See* 55 ILCS 5/3-9005. In cases against retroactive criminal sentencing reforms, if the state's attorney brought a Contract Clause challenge, the court will likely invalidate the contract violation claim because, like in *City of Worcester*, the state would be challenging its own entity. Further, the state's attorney may argue that a retroactive sentence reform "impairs the contract" so they are no longer receiving the benefit of their bargain, but this argument will likely fail because, as mentioned above, the Contract Clause is a limit on the State's power. Here, there is no "impairment" because the reform would benefit the defendant by reducing their time spent incarcerated. Ultimately, the legislature wields the power to address issues of broad public concern—the State cannot argue otherwise. Therefore, a Contract Clause challenge against a retroactive criminal sentencing reform is likely to fail.

V. Crime Victims' Rights Clause

Retroactive criminal sentencing reforms do not violate the Illinois Constitution's Crime Victims' Rights Clause. The Crime Victims' Rights Clause of the Illinois Constitution grants crime victims the "right to be heard at...any court proceeding involving a post-arraignment release decision, plea, or sentencing," as well as standing to assert that right. Ill. Const. 1970, art. I, § 8.1(a)(5), (b). A "court proceeding," by its plain language, does not encompass a legislative session enacting a bill that could result in a sentence reduction, nor does it encompass the decision to award sentence credit to individuals for particular instances of good conduct. *See Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 166 Ill. 2d 520, 532 (Ill. 1995) (distinguishing between "actual court proceedings" and the issuance of a draft consent order by a government agency). Legislative amendments do not take place in a court of law, and a court interpreting the constitution cannot expand victims' rights beyond the scope dictated by the constitution's plain language. *See Kanerva v. Weems*, 2014 IL 115811, ¶ 41. So, the Crime Victims' Rights Clause does not prevent the enactment of a retroactive criminal sentencing reform. In situations where there is a court proceeding that changes a defendant's sentence, such as a Parole Review Board hearing, the crime victim would continue to have the opportunity to appear at the hearing. Therefore, a challenge under the Crime Victims' Rights Clause cannot succeed because there is no constitutional right to be heard in the legislative process and the crime victim still possess the right to be heard at any future court proceeding involving sentencing.

CONCLUSION

Overall, these principal constitutional challenges are unlikely to pass muster against enacting a retroactive criminal sentencing reform bill that seeks to reduce punishment. The legislature has the power to enact retroactive laws when they (1) do so explicitly and (2) do not violate the ex post facto prohibition. There is no separation of powers concern as these branches often overlap without issue, and finality concerns may be overcome. A Contract Clause issues may arise in specific circumstances for those with fully negotiated plea agreements, but a state's attorney is unlikely to be a valid party in the suit and those challenging the statute would still have to prove that the reform is not reasonable or necessary to serve an important public interest. Finally, there is no Crime Victims' Rights Clause issue because the legislative session is not a court proceeding and crime victims continue to possess their right to be heard at such proceedings.

If these arguments had any traction, the Illinois General Assembly presumably would not have passed, and the courts would have struck down, the Joe Coleman Act (effective January 1, 2022) allowing people with terminal illnesses in custody to apply for medical release regardless of their sentencing date, Public Act 103-0330 amending 730 ILCS 5/3-6-3 (effective January 1, 2024) expanding programming credit retroactively, Public Act 103-0968 amending 730 ILCS 5/5-5-3.1(15) (effective January 1, 2025) expanding a resentencing opportunity for domestic violence survivors currently incarcerated, the Relief from Judgments Act amending 735 ILCS 5/2-1401(b-10) expanding a resentencing opportunity if postpartum depression and psychosis were not considered during sentencing, and 725 ILCS 5/213 allowing the state's attorney to initiate resentencing for an individual whose original sentence no longer serves the interest of justice. Because the legislature has successfully enacted these retroactive criminal sentencing reforms, they will be able to do so in the future.

Advocates and legislatures should feel empowered to draft, support, and pass retroactive legislation and reforms for the benefit of people currently incarcerated without the worry of a constitutional challenge. These laws are not only constitutional, but fair, sensible, and necessary.

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