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Implicit Balancing in the Adjudication of Criminal Law

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I. INTRODUCTION

It is a commonly understood notion of American law that, at all stages of criminal proceedings, the "judge has an affirmative . . . duty" to "safeguard the due process rights of the accused."[1] This duty did not materialize out of thin air. Safeguarding the rights of criminal defendants is, in fact, a constitutional duty vested in the judiciary by way of the long-standing tradition that judges are entrusted with interpreting and applying the rights and guarantees of the Constitution.[2] But whenever they interpret and apply constitutional provisions, judges understand that they face a stark reality: the acceptance and viability of their decisions rest on a general perception of legitimacy.[3] Having "no influence over either the sword or the purse," courts lack the ability to "take [any] active resolution whatever,"[4] and possess "as their only stock in trade moral authority."[5]

In other words, for courts' decisions to be viewed as credible, it is not enough for the public to know merely that judges are *functionally* competent to render decisions. Rather, the public must *believe* that judges are making unbiased and legally consistent decisions.[6] In order for the

1. Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979); *see* Trainor v. Hernandez, 431 U.S. 434, 443 (1977) ("[C]ourts have the solemn responsibility . . . to safeguard constitutional rights . . . ." (quoting Steffel v. Thompson, 415 U.S. 452, 460 (1974))); United States v. Gainey, 380 U.S. 63, 68 (1965) ("Our Constitution places in the hands of the trial judge the responsibility for safeguarding the integrity of the jury trial . . . .").

2. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). "John Marshall's famous opinion in *Marbury* . . . established the Court as the final arbiter of the meaning of the Constitution," MARK SILVERSTEIN, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATION 35 (1994), and, accordingly, as the ultimate protector of constitutional liberties.

3. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–96 (2005) (discussing courts' ability to make decisions as a sociological concept, dependent on the public's acceptance of their decisions as legitimate).

4. THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter, ed. 1961).

5. Kim Lane Scheppele, Univ. of Pa., The Function of Constitutional Courts: Techniques of Judicial Empowerment, Panel Discussion at AALS and American Political Science Association Conference on Constitutional Law (June 7, 2002), *available at* http://www.aals.org/profdev/constitutional/schepple.html.

6. *See* Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 199 (2011) ("An appearance of impropriety occurs when reasonable minds, with

public to interpret judicial decisions as correct, those decisions must be devoid of the appearance of bias.[7]

Those familiar with the common-law system understand that legal reasoning sometimes cannot be accomplished with precision. When a more rigid, formulaic approach to judging does not work, one alternative is judicial balancing—a method of decision making that "has reached the point where it is the dominant judicial style that characterizes this era."[8] In balancing, judges attempt to give appropriate weight to the competing interests and values at play in cases before them.[9] Although balancing of competing interests is viewed as a primarily legislative function,[10] it has become a commonplace and even expected function of the judiciary in some contexts.

The role of judicial balancing has expanded over time.[11] Given the

knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired." (alteration in original) (quoting CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A cmt. (2011)) (internal quotation marks omitted)).

7. *See* Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 686–87 (2011). Scholars have noted at length that actual bias in judicial decision making has been—and continues to be—an issue of serious concern to both the general public and to the judiciary itself. *See id.* at 672–73. Dean Geyh notes that several legal organizations, including the American Bar Association, have devoted time and resources to analyzing the problem of judicial bias. He also notes that this issue is of interest to the general public, given that popular author John Grisham used the U.S. Supreme Court's recent and highly controversial decision in *Caperton v. A.T. Massey Coal Co*., 556 U.S. 868 (2009), as the basis for his recent novel, *The Appeal*. While actual bias is a key concern, this paper focuses on the *appearance* of bias in the judiciary. This distinction is profound, most notably because an unbiased decision can appear biased in some circumstances. As explained below, this Comment argues that apparent bias should equally share the spotlight, especially as judicial balancing takes a more prominent role in judicial decision making.

8. Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 17 (1988).

9. *Id*. at 17, 19.

10. *See* Anthony E. Chavez, *The Red and Blue Golden State: Why California's Proposition 11 Will Not Produce More Competitive Elections*, 14 CHAP. L. REV. 311, 369 (2011) ("The Supreme Court has recognized that legislatures exercise political judgment in balancing competing interests, and that legislatures are the institutions 'best situated to identify and then reconcile traditional state policies' . . . ." (quoting Connor v. Finch, 431 U.S. 407, 414–15 (1977))).

11. *See* Coffin, *supra* note 8, at 18. ("[T]he onset of more general balancing by the Supreme Court began in the late 1960s, intensified in the 1970s, and [became] commonplace in the 1980s. Now there are bellwether balancing cases applying both to content-based and content-neutral limitations on speech (first amendment); to all aspects of search, seizure, warrants, and the exclusionary rule (fourth amendment); to double jeopardy and the privilege against self-incrimination (fifth amendment); to the right to a public jury trial (sixth amendment); to excessive

expanded role of balancing in judicial decision making, it is reasonable to assert that ostensibly there is nothing wrong with judicial balancing of competing interests in itself.[12] But when a judge has to make decisions in criminal proceedings, the task of balancing can be particularly trying because of the fundamental due-process rights at stake.[13] Knowing one of her key duties is to safeguard these due-process rights at trial,[14] the judge must somehow answer a litany of difficult questions. What rights should she consider? What rights—if any—are so important that they should not be balanced against other interests? Which of the many competing state interests should be factored into the equation? At what point does the scale tip in favor of protecting a defendant's rights over serving the competing public and governmental interests, or vice versa?

The balancing problem is further complicated, and additional questions arise, when one considers the ever-looming burden of maintaining the appearance of legitimacy. Knowing that the public is increasingly able to keep tabs on every decision she renders,[15] the judge must consider exactly what individuals or groups comprise the public—lawmakers, special interest groups, police agencies, people in general, or some combination of the above. Regardless of the tack she takes, the judge must continually evaluate the effect her actions have on the overall perception of the court's legitimacy.

This Comment analyzes judicial balancing as it relates to judges' task of upholding the appearance of legitimacy. Specifically, it contends that judges sometimes implicitly balance—that is, judges weigh often significant and determinative factors but leave those factors unidentified or unexplained. Because implicit balancing can produce unclear or

bail and cruel and unusual punishment (eighth amendment); and to procedural due process, substantive due process and equal protection (fourteenth amendment).").

12. But it may go without saying that some members of the judiciary—most notably and vocally, Justice Scalia—disagree on this point. *See, e.g.*, Bendix Autolite Corp. v. Midwestco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (arguing that "balancing" is not really a weighing of interests at all, but rather "more like judging whether a particular line is longer than a particular rock is heavy," and is "a task squarely within the responsibility of Congress and 'ill suited to the judicial function'"(quoting CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in judgment)).

13. Medina v. California, 505 U.S. 437, 442–43 (1992) (discussing the heightened degree of difficulty in balancing due-process rights against state interests in criminal cases as compared to civil cases).

14. *See* United States v. O'Hara, 301 F.3d 563, 569 (7th Cir. 2002) (noting that appellate courts rely heavily on the trial-court judge's discretion to protect the rights of the accused).

15. *See, e.g.*, Samira Jafari, *Religion in the News*, WORLDWIDE RELIGIOUS NEWS, July 19, 2007, *available at* http://wwrn.org/articles/25695/?&place=united-states&section=other-groups.

nontransparent rationales in judicial decision making, implicit balancing likely undermines courts' appearance of legitimacy in the long run.

As a microcosm in miniature of implicit judicial balancing and its effect on courts' appearance of legitimacy, a study of sex-offender legislation provides an excellent springboard for a discussion of implicit balancing. Sex-offender laws and the crimes prosecuted under them have generated much scholarship and vigorous debate over the last two decades.[16] A significant portion of that scholarship has focused on the legislation itself, discussing the weakening of due-process protections and constitutional liberties in enforcing civil commitment laws,[17] as well as the legislative role in advancing the modern sex-offender-legislation movement and the political motivations behind those laws.[18] Further, much literature has explored the post-incarceration effect of this legislation on convicted sex offenders and questioned its effectiveness in mitigating recidivism or facilitating rehabilitation.[19] But while scholars have made substantial contributions to both constitutional and functional problems associated with these laws, sex-offender legislation's impact on criminal defendants in the courtroom has been largely ignored—specifically when judges apply these laws during various stages of pretrial, trial, and sentencing proceedings.[20]

This Comment attempts to fill the void by taking a novel approach to the sex-offender debate, focusing on the courtroom application of these laws by judges. It argues that judges sometimes implicitly balance competing government and individual interests—that is, where it is not

16. *See, e.g.*, Daniel M. Filler, *Silence and the Racial Dimension of Megan's Law*, 89 IOWA L. REV. 1535 (2004) (discussing the racial ramifications of sex-offender laws); Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43 (1998) (describing legal terminology's effect on the public perception of sex offenders); Clare McGlynn, *Feminism, Rape and the Search for Justice*, 31 OXFORD J. LEGAL STUD. 825 (2011); Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. ON LEGIS. 355 (2005) (discussing the use of shaming techniques as a method of punishing sex offenders); Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253 (2011) (analyzing the derogation of due process in the civil-commitment context); Jeslyn A. Miller, Comment, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CALIF. L. REV. 2093 (2010) (arguing that treatment methods of civilly-committed sex offenders result in a self-reinforcing cycle of continuing detention).

17. Tsesis, *supra* note 16.

18. ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 13 (2006).

19. *See, e.g.*, Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. 697 (2011).

20. *Compare* Tsesis, *supra* note 16 (discussing constitutional due-process problems), *with* Hamilton, *supra* note 19 (discussing the practical implications of sex-offender legislation).

mandated by statute or when judges do not clearly identify the factors they weigh. It further claims that, in the criminal context, the implicit balancing of competing interests may prove problematic on several levels. First, it can allow actual bias to creep into the judicial process, which may disadvantage the accused. Second, it gives rise to problems for society as a whole by allowing constitutional rights to be balanced against unannounced or unknown factors. Finally, balancing of this sort undermines courts' appearance of legitimacy in the public eye, making their rulings less viable in the long run.

This Comment proceeds as follows. Part II provides a primer on sex-offender laws in the United States, tracking their historical development and discussing the mechanisms of control common in many state statutory schemes. Part III explains that, because of the substantial interests at stake on both sides of the argument, sex-crime and sex-offender legislation are subjects well suited to a discussion of judicial balancing and bias. Part IV submits evidence showing that implicit judicial balancing in the sex-offender context may be happening and that bias in the judicial system may result therefrom. Part IV also discusses the problems that arise for both the accused and society in general when judges hearing sex-offender cases implicitly balance. Part V concludes with the idea that judges can avoid these problems and ensure transparency in the decision-making process by identifying and explaining the factors and competing interests that they take into account when they balance. By so doing, courts will be better equipped to maintain the appearance of legitimacy and neutrality in the eyes of the public.

II. A PRIMER ON SEX-OFFENDER LEGISLATION

Before an analysis of implicit judicial balancing and the potential for bias in the application of sex-offender statutes can go forward, it is essential to understand the nature of the laws and competing interests in question. This section will provide a brief history of sex-offender legislation, introduce the reader to the types of crimes that may lead to classification as a "sex offender," and discuss the legislative mechanisms commonly employed to reduce these crimes.

A. History: Crimes that Gave Rise to Modern Sex-Offender Legislation

Sex-crime laws in America are as old as the nation itself, and form

the bases of our modern sex-offender legislation.[21] Yet sex-crime legislation as we know it today is a surprisingly recent development—an outgrowth of the public's reaction to a series of particularly heinous and highly publicized sex crimes that occurred in the late 1980s and early 1990s.[22] In two unrelated instances in 1988 and 1989, two convicted sex offenders, recently released from state prison in Washington, raped and brutally murdered a Seattle woman and a seven-year-old boy.[23] The public's reaction to these crimes was strong and its message clear: the state had failed to take requisite action to preserve public safety, and something had to be done to root out the "worst of the worst" from local communities.[24] The result of this public outcry was the passage of Washington's Community Protection Act of 1990, which used civil commitments and the tracking of sex offenders through registration programs as the primary tools for enforcing its provisions.[25]

In 1994, about five years after the Washington rape-murders, a seven-year-old girl in New Jersey named Megan Kanka was brutally raped and murdered by her neighbor who, unbeknownst to the girl's parents, was a twice-convicted sex offender.[26] These two facts—that the neighbor was a recidivist offender and that the state of New Jersey had failed to inform the Kankas of that fact—sparked significant public outrage.[27] The Kanka rape-murder received national media attention and "gave impetus to laws for mandatory registration of sex offenders and corresponding community notification."[28] That same year, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which "condition[ed] certain federal

21. *See* WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA 16 (2008) (noting that rape, adultery, and sodomy were considered capital offenses under the legal code of the Jamestown Settlement).

22. JANUS, *supra* note 18, at 13–14.

23. *Id*. at 14.

24. *See* Jim Simon, *Senate Sends Sex Offender Bill to House*, SEATTLE TIMES (Jan. 25, 1990), http://bit.ly/MYX8z8. The public outcry against these crimes is perhaps more understandable when one considers that in the case of the seven-year-old boy, "the offender had explicitly threatened, in his prison diaries, to commit just such brutality." JANUS, *supra* note 18, at 14.

25. WASH. REV. CODE § 9A.44.130 (2011). Although not contemporaneous with the Washington legislation, Minnesota enacted a substantially similar law in response to a set of vicious rape-murders that occurred there. JANUS, *supra* note 18, at 15; MINN. STAT. §§ 243.167, 253B.185 (2011).

26. Smith v. Doe, 538 U.S. 84, 89 (2003) (describing the story of Megan Kanka and its relationship to subsequent state SVP legislation).

27. JANUS, *supra* note 18, at 15.

28. *Smith*, 538 U.S. at 89.

law enforcement funding on the States' adoption of sex offender registration laws and set[] minimum standards for state programs."[29] Unsurprisingly, the states wasted little time in responding to the new federal registration and reporting requirements. By 1996, all fifty states, the District of Columbia, and the federal government had added some version of a "Megan's Law" to their criminal codes.[30]

B. Classification: Who Are "Sex Offenders"?

Although state criminal codes vary in terms of their precise legal definitions, an individual convicted of a crime that satisfies the applicable statutory requirements is classified as a "sex offender."[31] While the types of crimes that warrant such a designation may seem apparent to the layperson, the term itself can be rather nuanced. Although a "sex offender" may have been convicted of a sex crime in one of the more traditionally known categories—rape, sexual assault, sexual abuse of a minor, etc.[32]—state legislatures have not defined the term quite so narrowly.

In fact, some state laws require individuals who commit crimes that have no sexual component whatsoever to register as sex offenders. For example, in 2001, James Smith, a seventeen-year-old resident of

29. *Id*. at 89–90.

30. *Id*. at 90. Interestingly, Ida Ballasiotes, the mother of the Seattle woman who was murdered, ran for and took office in the Washington State Legislature, centering her campaign on getting "tough on crime." Ballasiotes served on a task force that led to passage of the Washington Community Protection Act. *See* Steve Miletich, *Inmates Fight a State Bite on Their Gifts; 35% Is Taken off the Top of All the Money They Are Sent*, SEATTLE POST-INTELLIGENCER, Apr. 7, 1997, at A1; Daniel T. Satterberg, *20 Year Anniversary of Washington's Community Protection Act*, KING COUNTY PROSECUTING ATTORNEY'S OFFICE (Jan. 11, 2010), http://www.kingcounty.gov/Prosecutor/news/2010/january/anniversary.aspx. Richard Kanka, the father of Megan Kanka and driving force behind the passage of Megan's Law, is currently campaigning for election to the New Jersey Senate on a similar platform. Erin Duffy, *Republican Richard Kanka, Who Pushed for Megan's Law, Announces N.J. Senate Bid in 14th District*, NJ.COM (Apr. 5, 2011, 5:21 PM), http://www.nj.com/mercer/index.ssf/2011/04/republican_richard_kanka_annou.html.

31. I use the term "sex offender" here to reference the exceptionally broad and varied group of individuals who have been convicted under federal or state sex-crime law and classified as sexually deviant in some manner. In reality, the nomenclature varies widely, depending on the statutory provisions in question and the severity of the offense committed. Rather than become mired in the distinctions between the various levels and classifications of sexual deviance (which do not relate to the subject of this Comment), I collectively refer to the group of individuals in question as "sex offenders."

32. *See, e.g.*, N.Y. PENAL LAW §§ 130.35, .65, .75 (McKinney 2010) (rape, sexual abuse, and course of sexual conduct against a child considered "sex offenses").

Wisconsin, forced another seventeen-year-old male into a car with him, intent on using the boy as a hostage to collect drug money from the boy's friend.[33] Having pled guilty to false imprisonment, it was undisputed that Smith committed the crime in question.[34] What surprised many members of the public, however, was that Smith would be forced to register as a sex offender for life; under Wisconsin's sex-registry statute, false imprisonment of a minor is a crime deserving of placement on the state registry.[35] The Wisconsin Supreme Court recently upheld Smith's conviction, finding that the statutory provision was rationally related to the state's legitimate interest in protecting children and the public and in aiding law enforcement.[36]

More serious sex crimes warrant a different appellation in most jurisdictions—specifically, those crimes deemed "sexually violent" or "predatory" in nature.[37] For these crimes, either an act of violence in the form of injury to the victim, or the repeated commission of a crime that would normally rise only to the level of a "sexual offense" is an almost universal requirement.[38] Because of the serious ramifications of classifying a person as "sexually violent" or "predatory," most states impose heightened requirements for adjudicating an individual to be as such, including (1) an underlying conviction for a sexually violent crime, (2) a "mental abnormality" or "mental disorder," and (3) a high risk of re-offense if released back into the community.[39] It was crimes of this nature—those committed by "predatory" individuals—that spawned much of the modern legislation in the sex-crime arena.[40]

33. Bruce Vielmetti, *Supreme Court Upholds Sex Offender Registration for Non-Sex Crime*, JSONLINE (Mar. 19, 2010), http://www.jsonline.com/news/wisconsin/88699992 .html.

34. WIS. STAT. § 940.30 (2011).

35. *Id.* § 301.45 ("'Sex offense' means a violation, or the solicitation, conspiracy, or attempt to commit a violation . . . of [the false imprisonment statute] if the victim was a minor and the person who committed the violation was not the victim's parent.").

36. Wisconsin v. Smith, 780 N.W.2d 90, 96, 106 (Wis. 2010).

37. *See, e.g.*, N.Y. PENAL LAW § 130.95 (McKinney 2010) ("predatory sexual assault" different in kind from other sex offenses).

38. *See, e.g.*, *id.*

39. *See, e.g.*, Peter C. Pfaffenroth, *The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of* Kansas v. Crane, 55 STAN. L. REV. 2229, 2232 (2003).

40. *Supra* Part II.A. As previously mentioned, although these crimes are different in name and in kind from other crimes, the term "sex offender" will still be used instead of "sexually violent predator" or some other appellation. *See supra* note 31.

C. Legislation: Mechanisms for the Control and Reduction of Recidivism

Each state code may differ greatly because the Constitution reserves to the states the power to create and implement their own criminal codes.[41] Curiously though, the laws that govern the incapacitation and regulation of sex offenders are strikingly similar. Provisions that typically carry over from state to state include civil-commitment proceedings—for individuals deemed too dangerous to be released from prison back into the community—and sex-offender-registration requirements, including housing and employment restrictions that govern where a registered sex offender may live and work. State legislatures frequently employ these statutory tools to regulate sex offenders. Each will be described in turn.

1. Civil commitments

In constructing their statutory schemes, a number of states utilize involuntary civil commitments as the primary means of incapacitating the most violent sex offenders.[42] By definition, civil-commitment laws and proceedings allow the state—specifically, a judge—to "deprive an individual of his liberty and compel him to accept psychiatric treatment," even though the course of his jail or prison sentence may be complete.[43]

Civil-commitment laws are largely creatures of the legislature and not of common-law legal tradition.[44] As far back as the 1930s, states utilized "sex psychopath laws" to govern the treatment of sexually deviant defendants, with "their espoused purpose [being] to create an alternative to punishment for a certain subclass of sex offenders, those 'too sick to deserve punishment.'"[45] In large measure, these laws fulfilled their purpose and had one overarching principle in mind: the infliction of mild punishment is better than too harsh a punishment (or in the alternative, better than no punishment at all) for those who are not of sufficient mental soundness to be subjected to the traditional mechanisms

41. *See* U.S. CONST. amend. X.

42. JANUS, *supra* note 18, at 22.

43. Note, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1201 (1974).

44. *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972) ("The common law had little need to concern itself with questions of adequate procedure for involuntary confinement because public institutions for the mentally ill were virtually nonexistent."), *vacated*, 414 U.S. 473 (1974).

45. JANUS, *supra* note 18, at 22 (quoting *Millard v. Harris*, 406 F.2d 964, 969 (D.C. Cir. 1968)).

of dispensing justice.[46] Interestingly, by the 1970s, many states decided that, although noble in theory, their civil-commitment schemes were ineffective at treating mental illness or reducing recidivism rates among sexually deviant offenders.[47] Thus, by the 1980s, most states with sex-psychopath laws had either repealed the laws or stopped enforcing them.[48]

But at the inception of the modern sex-offender-legislation movement, civil-commitment laws and proceedings gained new traction in a big way. With a renewed fervor, the states began passing or enforcing civil-commitment laws, specifically in relation to their sex-offender statutory schemes.[49] There was, notably, one key difference from the wave of laws passed in the 1930s. While the focus of the "sex psychopath laws" of yesteryear was the mild punishment of mentally ill individuals, the driving forces behind modern sex-offender laws were protecting public safety and mitigating the risk of recidivism.[50]

Faced with an infuriated public, state legislatures believed civil-commitment laws were the best way to get the most dangerous sex offenders out of their citizens' communities and prevent those offenders from acting again.[51] Deeming these incarcerations "civil" instead of "criminal" allowed states to achieve this purpose, as many of the constitutional safeguards associated with criminal proceedings—the right to a jury trial, the proof-beyond-a-reasonable-doubt evidentiary standard, or any of the other procedural-due-process rights that are guaranteed when the State attempts to deprive a person of "life, liberty, or property"—no longer applied.[52] As a civil matter, the government could hold the proceeding while the offender was still imprisoned, render judgment, and commence the civil-commitment term the day the offender's normal sentence terminated.[53] Outside the post-incarceration

46. *See* FRED COHEN, THE LAW OF DEPRIVATION OF LIBERTY: A STUDY IN SOCIAL CONTROL 286–87 (1980) (detailing the treatment of the insane in asylums, including those who otherwise would have otherwise gone to jail).

47. JANUS, *supra* note 18, at 22.

48. *Id.*

49. *Id*.

50. *Id.*

51. *Id*. at 23.

52. *See generally* U.S. CONST. amend. XIV, § 1; Tsesis, *supra* note 16.

53. Tsesis, *supra* note 16, at 256–57.

context, a state may sometimes commit individuals "based on the diagnoses of psychiatrists, emergency room doctors, and sometimes even psychiatric nurses or licensed social workers."[54]

The civil label on these commitments also afforded legislatures the benefit of indefinite sentencing terms. Because these proceedings were civil in nature, the criminal safeguards of proportionality and legality did not play a role in determining the length of time for which a previously incarcerated offender would spend involuntarily committed in a mental-health facility.[55] With public safety and risk mitigation as their driving motives to pass sex-offender laws of this nature, rather than the actual treatment of mentally ill offenders, indefinite incarceration periods made legislatures more willing to use civil commitment as a tool to incapacitate sex offenders, in spite of evidence that suggested these commitments might not be effective.[56] Thus, in enacting sex-offender legislation, the civil commitment of recidivist (or potentially recidivist) offenders was, and continues to be, a popular mechanism for incapacitation and regulation, which the Supreme Court on multiple occasions has held to be fully within the purview of the Constitution.[57]

2. Registration and notification requirements

Registration requirements, including housing and job restrictions, are the second major legislative tool. All fifty states and the District of Columbia employ registration requirements.[58] These registration systems serve two primary purposes: (1) allowing state governments to track the residence and movement of sex offenders who have been convicted and later released back into the community and (2) providing the public with notice that a convicted sex offender either has or soon will take up residence within the community.[59]

54. *Id.* at 256.

55. *See id.* at 304.

56. *See* JANUS, *supra* note 18, at 22–23.

57. *See, e.g.*, United States v. Comstock, 130 S. Ct. 1949 (2010); Kansas v. Hendricks, 521 U.S. 346 (1996).

58. *Sex Offender Registries*, PANDORA'S BOX, http://www.prevent-abuse-now.com/register.htm (last visited Mar. 19, 2012).

59. Brian J. Telpner, Note, *Constructing Safe Communities: Megan's Laws and the Purposes of Punishment*, 85 GEO. L.J. 2039, 2050 (1997) ("The essence of many community 'notification' statutes is to facilitate public access to information that local police may have already collected through their state's registration requirement." These notification statutes may either "create 'active' notification, which requires police to notify the public directly, or 'passive' notification, which merely allows the public to inspect relevant information.").

The Supreme Court has found that these primary ends are legitimate government purposes and has upheld the enforcement of registration laws as a valid exercise of governmental authority.[60] The Court has also held that because these requirements are, like commitment proceedings, considered civil in nature, community registration-and-notification laws are "nonpunitive," and therefore their "retroactive application does not violate the *Ex Post Facto* Clause" of the Constitution.[61]

Although requirements vary from state to state, Georgia's requirements are representative of community-notification laws generally. Once convicted sex offenders re-enter the community, they are required to register with the appropriate state authority[62] and to renew their registration annually.[63] Upon registration and renewal, an offender must submit or update his or her name, social-security number, age, race, sex, date of birth, height, weight, hair color, eye color, fingerprints, photograph, place of employment, vehicle information, and the crime for which the offender is registering.[64] The most pertinent identification information, such as name, gender, height, weight, and address, is made available to the public, and all of it is made available to state law-enforcement officials.[65] As in other states, the penalties for failing to register or renew registration in Georgia can be quite severe: failure to comply with registration laws within seventy-two hours of the specified time period results in a felony conviction and a mandatory minimum sentence of at least one year; any subsequent violation carries a five-year minimum sentence.[66]

As a part of notification and registration requirements, sex offenders are often prevented from taking up residence within certain areas of the town or city in which they live. These restrictions are generally intended to discourage re-offense by keeping sex offenders away from certain areas that traditionally see a high concentration of minors and children.[67] Georgia prevents registered sex offenders from taking up residence

60. Smith v. Doe, 538 U.S. 84, 85 (2003).

61. *Id.* at 105–06.

62. GA. CODE ANN. § 42-1-12(f) (2010).

63. *Id.* § 42-1-12(f)(4).

64. *Id.* § 42-1-12(a)(16).

65. *Id.* § 42-1-12(i).

66. *Id.* § 42-1-12(n).

67. *See* Paula Reed Ward, *Residency Restrictions for Sex Offenders Popular, but Ineffective*, PITTSBURG POST-GAZETTE, Oct. 26, 2008, at B1, *available at* http://www.post-gazette.com/pg/08300/922948-85.stm.

"within 1,000 feet of any child care facility, church, school, or area where minors congregate";[68] other states' statutes require 2,000 feet.[69] These statutes may also put similar restrictions on what type of employment registered sex offenders may hold: in Georgia, sex offenders may not be "employed by or volunteer at any child care facility, school, or church or by or at any business or entity that is located within 1,000 feet of a child care facility, a school, or a church."[70]

III. WHY SEX-OFFENDER LEGISLATION IS RELEVANT TO A DISCUSSION OF JUDICIAL BALANCING

As discussed previously, judicial balancing of competing interests happens in all sorts of cases and contexts, both civil and criminal.[71] Sex-offender cases are particularly relevant to a discussion of judicial decision making for three reasons. First, the seriousness of the crimes in question engenders concerns about the competing interests of both the defendant and the government. Second, although sex crime appears to be decreasing overall, the number of individuals registered as sex offenders continues to rise. Third, many sex-crime prosecutions involve youth offenders, making the balancing of competing interests even more complex and precarious.

A. Interests in Heightened Competition

First, sex crimes are generally considered among the most heinous crimes a person can commit,[72] which raises the stakes in protecting the public interest. Yet, as in all criminal trials, due process is at issue.[73] The heightened public-safety concern amplifies the degree of competition between the defendant's due-process rights and the government's interest in protecting the public from recidivist offenders.

Governments have a legitimate interest in protecting the public from dangerous and predatory recidivists and in maintaining a sense of

68. GA. CODE ANN. § 42-1-15(b).

69. *See, e.g.*, ALA. CODE § 15-20A-11 (2011).

70. GA. CODE ANN. § 42-1-15(c).

71. *See* Coffin, *supra* note 8, at 18.

72. JANUS, *supra* note 18, at 1–2.

73. Duncan v. Louisiana, 391 U.S. 145, 156 (holding that criminal defendants in all cases—state or federal—must be afforded due-process guarantees).

security in American communities.[74] Problems tend to arise in determining exactly *who* the truly dangerous criminals are, and what steps can and should be taken to mitigate risk, especially given the public's perception of who sex offenders are and the types of crimes they commit.[75] Considering the nature of the crimes in question, the consequences of releasing these individuals back into the community without tracking their movements when they are released are astronomically high. Indeed, evidence of the heightened interest in public safety is demonstrated in the language legislators used when passing sex-offender laws in individual states across the country. For example, when pressed on the issue, former state legislator Ida Ballasiotes avowed that no sexual predator should be released back into the community.[76] Believing that sexually violent offenders "can[not] be treated, period," Ballasiotes stated that extensions of prison sentences through civil commitments should "absolutely" be considered as a mechanism employed by states to deter and prevent reoffense.[77]

Other state legislators have employed similar language to appeal to the fear of recidivism and the desire for public safety to keep high-risk offenders detained after their sentences run.[78] For states, the apparent knowledge that they are getting near "100 percent protection from real, identified individuals" who are guaranteed not to reoffend as long as they remain committed or monitored justifies the action.[79] Thus, it seems that the keen interest in public safety in sex-offender cases justifies viewing the due-process rights of the accused as if they exist in "an alternate legal universe," treating this class of cases as different in kind from others.[80]

On the other hand, due-process rights do not simply dissipate because of a heightened interest in public safety, for "[a]t the core of

74. Morascini v. Comm'r of Pub. Safety, 675 A.2d 1340, 1352 (Conn. 1996) (finding that government has a substantial interest in preserving public safety).

75. JANUS, *supra* note 18, at 2. ("The . . . crimes [these] men are accused of mark them as the 'worst of the worst.' . . . These are the men who lurk in the bushes and the parking lots, attacking strangers without provocation or warning. They often seem to lack the essential empathy and conscience that mark human beings. They are 'monsters' and 'beasts.'")

76. Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at 1.1, *available at* http://www.nytimes.com/2007/03/04/us/04civil.html.

77. *Id.*

78. *E.g.*, JANUS, *supra* note 18, at 60 (quoting Minnesota state representative Kurt Zeller: "What is the price of yet another victim, the innocence stolen from another child, the sense of safety at night for yet another woman?").

79. *Id.* at 61.

80. *Id.* at 32.

procedural justice is the individual's interest in remaining free from erroneous bodily restraint and being protected against arbitrary government abuses."[81] Given that "[s]tandards of due process are meant to provide sufficiently rigorous standards of proof to prevent the wrongful deprivation of liberty," which is frequently at issue in sex-offender legislation, a state's assertion of heightened safety interest does not completely relax due-process guarantees.[82] Thus, because the due-process rights are retained, and yet the interest in public safety is exceptionally high, the method by which judges make decisions in these cases becomes a matter of increased importance.

B. Rising Sex-Offender Registration Rates

Second, although sex crime appears to be decreasing overall, the number of individuals registered as sex offenders keeps rising. While the national rate of forcible rape, for example, has decreased steadily from 94,000 in 2005 to 88,000 in 2009,[83] over 747,000 individuals in the United States are registered sex offenders,[84] up from 603,000 in 2007.[85] State statistics show an increase in sex-offender registrations as well. A recent report from Iowa's Division of Criminal and Juvenile Justice Planning shows that "[t]he number of people convicted . . . for sex crimes has grown for each of the last five years," and that this increase in crime "will increase the parole caseload by 78 percent in 10 years."[86] The obvious implication of this fact is that judges will adjudicate sex-

81. Tsesis, *supra* note 16, at 260.

82. *Id.*

83. *See* FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2009 tbl.1, *available at* http://www2.fbi.gov/ucr/cius2009/data/table_01.html.

84. NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, *Map of Registered Sex Offenders in the United States*, MISSINGKIDS.COM (Nov. 4, 2011), http://www.missingkids.com/en_US/documents/sex-offender-map.pdf. During the drafting and editing of this Comment, this figure increased by 7,000 in only about five months, from just under 740,000 on June 17, 2011, to 747,000 on November 4, 2011.

85. *See* John Gramlich, *The Ever-Growing Sex Offender Registry*, STATELINE (Apr. 12, 2010), http://www.stateline.org/live/details/story?contentId=476264.

86. Lee Rood, *Iowa Sex Offender Convictions Rise—And So Do Costs*, DES MOINES REG. BLOG (Oct. 24, 2011, 11:29 AM), http://blogs.desmoinesregister.com/dmr/index.php/2011/10/24/iowa-sex-crime-convictions-rise-and-so-do-costs/. Although an inverse relationship between sex crimes and sex-offender registrations may seem counterintuitive, there may be any number of reasons for such an effect, not the least of which may be the generally long length of time sex offenders must remain on sex-offender registries, *see supra* Part II.C, and the variety of crimes that are nonsexual in nature but nevertheless require individuals to register as sex offenders, *see supra* Part II.B.

offender cases at an increasing rate over the next several years. Considering the high number of cases being prosecuted, and the fact the number of new cases are unlikely to decrease in the near future, courts face a difficult task when it comes to adjudicating sex-crime cases. This makes the way judges are making their decisions in sex-offender cases all the more important if the goal is to keep those decisions consistent with constitutional principles.

C. The Relative Age of Some Sex Offenders

Finally, another statistic that lends support to the argument that the method of judicial decision making is of importance in the sex-offender context is that many individuals prosecuted for sex crimes are relatively young. In California, for example, the defendant was age twenty or younger in 30% of the approximately 17,000 statutory rape cases prosecuted.[87] Sample cases of minors who are prosecuted for sex crimes abound. Shane Sandborg, a resident of Illinois, engaged in a "consensual sexual relationship" at age seventeen with a girl fourteen months younger than he, and she became pregnant.[88] In the course of an investigation for another crime, the police discovered Sandborg's relationship with the girl, and he was charged with criminal sexual abuse.[89] As a result, even though Sandborg is now married and raising three children with this same woman, Sandborg remains on Illinois' sex-offender registry for "the crime of having sex with a minor"—preventing him from attending his children's school functions or going to the park as a family.[90]

For youth, such an ignominious designation can have enormous ripple effects on individuals in many aspects of their day-to-day lives for years into the future, making the method of judicial decision making in the sex-offender context all the more important.[91] Considering this fact,

87. CAL. COAL. AGAINST SEXUAL ASSAULT, 2008 REPORT: RESEARCH ON RAPE AND VIOLENCE 51 (2008), *available at* http://www.calcasa.org/stat/CALCASA_Stat_2008.pdf.

88. *Illinois 'Romeo and Juliet' Law Would Take Young Sex Offenders Off Registry*, HUFFINGTON POST (Mar. 2, 2011, 1:20 PM), http://www.huffingtonpost.com/2011/03/ 02/illinois-romeo-and-juliet_n_830301.html.

89. *Id.*

90. *Id.*

91. *See* Henry F. Fradella & Marcus A. Galeste, *Sexting: The Misguided Penal Social Control of Teenage Sexual Behavior in the Digital Age*, 47 NO. 3 CRIM. LAW BULL. ART. 4 (2011) (noting reasons why penal social-control mechanisms may be inappropriate for teenagers).

and combined with the nature of the competing interests at stake and the rise in sex crimes generally, sex-offender cases prove to be an excellent springboard for analysis of the process of judicial decision making.

IV. IMPLICIT JUDICIAL BALANCING: EVIDENCE AND ASSOCIATED PROBLEMS

The sex-offender context thus is an excellent candidate for analysis of implicit judicial balancing. As previously mentioned, this Comment defines implicit balancing as that which is accomplished either without statutory mandate or without judicial identification of the factors weighed.[92] But what evidence demonstrates that implicit balancing—that is, balancing not accomplished by statutory mandate or without clear identification of the factors weighed—is actually happening in sex-offender cases? And even if implicit judicial balancing is occurring, what are the implications and problems associated with it? This Comment argues that implicit balancing occurs in the application of sex-offender laws. It appears that judges across the country, while presumably concerned with protecting the rights of the accused or convicted, are engaging in an unexpressed, implicit balancing act in which they weigh the competing interests identified above[93]: the state's interest in public safety and the constitutional due-process guarantees of the accused.

A. Supporting Evidence

An examination of court decisions from recently decided sex-offender cases provides ample support for these propositions. As a preliminary matter, it is important to note that the situations identified below may not be the only ones in which implicit balancing occurs. Although many federal court decisions are published or, if unpublished, are at least available in written form, detailed opinions from the majority of state appellate and lower court decisions are often inaccessible in writing.[94] Furthermore, many of these trial court decisions are not

92. *See supra* Part I.

93. *See supra* Part III.

94. *See, e.g.*, CAL. R. OF CT. 2.952 (2011) (placing no mandate on state trial court judges for recording decisions); *Published and Unpublished Case Research Guide*, SAN DIEGO COUNTY PUBLIC LAW LIBRARY, http://www.sdcll.org/resources/guides/Published_and_Unpublished_Cases.pdf (last visited Sep. 5, 2012) ("[M]any appellate and lower court decisions are not published. For example, in fiscal year 2006–07, only about 9% of the majority opinions issued

appealed.[95] Thus, the amount of case law available to analyze the method by which judges make decisions in the sex-offender context is frequently limited to either federal cases or those state cases that are appealed and result in a written opinion.

1. Explicit balancing

To better understand what form *implicit* balancing might take, it is useful to briefly see what *explicit* balancing looks like. Civil-commitment cases—cases in which judges decide whether to commit an individual post-release from prison—are good illustrations of explicit balancing. In adjudicating civil commitments, it is presumed that judicial balancing will occur. The New Jersey Superior Court of Appeals noted that it employs an "exceedingly narrow" scope of review in commitment cases, and "gives the utmost deference to the reviewing judge's determination of the appropriate balancing of societal interest and individual liberty."[96] The U.S. Supreme Court itself has sanctioned this approach, noting that an important part of making due-process determinations in civil-commitment cases is looking for the decision that "strikes a fair balance between the rights of the individual and the legitimate concerns of the state."[97] This appellate sanctioning of the balancing approach leaves the judiciary with broad discretion to make quasi-legislative determinations about the appropriate balance between individual liberties and state interests.

One example of this balancing is found in the case of Dennis Linehan, in which the court balanced a convicted sex-offender's liberty interest with the state's concern for public safety. After Linehan served nearly thirty years in the Minnesota prison system for the rape-murder of a girl in the 1960s, the Minnesota Supreme Court held that, under the state law's standard, Linehan was fit to be released from the penitentiary to a halfway house on the prison grounds, where he was to complete mandatory psychological evaluation and counseling to begin the process of being released back into the community.[98] But in accordance with new civil-commitment legislation passed in direct response to Linehan's

by the California Courts of Appeal were published in California official reporters.").

95. *See* Charles M. Sevilla, *Criminal Defense Lawyers and the Search for Truth*, 20 HARV. J.L. & PUB. POL'Y 519, 526 (1997) (noting "there are not that many" criminal appeals).

96. *In re* Civil Commitment of J.M.B., 928 A.2d 102, 114 (N.J. Super. Ct. App. Div. 2007).

97. Addington v. Texas, 441 U.S. 418, 431 (1979).

98. JANUS, *supra* note 18, at 27–30.

release, the Minnesota court had to rule on whether to recommit Linehan when he had already been found at least partially fit for release.[99] In *In re Linehan*, the court analyzed Linehan's continuing actions while inside the halfway house to determine that he was fit to be removed from the halfway house to a commitment facility for the sexually dangerous; the court cited its own precedent to determine that "[e]ven when treatment is problematic, and it often is, the state's interest in the safety of others is no less legitimate and compelling. As long as civil commitment is programmed to provide treatment and periodic review, due process is provided."[100]

In other civil-commitment cases, judges have gone beyond factoring due-process rights into the balancing equation and have expressed a desire to implement other factors as well. For example, in *In re Nelson*,[101] the dissenting judges disagreed with the majority's method of determining what standards would be most appropriate in satisfying due process in civil-commitment cases. Recognizing that "it is undisputed that an individual's liberty interest is at stake in an involuntary commitment proceeding," the dissenters argued that "[m]ore than the individual's liberty interest is at stake" in proceedings of this nature, with other interests including that of "providing care to its citizens who are unable because of emotional disorder to care for themselves."[102] Other courts, while noting that "those facing . . . commitment[] are entitled to due process of law before they can be committed," are also quick to note the "flexible concept" of balancing and the multiplicity of factors that courts might choose to weigh, "including the costs and administrative burdens" of added protective due-process measures.[103] These holdings—that the state's interest in safety, police protection, and cost minimization may outweigh traditional due-process procedures—are evidence that judicial balancing is happening in the sex-offender context, and that traditional notions of due process could take a back seat in the process depending on how "substantial"[104] those state interests are.

99. *Id.* at 34.

100. *In re* Linehan, 557 N.W.2d 171, 181 (Minn. 1996) (quoting *In re* Blodgett, 510 N.W.2d 910, 916 (Minn. 1994)), *vacated sub nom.* Linehan v. Minnesota, 522 U.S. 1011 (1997).

101. 408 A.2d 1233 (D.C. 1979).

102. *Id.* at 1239 (Nebeker, J., concurring) (quoting Addington, 441 U.S. at 426).

103. *In re* Detention of Stout, 150 P.3d 86, 93 (Wash. 2007).

104. Morascini v. Comm'r of Pub. Safety, 675 A.2d 1340, 1352 (Conn. 1996).

2. Implicit balancing

Having examined those instances in which judges explicitly balance defendants' due-process rights against a state's interest in public safety, the analysis of those cases in which judges may be implicitly balancing can move forward. Courts may be engaging in such implicit balancing in cases in which they decide whether sex-offender laws are either penal or nonpenal in nature. In *Lesher v. Trent*, the defendant filed a writ of mandamus seeking to compel the correction of public records,[105] arguing that the Illinois Sex Offender Registration Act's registration requirement was an unconstitutional *ex post facto* punishment.[106] The Appellate Court of Illinois disagreed, relying on Illinois Supreme Court precedent that "long held" the registration requirement was not a retroactive punishment under the *ex post facto* clause.[107] Rather, the court said, the fact that the legislature's stated goal was "to enhance public safety" makes the statute not punitive in nature, and "[a]lthough registration does impose a burden on those required to register, the burden is not substantial enough to constitute punishment."[108]

The above language of the Illinois court indicates implicit balancing. Although different in kind from the explicit balancing of due-process rights and public safety in *In re Linehan*,[109] the court took into account some combination of legislative intent and public-safety concerns that (at least partially) led it to ultimately decide that registration was not retroactive punishment. The justification for letting public safety trump the right to freedom from retroactive punishment may have been something specifically related to the defendant or his crime—like the way the defendant carried out the crime in question. Or the justification may have been something more general—like protecting the public at large. One cannot know for sure, because the court implicitly balanced two competing interests without clearly explaining the specific factors it took into account.

In a similar case, *Roe v. Office of Adult Probation*,[110] the Second Circuit decided Connecticut's sex-offender notification policy was not punishment for *ex post facto* purposes, holding that the policy was "not

105. 944 N.E.2d 479, 480 (Ill. App. Ct. 2011).

106. *Id.* at 483.

107. *Id.*

108. *Id.* at 484.

109. *See supra* text accompanying notes 102–04.

110. 125 F.3d 47 (2d Cir. 1997).

excessive *in relation to* its purpose of enhancing public awareness and helping to prevent the recovering offender from harmful relapses."[111] Again, although not explicitly recognized as such, the language the court employed demonstrates how implicit balancing played a part in its decision. The court quite clearly gave attention to the government's interest in protecting public safety.[112] But, as in *Lesher*,[113] any combination of factors might have swayed the court's ultimate conclusion. In fact, it is entirely possible that, standing alone, the court thought the notification policy was sufficiently burdensome to justify calling it retroactive punishment. Unfortunately, the court provided no explanation about the precise nature of the factors it took into account; the notification policy was excessively burdensome only "in relation to" the government's interest in protecting public safety.[114] Thus, the sex-offender *ex post facto* punishment cases are evidence of those situations in which a defendant's rights in question are subject to implicit judicial balancing and pitted against the state's interest in protecting public safety.

A defendant's rights are also subjected to implicit balancing when judges decide the reasonableness of sentences for sex offenses. Under the advisory federal-sentencing guidelines,[115] judges may take into account a variety of mitigating or aggravating factors that may reduce or enhance the recommended sentence.[116] Each factor that judges consider before sentencing, however, must be proved beyond a reasonable doubt by jury trial.[117]

For example, in *United States v. Shira*, a defendant convicted of possessing child pornography failed to register as a sex offender under applicable federal law after serving his prison sentence, and as a result was sentenced to serve another fifteen months in prison.[118] The defendant argued that the term of the sentence was unreasonable, a point

111. *Id.* at 55 (emphasis added).

112. *Id.*

113. 944 N.E.2d 479 (Ill. App. Ct. 2011).

114. *Id.*

115. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch.2, 98 Stat. 1837 (1984).

116. *See* Amy Baron-Evans & Kate Stith, Booker *Rules*, U. PA. L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1987041; *see also* 18 U.S.C. § 3553 (2006).

117. Booker v. United States, 543 U.S. 220, 230 (2005).

118. 286 Fed. App'x 650, 652 (11th Cir. 2008).

with which the Eleventh Circuit disagreed.[119] In arriving at its decision, the court found that the lower court was not remiss in balancing a multiplicity of factors that would influence the length of the defendant's sentence, including "the need for the sentence to reflect the seriousness of the offense, promote respect for the law and provide just punishment; to afford adequate deterrence; to protect the public and to provide the defendant with needed educational or vocational training, medical care or correctional treatment."[120]

In this case, although the district court did explicitly balance due process and public safety by explaining some of the factors it considered, the court implicitly balanced the defendant's rights.[121] The court did not, however, explain why the defendant's failure to register substantiated the need to take into account seemingly extraneous factors, such as the defendant's need for "educational or vocational training, medical care" or even the public's need for an additional layer of protection.[122] Although the applicable statute did not require the court to explain its rationale entirely, the court did not explain why this particular defendant's failure to register justified an enhanced sentence; implicit balancing leaves one in the dark about the court's rationale.

Jury selection is another area in which implicit judicial balancing may occur. In 2004, Barry Heath was charged with and convicted of the rape of a woman with whom he had formerly been romantically involved.[123] Heath challenged the verdict on the grounds that during *voir dire*, the district court "denied [his peremptory] challenges for cause regarding two prospective jurors.," one of whom had acted "as a rape survivor advocate in college and" whose ex-boyfriend had once stalked her, and the second of whom "had completed fifty-six hours of continuing education on sex offenses."[124] At various points during *voir dire*, the first prospective juror expressed her reservations about serving as a juror on the case.[125] Despite these reservations, the Montana

119. *Id.* at 652–53.

120. *Id.* at 653.

121. *Id.*

122. *Id.*

123. State v. Heath, 89 P.3d 947, 949 (Mont. 2004). The legal name of the charge was "sexual intercourse without consent." *Id.*

124. *Id.* at 956.

125. *Id.* at 951–52 ("[I]f I were in [the defendant's] situation, I probably wouldn't want somebody on the jury that had my experience. . . . I feel I probably shouldn't be on this particular case . . . because of the previous experience that I've had and also the experience with rape survivors.").

Supreme Court ruled that the trial court's decision to retain the juror was not an abuse of discretion. The court focused solely on the fact that the first prospective juror also expressed that she would be "willing and able to set [her past experiences] aside."[126] The court cited this as evidence that she would be able to form something other than "fixed opinions on the guilt or innocence of the defendant" and render an unbiased verdict.[127] The court implicitly balanced in deciding this case. Relying on prior decisions, the court delineated a rule that jurors need to "state[] an actual bias directly related to an issue critical to the outcome of the case" before they are disqualified.[128] While there may be multiple explanations that undergird the court's decision to adopt this rule, (e.g., the interest in efficient trials or in keeping jurors on the jury), the court at no point expressed its reasoning or policy rationale. The court must have considered some combination of state interests that outweighed the defendant's interest in having a jury composed of individuals without "admittedly skeptical state[s] of mind."[129] But one cannot know for certain because the court implicitly balanced.

While implicit balancing may adversely impact a defendant's chance for a successful trial or appeal, this is not to say that a test that balances competing individual and state interests always disadvantages the defendant. Indeed, sometimes implicit balancing works in the defendant's favor.[130] But regardless of whether the outcome for sex offenders is positive or negative, all of these cases indicate that implicit balancing occurs in at least some sex-offender cases.

B. Problems with the Balancing-Test Approach

Given the evidence that implicit judicial balancing is happening in this context, what is the cause for concern? This Comment suggests that the broader problem with implicit balancing is twofold. First, implicit balancing creates problems for individual defendants when it pits

126. *Id.* at 951.

127. *Id*. at 950 (quoting Great Falls Tribune v. District Court, 608 P.2d 116, 120 (Mont. 1980)); *id.* at 955.

128. *Id.* at 950 (quoting State v. Freshment, 43 P.3d 968, 974 (Mont. 2002)) (internal quotation marks omitted).

129. *Id.* at 958 (Leaphart, J., dissenting).

130. *See, e.g.*, Doe v. State, 189 P.3d 999, 1017–18 (Alaska 2008) (holding that, in balancing the "consequences to sex offenders" against the state's interest in public safety, a convict's state constitutional rights are violated when the convict is required to register as a sex offender under the Alaska Sex Offender Registration Act).

constitutional guarantees against asserted state interests and treats both as equals without clear regard to the factors used to balance those interests. Second, this may create the appearance of judicial bias, which undermines the legitimacy of courts and potentially decreases public willingness to accept and comply with judicial opinions.[131]

First, when judges implicitly weigh competing state interests against the defendant's interests, the defendant's loss of rights may be rationalized in ways unintended by the legislature and in ways that due process would not otherwise permit. During the course of any criminal proceeding, defendants may invoke any number of constitutional protections: the right to a hearing, the right to a trial by a jury, and the protection against *ex post facto* punishments, to name a few.[132] This is not to say, however, that these rights are absolute. Indeed, as in the civil context,[133] judges regularly must balance criminal defendants' rights against competing state interests.[134] These state interests—namely, public safety and reducing recidivism risk—are "important,"[135] and even "substantial."[136] That balancing happens is not bad in itself, as long as the judge remains fair and neutral as to the evidence presented and then strikes the appropriate balance to the best of her knowledge and ability; no one expects more of a judge than this.[137] But while the more familiar type of explicit balancing is permissible, implicit balancing is not.

When judges implicitly balance, they either fail to explain the factors they considered or the degree of weight they afforded those factors during the decision-making process.[138] If a judge strikes the balance in favor of state interests in protecting public safety or in reducing the risk of recidivism, yet leaves the means of making the decision unexplained, the defendant cannot know what weight her rights were afforded. Nor can she know with precision going forward when her rights might be balanced. Perhaps more importantly, she cannot know *why* her interests took a back seat to other competing state interests. Put simply, the

131. *See generally* Fallon, *supra* note 3 (suggesting that judicial decisions derive their legitimacy from public acceptance).

132. *See* U.S. CONST. art. III, § 2, amend. V, § 1, amend. VIII.

133. *See* Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 570 (2008).

134. *See supra* Part IV.A.1.

135. Roe v. Office of Adult Prob., 125 F.3d 47, 54 n.14 (2d Cir. 1997).

136. Morascini v. Comm'r of Pub. Safety, 675 A.2d 1340, 1352 (Conn. 1996).

137. Nancy Gertner, *On Being Judged: Why the Label "Activist Judge" Doesn't Apply to Me*, BOSTON GLOBE, May 1, 2011, at BGM.12.

138. *See supra* Part I.

implicit, unexplained balancing of defendant and state interests can rationalize defendants' rights at trial and leave defendants with limited ability to properly analyze the decision because judges' reasoning processes are left unclear or unexplained.

Second, implicit balancing may undermine the legitimacy of courts in the eyes of Americans and decrease public willingness to accept judicial opinions as legitimate.[139] This stems from a combination of two ideas: that courts must rely on public acceptance of their legitimacy if they expect the public to rely on their decisions[140] and that the appearance of procedural injustice is substantially related to individuals' compliance with laws and judicial decisions.[141] The Supreme Court stated in no uncertain terms in *Planned Parenthood* that its legitimacy (and, by extension, the legitimacy of other courts) in the eyes of the public is the only true power courts wield:

> [T]he Court cannot buy support for its decisions by spending money and . . . it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands . . . .
>
> . . . The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures . . . . Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.[142]

When the *Planned Parenthood* Court spoke of legitimacy, it did not reference the legitimacy of its existence or its ability to decide constitutional cases generally. Rather, it spoke of the *people's* perception of the Court's ability to decide constitutional cases. The Court focused on the *people's* perception of its legitimacy.[143] Indeed, this is by far the most valuable "currency" that courts have at their disposal.[144]

139. *See generally* Fallon, *supra* note 3.

140. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 865–66 (1992).

141. *See, e.g.*, Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003).

142. 505 U.S. at 865–66.

143. *Id.*

144. *See* Fallon, *supra* note 3, at 1832.

This problem—the need to maintain the appearance of legitimacy—has proved to be an idea that exists not just in theory alone; scholars have found "[c]onsiderable evidence [to] suggest[] that the key factor shaping public behavior is the fairness of the processes legal authorities use when dealing with members of the public."[145] In other words, to ensure compliance with their decisions, judges must make sure the public perceives those decisions as procedurally fair.[146]

Implicit balancing tends to undermine both the appearance of legitimacy in the eyes of the public and, consequently, the public's compliance with those decisions. A judge in a certain case might view punishment as "not excessive in relation to" the state's asserted interest in public safety,[147] but the public, like defendants themselves, is left to wonder exactly why this is the case. Perhaps the state interest was in fact very important, or perhaps there was something particularly unusual or heinous about the crime in question; perhaps the judge was simply set on making sure a particular defendant got her just deserts. While such nefarious actions surely are unlikely, these guesses represent the broad range of possible conclusions at which the public might arrive because of a lack of transparency inherent in the implicit-balancing process. This may have a negative effect on the public's acceptance and compliance with the decisions courts set forth, causing judges to be "unsure whether they can issue directives and expect that they will be obeyed."[148] In short, when judges engage in implicit balancing, it tends to undermine both the appearance of legitimacy and the court's ability in the long run to render decisions that the public will view as legitimate.

V. CONCLUSION

Implicit judicial balancing appears to occur on a fairly regular basis at various points in the judicial process during the adjudication of sex crimes.[149] Furthermore, that implicit balancing can be problematic both for individual defendants and for society in general, as it may rationalize defendants' rights and undermine courts' appearance of legitimacy in the

145. Tyler, *supra* note 140, at 283.

146. Professors Tyler, Robinson, and Slobogin have discussed this idea at length and have adopted the term "compliance theory" to describe the effect of procedural justice on compliance with the law. For an in-depth treatment of compliance theory, see generally Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place* (on file with author).

147. *Id.* at 55.

148. Tyler, *supra* note 140, at 288.

149. *See supra* Part IV.A.2.

long run.[150] This Comment does not suggest that explicit balancing is inherently negative or inappropriate in the sex-offender context, considering the strong foothold the practice has gained as a method of judicial decision making.[151] Rather, it suggests that implicit balancing can be problematic with severe consequences, as discussed above.[152] What, then, might be done to correct these potential problems? Put simply, if balancing is the approach judges choose to adopt in adjudicating sex offenses and other like crimes, the best solution is to ensure transparency and forthrightness in the factors and competing interests judges weigh when they arrive at their end decision.

Avoiding implicit balancing will maintain the appearance of legitimacy, as well as neutrality, in the eyes of the public. As "[t]ransparency is the *sine qua non* of the common-law tradition we have inherited,"[153] it makes sense for judges to explain their actions. If competing state interests in public safety or in controlling recidivist offenders outweigh a defendant's liberty interests, the judge should explain the factors that she considered to the defendant, appellate judges, and the public at large. If a former rape counselor and stalking victim is selected to sit on a jury in a sex-crime case, it would be useful for the judge to explain *why* it was appropriate for such a person to sit on the jury. The factors that a judge considers when weighing a defendant's rights against public safety must be pronounced to allow transparency and bolster legitimacy.

A constant stream of explanations is not something that is required of judges in every decision they render, nor does this Comment assert that it should be; such a requirement would probably prove impossible for judges burdened with ever-increasing case loads. But if judges are concerned about the appearance of their courts' legitimacy, explaining their decisions more fully and avoiding implicit balancing may provide a relatively simple solution.[154] By simply articulating the reasoning they

150. *See supra* Part IV.B.

151. *See supra* Part I, at 2–3.

152. *Supra* Part IV.B.

153. Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 FED. CTS. L. REV. 177, 215 (2009).

154. In fact, Judge Nancy Gertner, a Massachusetts federal district-court judge who recently retired from the bench, uses just such a method of overcoming the legitimacy problems that can arise when judges implicitly balance. *See* Gertner, *supra* note 136 ("I have written several hundred opinions over the years—frequently when none was required. I wrote to explain my decisions to the public I felt privileged to serve, taking pains not to hide behind legalese. I wrote even when I was compelled by the law to do something with which I disagreed. *I wrote precisely because I wanted to*

use when balancing competing interests, and thus being more rather than less transparent in their efforts, judges may avoid the legitimacy problems that can arise from implicit balancing.

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make certain that my years as an advocate would not improperly affect my judging or the perception of its legitimacy." (emphasis added)).

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