

**What is Punishment?:
The Case for Considering Public Opinion
Under *Mendoza-Martinez***

*David A. Singleton**

INTRODUCTION	436
I. DETERMINING WHAT IS PUNITIVE IN EFFECT	441
A. The <i>Mendoza-Martinez</i> Framework and Its Criticisms .	441
B. The <i>Mendoza-Martinez</i> Factors and Sex Offenders...	445
1. <i>Kansas v. Hendricks</i>	445
2. <i>Smith v. Doe</i>	447
3. <i>Doe v. Miller</i>	449
4. Were <i>Hendricks</i> , <i>Smith</i> , and <i>Miller</i> correctly decided?.....	453
II. INCORPORATING PUBLIC OPINION INTO THE <i>MENDOZA-MARTINEZ</i> FRAMEWORK	454
A. The Admissibility of Public Opinion Surveys in Other Contexts	455
B. The Relevance of Public Opinion Surveys in the <i>Mendoza-</i> <i>Martinez</i> Context.....	457
C. The Benefits of Considering Public Opinion in Determining Punishment Under <i>Mendoza-Martinez</i>	459
D. Other Objections to Considering Public Opinion under <i>Mendoza-Martinez</i>	461
1. Members of the Public Are No Better Than Judges at Objectively Determining What Constitutes Punishment	462
2. Consideration of Public Opinion Evidence Could Create an Inconsistent Body of Case Law.....	462
3. Determining the Significance of Survey Results Would Add Another Element of Subjectivity and Arbitrariness to the <i>Mendoza-Martinez</i> Analysis ...	464
E. Conclusion.....	465

III. DECONSTRUCTING A PUBLIC OPINION STUDY	465
A. The Study	465
B. The Results	469
C. What this study means for <i>Mendoza-Martinez</i>	470
CONCLUSION	474

INTRODUCTION

In 1974, seventeen year-old Daryl Coston was convicted of raping two adult women.¹ In 2005, one year after his release from prison, Coston learned that the Ohio General Assembly had passed a law forbidding sex offenders from living within 1,000 feet of schools.² Because of the law, Coston was unable to find a place to live and risked becoming homeless.³ Coston, along with other sex offenders, filed suit in the United States District Court for the Southern District of Ohio alleging, among other claims, that Ohio's residency restriction retroactively imposed punishment in violation of the *Ex Post Facto* Clause.⁴ The district court dismissed the case.⁵

Perhaps you are thinking, "so what? Coston committed terrible crimes. He and other sex offenders deserve no sympathy. Too bad if they can't find places to live." But does the Constitution condone imposing such harsh burdens retroactively on maligned groups in the name of public safety? Though courts frequently answer this question in the affirmative, it is unclear that the Framers would have agreed.

The Framers considered the Constitution's *Ex Post Facto* Clause⁶ to be one of the most important safeguards of liberty. The Clause prohibits retroactively punishing someone, including by "chang[ing] the punishment, and inflict[ing] a greater punishment, than the law

* Assistant Professor of Law, Northern Kentucky University Salmon P. Chase College of Law; Executive Director, Ohio Justice & Policy Center; A.B., Duke University; J.D., Harvard Law School. I am very appreciative of the time, insights, and assistance provided by my law school colleague Donna Spears, my research assistants Tamara Scull and Colin P. Pool, my OJPC colleague Sasha Appatova, and my friend and former colleague Michael Pinard. I dedicate this Article to my wife Verna Williams and my daughter Allison.

¹ Second Amended Class Action Complaint at ¶¶ 42–43, *Coston v. Petro*, No. 1:05-cv-00125 (S.D. Ohio May 26, 2005).

² *Id.* at ¶¶ 53, 70.

³ *Id.* at ¶ 73.

⁴ *Id.* at ¶¶ 120–21.

⁵ *Coston v. Petro*, 398 F. Supp. 2d 878, 883, 885–87 (S.D. Ohio 2005) (dismissing action for lack of standing but concluding that plaintiffs would not be able to demonstrate that the statute imposed punishment for *Ex Post Facto* purposes).

⁶ U.S. CONST. art. I, § 10.

annexed to the crime, when committed.”⁷ James Madison believed *ex post facto* laws to be “contrary . . . to every principle of sound legislation.”⁸ Agreeing with Madison, Alexander Hamilton observed that the prohibition against *ex post facto* laws is among the “three great[est] securities to liberty and republicanism”⁹ Contemporary scholars agree that the *Ex Post Facto* Clause is intended to protect “against the hydraulic pressures that periodically beset our majoritarian political processes and compel lawmakers to impose retroactive punishments on maligned individuals and groups of the moment.”¹⁰

Although the prohibition against creating new punishments for past acts is stitched into the Constitution’s fabric, courts have struggled to answer the threshold question of what amounts to punishment under the *Ex Post Facto* clause. The threshold question turns on whether a punishment is “criminal” or “civil” in nature.¹¹ While legislatures are constrained from enacting statutes that impose new criminal penalties retroactively,¹² they have power to pass civil, regulatory laws that may incidentally burden people who have already been convicted of a crime and have completed their sentences.¹³ Thus, a central question in *ex post facto* cases is whether a statute is punitive or regulatory.¹⁴

This question has become increasingly important in recent years due to the promulgation of ostensibly regulatory laws aimed at protecting the community from sex offenders—one of the most reviled, feared, and marginalized groups in society.¹⁵ These laws

⁷ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.).

⁸ James Madison, *THE FEDERALIST* NO. 44, at 282 (Clinton Rossiter ed., 1961).

⁹ Alexander Hamilton, *THE FEDERALIST* NO. 84, at 511 (Clinton Rossiter ed., 1961).

¹⁰ Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 *AM. CRIM. L. REV.* 1261, 1267 (1988) (internal quotation marks omitted).

¹¹ *Id.* at 1268 (describing Supreme Court’s punishment jurisprudence as “an incoherent muddle”).

¹² *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 504 (1999); *Collins v. Youngblood*, 497 U.S. 37, 43 (1990); *Calder*, 3 U.S. at 390.

¹³ *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *United States v. Ward*, 448 U.S. 242, 248–49 (1980).

¹⁴ *Id.*

¹⁵ *See, e.g., McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality opinion) (“Sex offenders are a serious threat in this Nation.”); Cassie Dallas, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 *TEX. TECH L. REV.* 1235, 1237 (2009) (“[C]ommunity members have been forced out of their neighborhoods and branded as social pariahs because they are sex offenders—a reviled and vilified class.”); Meghan Sil• Towers, *Protectionism, Punishment and Pariahs: Sex Offenders and Residence Restrictions*, 15 *J.L. & POL’Y* 291, 292 (2007) (referring to laws

include residency restrictions, which forbid convicted sex offenders from living within a certain radius from places where children congregate (e.g., schools, daycare facilities, and parks).¹⁶ Although the United States Supreme Court has held that sex offender registration schemes do not impose punishment,¹⁷ the question of whether residency restrictions are punitive has not been definitively decided.¹⁸

Courts use a two-pronged test when determining whether a particular sanction is punitive.¹⁹ Under the first prong, courts initially consider whether the legislature clearly intended the statute to be punitive.²⁰ If so, then the statute is deemed punitive and cannot be applied retroactively.²¹ If the court determines that the legislature intended the statute to be civil and non-punitive, then the court must determine whether the effect of the statute is nonetheless punitive by the “clearest proof.”²²

that “make[] pariahs out of sex offenders.”); Lindsay A. Wagner, *Sex Offender Residency Restrictions: How Common Sense Places Children at Risk*, 1 DREXEL L. REV. 175, 175 (2009) (“Sex offenders, as a group, incite the public’s fear and hatred, and politicians seeking to curry electorate favor often support increasingly harsh sanctions against these ‘political pariahs of our day.’”) (citation omitted); Roger N. Lancaster, *Sex Offenders: The Last Pariahs*, N.Y. TIMES (Aug. 20, 2011), <http://www.nytimes.com/2011/08/21/opinion/sunday/sex-offenders-the-last-pariahs.html?pagewanted=all> (“The most intense dread, fueled by shows like ‘America’s Most Wanted’ and ‘To Catch a Predator,’ is directed at the lurking stranger, the anonymous repeat offender.”).

¹⁶ See David A. Singleton, *Sex Offender Residency Restrictions and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600, 607–09 (2006) (describing the proliferation of sex offender residency restrictions).

¹⁷ *Smith v. Doe*, 538 U.S. 84 (2003).

¹⁸ Compare *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) (holding that Iowa’s sex offender residency statute does not impose punishment for *Ex Post Facto* purposes); *Parker v. King*, No. 2:07-CV-624-WKW, 2008 WL 901087 (M.D. Ala. Mar. 31, 2008) (same holding regarding Alabama’s residency statute); *Cunningham v. Parkersburg Hous. Auth.*, No. 6:05-cv-00940, 2007 WL 712392 (S.D. W. Va. Mar. 6, 2007) (same holding regarding West Virginia’s residency statute); *Doe v. Baker*, No. Civ. A. 1:05-CV-2265, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006) (same holding regarding Georgia’s residency statute); *Graham v. Henry*, No. 06-CV-381-TCK-FHM, 2006 WL 2645130 (N.D. Okla. Sept. 14, 2006) (holding that residency restriction did not impose punishment for double jeopardy purposes); with *Mikaloff v. Walsh*, No. 5:06-CV-96, 2007 WL 2572268 (N.D. Ohio Sept. 4, 2007) (concluding that Ohio’s residency restriction is an unconstitutional *ex post facto* law); *Does I-IV v. City of Indianapolis*, No. 1:06-CV-865-RLY-WTL, 2006 WL 2927598 (S.D. Ind. Oct. 5, 2006) (same holding regarding Indiana’s residency statute); and *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009) (holding that application of Kentucky residency statute to defendant violated prohibition on *ex post facto* laws).

¹⁹ *Smith*, 538 U.S. at 92; *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

²⁰ *Hendricks*, 521 U.S. at 361.

²¹ *Smith*, 538 U.S. at 92.

²² *Smith*, 538 U.S. at 92; *Hendricks*, 521 U.S. at 361.

In *Kennedy v. Mendoza-Martinez*,²³ the Supreme Court articulated a list of seven non-exhaustive factors to guide the analysis of whether a sanction is punitive in effect.²⁴ The *Mendoza-Martinez* framework has been criticized on a number of grounds, including that it leads to unprincipled, results-oriented decisions.²⁵

Despite the many scholars and courts calling for *Mendoza-Martinez* to be jettisoned in its entirety,²⁶ there is no indication that the Supreme Court will abandon its framework. Indeed, over the last fifty years, the framework has been used in a variety of contexts to determine whether statutory sanctions impose punishment.²⁷

There is no doubt that punishment determinations under *Mendoza-Martinez* need to be improved. However, this Article will argue that it is possible to improve these determinations without abandoning the *Mendoza-Martinez* framework. Specifically, it will explore a novel prescriptive remedy for improving these punishment determinations: allowing courts to consider public opinion regarding whether a sanction is punitive in effect. This approach will improve punishment determinations by introducing common sense into the *Mendoza-Martinez* analysis, which could force courts to render more intellectually honest decisions about what does and does not constitute punishment.

Part I begins with a brief discussion of the criticisms directed at the *Mendoza-Martinez* framework by scholars and jurists, including that (1) *Mendoza-Martinez* is too deferential to the legislatures; (2) the framework is subjective and therefore easily manipulated by results-oriented judges; and (3) analysis of the factors is largely circular. Part I then explores how those concerns are amplified when the framework is applied to sex offenders, who are easy targets for oppressive, if not vindictive, laws ostensibly passed as public safety measures. Three cases illustrate the problem: *Kansas v. Hendricks*,²⁸ where the Supreme Court

²³ 372 U.S. 144 (1963).

²⁴ *Id.* at 168–69.

²⁵ See *infra* notes 48–60 and accompanying text.

²⁶ See *infra* notes 61–63 and accompanying text.

²⁷ See, e.g., *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994) (applying *Mendoza-Martinez* to hold that imposition of a special drug tax constituted punishment); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (using *Mendoza-Martinez* factors to conclude that civil forfeiture did not impose punishment for double jeopardy purposes); *United States v. Ward*, 448 U.S. 242 (1980) (applying *Mendoza-Martinez* to conclude that monetary penalty was civil and therefore did not trigger the procedural protections afforded to criminal defendants); *Bell v. Wolfish*, 441 U.S. 520 (1979) (using *Mendoza-Martinez* framework to hold that conditions of pre-trial confinement were not punitive).

²⁸ 521 U.S. 346 (1997).

held that continuing to confine a dangerous sex offender at the end of his prison sentence did not impose punishment for *Ex Post Facto* purposes; *Smith v. Doe*,²⁹ where the Supreme Court held that subjecting sex offenders to registration and community notification requirements was not punitive; and *Doe v. Miller*,³⁰ where the Eighth Circuit held that sex offender residency restrictions do not constitute punishment.³¹

Part II responds to the criticisms of *Mendoza-Martinez* by arguing that courts should consider public opinion as a factor when determining what constitutes punishment. This part discusses other contexts where courts have considered public opinion evidence, and addresses whether the rationales for admitting public opinion surveys in those cases should apply to punishment determinations under *Mendoza-Martinez*. It contends that public opinion surveys, provided their methodologies are sound, are relevant and admissible under *Mendoza-Martinez* to aid courts in determining whether a statute has a punitive effect, and argues that including public opinion as a factor under *Mendoza-Martinez* partially addresses the problems identified in Part I by adding a measure of objectivity to the analysis.

Shifting from Part II's more abstract and conceptual discussion, Part III describes a specific study which explored whether the public believes residency restrictions for sex offenders and drunk drivers impose additional punishment.³² Although there are no known residency restrictions for DUI³³ offenders, the study asked about these hypothetical restrictions to determine whether public opinion about the punitive nature of residency restrictions depends on the crime of conviction. Briefly, the study found that a majority of respondents believed that making DUI offenders and sex offenders leave their homes was punitive.³⁴ A majority also believed that prohibiting a DUI offender from moving to a new residence within 1,000 feet of a place that sells alcohol would impose additional punishment.³⁵ However, a minority believed that prohibiting sex offenders from moving to a new residence near a school was not punitive.³⁶ The point of discussing this

²⁹ 538 U.S. 84 (2003).

³⁰ 405 F.3d 700 (8th Cir. 2005).

³¹ *Id.* at 719–23.

³² Jill S. Levenson, Ryan T. Shields & David A. Singleton, *Collateral Punishments and Sentencing Policy: Perceptions of Residence Restrictions for Sex Offenders and Drunk Drivers*, 25 CRIM. J. POL'Y REV. 135 (2014).

³³ DUI is the acronym for "driving under the influence," a phrase commonly used to refer to drunk driving offenses. BLACK'S LAW DICTIONARY 576 (9th ed. 2009).

³⁴ Levenson et al., *supra* note 32, at 145.

³⁵ *Id.* at 144.

³⁶ *Id.* at 146.

study is not to suggest that its findings should be definitive proof, one way or the other, of whether residency restrictions are punitive in effect. Rather, the study is valuable because it illuminates how public opinion results can inform the courts' analysis of whether a particular sanction punishes.

I. DETERMINING WHAT IS PUNITIVE IN EFFECT

A. *The Mendoza-Martinez Framework and Its Criticisms*

Kennedy v. Mendoza-Martinez was not an *Ex Post Facto* case. The question at issue was whether a federal statute stripping United States citizenship from persons who left or remained outside of the country to avoid military service imposed punishment for the purpose of triggering the procedural safeguards guaranteed by the Fifth and Sixth Amendments.³⁷

The Court held that the “punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character”³⁸ The Court then articulated seven factors it had considered in previous cases to determine the existence of punishment: (1) whether the statute imposes an affirmative disability or restraint; (2) whether the resulting sanction or burden has historically been regarded as punishment; (3) whether the statute “comes into play only on a finding of scienter;” (4) whether the statute promotes retribution and deterrence, traditional aims of punishment; (5) “whether the behavior to which it applies is already a crime;” (6) whether the statute is rationally connected to an alternative purpose other than punishment; and (7) whether the statutory sanction or burden appears excessive in relation to the alternative purpose.³⁹ According to the Court, these seven factors are “all relevant to the [punishment] inquiry, and may often point in different directions.”⁴⁰

However, beyond its conclusory statement that the “punitive nature of the sanction here is evident,”⁴¹ the Court did not analyze the seven factors. Instead, the Court held that the legislative history showed that Congress intended the statute “to serve as an additional penalty for a special category of draft evader.”⁴²

³⁷ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 163–64 (1963).

³⁸ *Id.* at 168.

³⁹ *Id.* at 168–69.

⁴⁰ *Id.* at 169.

⁴¹ *Id.* at 168.

⁴² *Id.* at 169–70.

Mendoza-Martinez foreshadowed the Supreme Court's announcement of a two-pronged punishment test in *United States v. Ursery*,⁴³ a double jeopardy case. Under the two-pronged test, courts must first determine whether the legislature intended for a statute to punish.⁴⁴ A finding that the legislature intended punishment ends the inquiry for purposes of the constitutional protection at issue.⁴⁵ But if the legislative intent was to establish a civil regulatory scheme, then courts go to the second step of examining the *Mendoza-Martinez* factors to determine whether the sanction or burden imposed by the statute is punitive in effect.⁴⁶ Under the second prong, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."⁴⁷

Scholars and jurists have criticized *Mendoza-Martinez* on a number of grounds. First, given the *Ex Post Facto* Clause's role in safeguarding liberty, critics of the *Mendoza-Martinez* approach contend that the framework is too deferential to the legislature.⁴⁸ According to Professor Wayne Logan, the *Ex Post Facto* Clause serves two important purposes.⁴⁹ First, the Framers considered *ex post facto* laws to be "especially unfair because they deprive citizens of notice of the wrongfulness of behavior, and thus result in unjust deprivations."⁵⁰ Thus, the *Ex Post Facto* Clause "ensures that legislative acts 'give fair

⁴³ 518 U.S. 267, 288 (1996).

⁴⁴ *Id.*; see, e.g., *Smith v. Doe*, 538 U.S. 84, 92 (applying *Ursery*'s two-pronged punishment test in *Ex Post Facto* context); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (same).

⁴⁵ *Smith*, 538 U.S. at 92.

⁴⁶ *Id.* at 92–97; *Hendricks*, 521 U.S. at 361–62.

⁴⁷ *Hudson v. United States*, 522 U.S. 93, 100 (1997) (quoting *U.S. v. Ward*, 448 U.S. 242, 249 (1980)).

⁴⁸ See Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 36 (2005) (referring to the "deep flaw of judicial deference to the legislature" inherent in the *Mendoza-Martinez* framework); Logan, *supra* note 10, at 1287 (criticizing the "highly deferential two-pronged 'intent-effects' test"); see also John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 679 (2012) ("[T]he Supreme Court has made judicial policing of the line between criminal and civil statutes more difficult by building a wall of deference around the legislative decision to call a statute civil rather than criminal."); Christopher Moseng, *Iowa's Sex Offender Residency Restrictions: How the Judicial Definition of Punishment Leads Policy Makers Astray*, 11 J. GENDER RACE & JUST. 125, 135 (2007) ("The hallmark of the *Smith* doctrine and the *Mendoza-Martinez* factors is legislative deference."); Mark Loudon-Brown, "They Set Him on a Path Where He's Bound to Get Ill": Why Sex Offender Residency Restrictions Should be Abandoned, 62 N.Y.U. ANN. SURV. AM. L. 795, 820–28 (2007) (describing the Supreme Court's view of what satisfies a rational connection to a nonpunitive purpose under *Mendoza-Martinez* as "very deferential" to the legislature).

⁴⁹ See Logan, *supra* note 10, at 1276.

⁵⁰ *Id.*

warning of their effect and permit individuals to rely on their meaning until explicitly changed.”⁵¹ Second, the Framers feared arbitrary and vindictive lawmaking that could target unpopular people.⁵² Thus, critics contend, lawmakers should not have unchecked freedom to impose retroactive laws that severely restrict freedom or impose oppressive burdens.⁵³

Second, consideration of the *Mendoza-Martinez* factors is highly subjective and potentially leads to results that undermine public confidence in the rule of law, “particularly when the rule is designed to guarantee fundamental civil liberties.”⁵⁴ As Professor Aaron Fellmeth observes, “[m]ultifactor tests give guidance in extreme circumstances . . . but in all other cases, a subjective judgment is merely clothed with the legitimacy of an ostensibly reasoned decision.”⁵⁵

Adding to this problem is the potential that results-oriented judges will manipulate the test to achieve a desired result.⁵⁶ As one state court judge eloquently explained:

It should come as little surprise then, in the politically charged and passionate atmosphere surrounding [residency restrictions], that negative findings on these factors are afforded great weight by reviewing courts while affirmative findings are often glossed over and discounted as insignificant in route to upholding the measure’s constitutionality. It is often a process that can be fairly criticized as little more than judicial sleight of hand.⁵⁷

Third, the *Mendoza-Martinez* analysis is largely circular. As Fellmeth explains, the analysis “assumes that these factors are a priori elements of a concept of criminality whose origin or purpose the Court has never sufficiently explained. The factors named by the Court beg the very question they should be answering.”⁵⁸ For example, “a law whose sanction historically has been regarded as punishment is more ‘criminal’ than a law whose sanction has not been so regarded” under *Mendoza-Martinez*.⁵⁹ But a finding that a sanction is a historical form of

⁵¹ *Id.* (quoting *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981)).

⁵² *Id.* at 1276–77.

⁵³ Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1105 (2012).

⁵⁴ Fellmeth, *supra* note 48, at 37.

⁵⁵ *Id.* at 36–37.

⁵⁶ See *Smith v. Doe*, 538 U.S. 84, 113 (Stevens, J., dissenting).

⁵⁷ *Commonwealth v. Baker*, Nos. 07-M-00604, 06-M-5879, 06-M-5885, 06-M-6031, 06-M-5834, 06-M-5930, 06-M-5866, at 18–19 (Kenton Cnty. Dist. Ct. Apr. 20, 2007).

⁵⁸ Fellmeth, *supra* note 48, at 40.

⁵⁹ *Id.*

punishment would resolve the punishment inquiry without the need to consider other factors.⁶⁰

Because of these problems, some critics have proposed jettisoning the *Mendoza-Martinez* framework altogether. For example, Fellmeth proposes defining as punitive a sanction that has “the systemic effect of deterring or punishing a forbidden act,” while defining as non-punitive a sanction “having the systemic effect of providing remediation to a party allegedly injured by an act or omission of the defendant” as non-punitive.⁶¹ Fellmeth argues that this makes sense because “the basic function of civil law is remediation of a past injury, while the function of criminal law is deterrence and retribution.”⁶² Fellmeth’s definition of punishment would not require deference to the legislature; would remove the subjectivity of the *Mendoza-Martinez* framework and replace it with an objective definition of punishment; and would replace *Mendoza-Martinez*’s circular analysis with a more straightforward and principled way to distinguish punitive from remedial measures. Under Fellmeth’s approach, residency restrictions would be found punitive because they do not remediate a party’s past harm yet further deterrence and retribution.⁶³

Perhaps another approach is the one Justice Stevens advocated for in his dissenting opinion in *Smith v. Doe*. Stevens defined a sanction as punitive if it “(1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person’s liberty.”⁶⁴ Like Fellmeth’s proposal, Stevens’s formulation does not require courts to defer to legislative intent in determining whether a statute has a punitive effect. Additionally, because the first two of Justice Stevens’s proposed factors are objective, the ability of courts to manipulate the analysis is reduced. Moreover, while the third factor is subjective—judges could disagree in particular cases about how severely a sanction impairs liberty—it would be hard to imagine courts concluding that the Iowa residency restriction, for example, does not severely impair sex offenders’ liberty.

But neither of these proposed tests have been adopted by the Supreme Court. Thus, the *Mendoza-Martinez* analysis, flawed as it may be, is the method courts currently use to determine whether a sanction

⁶⁰ *Id.*

⁶¹ *Id.* at 41.

⁶² *Id.*

⁶³ See, e.g., *Doe v. Miller*, 405 F.3d 700, 720 (8th Cir. 2005) (finding that Iowa’s residency restriction promotes deterrence and “potentially retributive” goals); *Mikaloff v. Walsh*, No. 5-06-CV-96, 2007 WL 2572268 (N.D. Ohio Sept. 4, 2007).

⁶⁴ *Smith v. Doe*, 538 U.S. 84, 113 (Stevens, J., dissenting).

is punitive in effect. Therefore, rather than argue that *Mendoza-Martinez* be abandoned in its entirety in favor of a new theoretical framework, this Article will explore a different question: should public opinion—whether lay people believe a statute imposes punishment—be added as a factor for courts to consider under *Mendoza-Martinez*.

B. The Mendoza-Martinez Factors and Sex Offenders

The above-discussed criticisms have particular force in situations where courts apply the *Mendoza-Martinez* framework to determine whether restrictions imposed on sex offenders are punitive. During the past twenty years, various measures have been taken to impose additional restrictions on sex offenders, from registration and community notification requirements⁶⁵ to civil commitment schemes⁶⁶ and residency restrictions.⁶⁷ The burdens these laws impose are unquestionably significant. But do such laws constitute criminal punishment, or are they civil statutes designed to protect the public from harm? The following cases show the difficulty sex offenders face when trying to persuade the courts that burdensome laws impose punishment.

1. *Kansas v. Hendricks*

Kansas v. Hendricks addressed the question of whether Kansas's civil commitment for sexually violent predators—which the state applied retroactively to Leroy Hendricks as he was about to complete his prison sentence for taking indecent liberties with two thirteen year-old boys—violated his rights under the *Ex Post Facto* and Double Jeopardy Clauses of the United States Constitution.⁶⁸ The statute allowed the state to indefinitely commit any sexually violent offender whom the state proved, beyond a reasonable doubt, suffered from a “mental abnormality” or “personality disorder” that makes it likely that the offender is going to engage in future “predatory acts of sexual violence.”⁶⁹

After determining that the Kansas legislature intended the statute to be civil,⁷⁰ the Court explained how difficult it would be for Hendricks—and future litigants—to show that a statute has a punitive effect, stating, “we will reject the legislature’s manifest intent only

⁶⁵ See, e.g., *Smith*, 538 U.S. at 84.

⁶⁶ See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997).

⁶⁷ See, e.g., *Miller*, 405 F.3d at 700.

⁶⁸ *Id.* at 353, 356.

⁶⁹ *Id.* at 352.

⁷⁰ *Id.* at 361.

where a party challenging the statute provides ‘the clearest proof’ that ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’⁷¹

The Court then analyzed several of the *Mendoza-Martinez* factors and concluded that the statute had no punitive effect.⁷² First, the Court concluded that the statute neither furthered retribution⁷³ nor deterrence.⁷⁴ Second, while acknowledging that involuntary civil commitment as a sexually violent predator imposed an affirmative restraint, the Court dismissed the importance of that factor, stating that “‘the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.’”⁷⁵ Third, comparing the involuntary commitment of sex offenders like Hendricks to the involuntary commitment of the dangerously mentally ill, the Court characterized the Kansas statute as “a legitimate nonpunitive governmental objective and has been historically so regarded.”⁷⁶ Finally, without explicitly stating so, the Court appears to have concluded that the statute was not excessive in relation to its non-punitive purpose, noting that the statute “is only *potentially* indefinite” and that those subject to it would only be confined so long as their mental abnormalities made them unable to control their dangerousness.⁷⁷

⁷¹ *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)).

⁷² *Id.* at 361–69.

⁷³ *Hendricks*, 521 U.S. at 362 (concluding that the statute did not further the goal of retribution because it “does not affix culpability for prior criminal conduct” but instead uses “such conduct . . . solely for evidentiary purposes, either to demonstrate that a ‘mental abnormality’ exists or to support a finding of future dangerousness”).

⁷⁴ *Id.* at 362–63 (concluding that because of their mental abnormality or personality disorder persons subject to commitment under the statute “are therefore unlikely to be deterred by the threat of confinement”).

⁷⁵ *Id.* at 363 (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)).

⁷⁶ *Id.*

⁷⁷ *Id.* at 364. The Court also rejected Hendricks’ claims that the statute was punitive because it provided for proof beyond a reasonable doubt of dangerousness before an offender could be committed, a standard that is applicable in criminal cases, and because the treatment was not actually made available to sex offenders committed under the act. The Court dismissed the former, stating that Kansas’ decision to provide greater procedural protections “does not transform a civil commitment proceeding into a criminal prosecution.” *Id.* at 364–65. The Court dismissed Hendricks’ lack of treatment argument, “observ[ing] that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law.” *Id.* at 365–66 (citing *Allen v. Illinois*, 478 U.S. 364, 373 (1988)).

2. *Smith v. Doe*

Six years after *Hendricks*, the Supreme Court decided *Smith v. Doe*.⁷⁸ There, the Court held that Alaska's sex offender registration scheme—which required convicted sex offenders to verify their addresses periodically with law enforcement and mandated law enforcement to publish the offenders' names, photographs, addresses, and other information on the Internet—did not impose retroactive punishment in violation of the *Ex Post Facto* Clause.⁷⁹ After concluding that the Alaska legislature intended to create a civil, non-punitive scheme,⁸⁰ the Court then addressed the question of whether the statute had a punitive effect.

Noting that the *Mendoza-Martinez* factors “are neither exhaustive nor dispositive”⁸¹ and are “useful guideposts,”⁸² the Court concluded that the most relevant of the seven factors to its analysis were whether the scheme “has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.”⁸³

Addressing whether the scheme “has been regarded in our history and traditions as punishment,” the Court rejected the plaintiffs' argument that the statute resembled Colonial Era shaming punishments.⁸⁴ The Court reasoned that colonial shaming punishments “involved more than the dissemination of information” such as holding “the person up before his fellow citizens for face-to-face shaming or expel[ing] him from the community,”⁸⁵ and that Alaska's statute “results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.”⁸⁶

⁷⁸ 538 U.S. 84 (2003).

⁷⁹ *Id.* at 105–06.

⁸⁰ *Id.* at 96.

⁸¹ *Id.* at 97 (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365, n.7 (1984)).

⁸² *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 99 (1997)).

⁸³ *Id.* Later in the opinion the Court explained that [t]he two remaining *Mendoza-Martinez* factors—whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime—are of little weight in this case.” According to the Court, the fact that the scheme “applies only to past conduct, which was, and is, a crime . . . is a necessary beginning point, for recidivism is the statutory concern.” *Id.* at 105.

⁸⁴ *Smith*, 538 U.S. at 98.

⁸⁵ *Id.* (citations omitted).

⁸⁶ *Id.*

The Court also rejected the argument that the registration scheme imposed an affirmative disability or restraint. Although the Court acknowledged that the registration requirements and the publishing of registrant's information on the Internet "may have a lasting and painful impact on the convicted sex offender," it concluded that "these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record."⁸⁷

Although the state conceded that Alaska's scheme promoted deterrence, the Court concluded that the existence of deterrence "proves too much"⁸⁸ and that "[t]o hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation."⁸⁹ Moreover, although the Ninth Circuit concluded that the statute was retributive because the length of the reporting requirement appeared tied to the extent of wrongdoing and not the risk of harm posed, the Supreme Court disagreed, reasoning that the "broad categories . . . and the corresponding length of the reporting requirement . . . are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective."⁹⁰

The Court then discussed the statute's rational relationship to a nonpunitive purpose, which it noted "is a '[m]ost significant' factor in our determination that the statute's effects are not punitive."⁹¹ Addressing the sex offenders' argument that the statute was not narrowly drawn and therefore lacked the necessary connection to a nonpunitive purpose, the Court concluded that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance."⁹²

Finally the Court disagreed with the Ninth Circuit's finding that the statute was excessive because it applied to all convicted sex offenders regardless of their future dangerousness and did not limit the number of people who had access to the registry information. With respect to the first point, the Court explained that "the *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular

⁸⁷ *Id.* at 101.

⁸⁸ *Id.* at 102.

⁸⁹ *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 105 (1997)).

⁹⁰ *Smith*, 538 U.S. at 102.

⁹¹ *Id.* (quoting *United States v. Usury*, 518 U.S. 267, 290 (1996)).

⁹² *Id.* at 103.

regulatory consequences.”⁹³ Regarding the second point, the Court characterized the notification system as “a passive one,” meaning that “[a]n individual must seek access to the information.”⁹⁴ In reaching its conclusion that the statute is not excessive, the Court accepted as gospel the “grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class,”⁹⁵ a risk the Court characterized as “frightening and high,”⁹⁶ and noted that “[t]he excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy.”⁹⁷

Accordingly, in light of its analysis of the *Mendoza-Martinez* factors, the Court concluded that those challenging the Alaska statute “cannot show, much less by the clearest proof, that the effects of the law negate Alaska’s intention to establish a civil regulatory scheme.”⁹⁸ As set forth below, *Smith v. Doe* would prove to be a harbinger of bad news for sex offenders in Iowa and other parts of the country seeking to challenge retroactive application of sex offender residency restrictions on *Ex Post Facto* grounds.

3. *Doe v. Miller*

Three convicted sex offenders filed suit in Iowa District Court on behalf of themselves and the class of similarly situated offenders affected by Iowa’s sex offender residency restriction.⁹⁹ Iowa’s statute forbids sex offenders from living within 2,000 feet of schools and daycare facilities.¹⁰⁰ The statute has no time limitation and thus applies for an offender’s entire life.¹⁰¹ However, the statute does contain a limited grandfather provision, exempting offenders who had established their residence before the statute’s effective date.¹⁰²

The plaintiffs alleged that the statute violated a number of their constitutional rights, including their right under the *Ex Post Facto* Clause not to be punished retroactively.¹⁰³ With respect to the *Ex Post Facto* challenge, the district court applied the two-prong intents-effect

⁹³ *Id.*

⁹⁴ *Id.* at 105.

⁹⁵ *Id.* at 103.

⁹⁶ *Smith*, 538 U.S. at 103 (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

⁹⁷ *Id.* at 105.

⁹⁸ *Id.*

⁹⁹ *See Doe v. Miller*, 298 F. Supp.2d 844 (S.D. Iowa 2004).

¹⁰⁰ *Id.* at 847 (citing IOWA CODE § 692A.2A (2004)).

¹⁰¹ *Id.* at 849.

¹⁰² *Id.* (citing IOWA CODE § 692A.2A (4)(c) (2004)).

¹⁰³ *Id.* at 847.

test to determine whether the Iowa statute imposed punishment.¹⁰⁴ After determining that the legislature intended to create “a civil, non-punitive scheme to protect the public,” the district court then addressed whether the effect of the statute was nonetheless punitive under the modified version of the *Mendoza-Martinez* test applied in *Smith v. Doe*.¹⁰⁵

Regarding the first factor—whether the residency restriction has historically been regarded as punishment—the district court concluded that the statute bore “striking similarities” to banishment given the evidence that “sex offenders are completely banished from living in a number of Iowa’s smaller towns and cities” and are “relegated to living in industrial areas in some of the cities’ most expensive developments, or on the very outskirts of town where available housing is very limited.”¹⁰⁶ In light of these findings, the district court concluded that this first factor pointed towards the Iowa residency restriction being punitive.¹⁰⁷

Turning to the second factor—whether the statute imposed an affirmative disability or restraint—the court concluded that the burden imposed by the statute was “neither minor nor indirect” and led to “substantial housing disadvantages” for sex offenders subject to its provisions.¹⁰⁸ Thus, the second factor also suggested that the statute is punitive because Iowa’s residency restriction imposed an affirmative disability or restraint.¹⁰⁹

The district court also concluded that the third factor—whether the statute promoted the traditional aims of punishment—also indicated the statute’s punitive nature because the statute furthered both deterrence and retribution.¹¹⁰ With regard to the latter, the court concluded that the statute promoted retribution because it applied to sex offenders regardless of their dangerousness.¹¹¹

With regard to the fourth factor—whether the residency restriction was rationally related to a non-punitive purpose—the district court concluded that “[t]here is no doubt” that the statute had a purpose other than to punish sex offenders, i.e., to protect the

¹⁰⁴ *Miller*, 298 F. Supp.2d at 867.

¹⁰⁵ *Id.* at 868.

¹⁰⁶ *Id.* at 869.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 870.

¹¹⁰ *Miller*, 298 F. Supp.2d at 870.

¹¹¹ *Id.*

public.¹¹² But the district court also concluded that under the fifth factor, the Iowa statute was excessive in relation to its non-punitive purpose because it applied to offenders who were not dangerous.¹¹³

The Eighth Circuit Court of Appeals reversed.¹¹⁴ The court agreed that the legislature's intent was not punitive, and then turned to the question of whether plaintiffs-appellees had demonstrated, by the clearest proof, that the effect of the residency restriction was punitive.¹¹⁵

First, the Eighth Circuit rejected the district court's conclusion that Iowa's statute was analogous to banishment. The Eighth Circuit declined to find that the Iowa statute sufficiently resembled banishment because the statute "restricts only where offenders may reside" and does not "expel" the offenders from the community," adopting what one commentator has called a *per se* approach to the issue of what constitutes banishment.¹¹⁶

Second, while the Eighth Circuit acknowledged that the statute could have a deterrent effect, it disagreed that such effect meant that the restriction is punishment, noting "that the Supreme Court has cautioned that this factor not be over-emphasized, for it can 'prove[] too much,' as '[a]ny number of governmental programs might deter crime without imposing punishment.'"¹¹⁷ Finding that Iowa's residency restriction "is at least potentially retributive in effect," the court concluded that the statute, "like the registration requirement in *Smith v. Doe*, is consistent with the legislature's regulatory objective of protecting the health and safety of children."¹¹⁸

The court also brushed aside the issue of whether the statute imposed an affirmative disability or restraint. After acknowledging that the statute did impose an affirmative disability or restraint, the court, quoting *Smith v. Doe*, concluded that the imposition of such a burden did not "inexorably lead to the conclusion that the government has imposed punishment,"¹¹⁹ reasoning that this factor "ultimately points us to the importance of the next inquiry: whether the law is rationally connected to a non-punitive purpose, and whether

¹¹² *Id.*

¹¹³ *Id.* at 871.

¹¹⁴ *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005).

¹¹⁵ *Id.* at 718.

¹¹⁶ *Id.* at 719.

¹¹⁷ *Id.* at 720 (quoting *Smith v. Doe*, 538 U.S. 84, 102 (2003)).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 721 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997)).

it is excessive in relation to that purpose.”¹²⁰

Stating that the rational-connection prong is “*the* ‘most significant factor’ in the *Ex Post Facto* analysis,”¹²¹ the Eighth Circuit agreed with the district court that the statute is rationally related to protecting children “[i]n light of the high risk of recidivism posed by sex offenders.”¹²² But the Eighth Circuit parted ways with the district court over whether the statute was excessive in relation to its non-punitive purpose. In overruling the district court on that point, the Eighth Circuit concluded that the “‘excessive’ prong of the *ex post facto* analysis does not require a ‘close or perfect’ fit between the legislature’s non-punitive purpose and the corresponding regulation.”¹²³ The Eighth Circuit also concluded that the absence of scientific evidence that the 2,000-foot restriction protects children did not render the law excessive because the distance the legislature chose was a reasonable policy choice.¹²⁴ Thus, the Eighth Circuit concluded that Iowa’s residency restriction did not impose punishment.¹²⁵

¹²⁰ Miller, 405 F.3d at 721.

¹²¹ *Id.* (emphasis added) (quoting *Smith*, 538 U.S. at 102). Note that the Supreme Court in *Smith* stated that the statute’s rational relationship to a non-punitive purpose was “a most significant factor,” not *the* most significant one as the Eighth Circuit states. *Smith*, 538 U.S. at 102.

¹²² *Id.* (citing *Smith*, 538 U.S. at 103).

¹²³ *Id.* at 722.

¹²⁴ *Id.*

¹²⁵ *Id.* at 723. The Eighth Circuit’s decision was not unanimous. The dissent disagreed with the majority’s analysis of whether the statute should be regarded in our history and traditions as punishment, concluding that the statute “sufficiently resembles banishment to make this factor weigh towards finding the law punitive.” *Id.* at 724 (Melloy, J., dissenting). The dissent also concluded that the statute promotes deterrence and criticized the majority for “attempt[ing] to minimize the deterrent effect of the statute.” *Id.* at 725 (Melloy, J., dissenting). Additionally, the dissent found that the statute imposed an affirmative disability or restraint, and distinguished the residency restriction from the registration scheme at issue in *Smith*. *Id.* (Melloy, J., dissenting). Although the dissent agreed that the statute is related to a non-punitive purpose, it took issue with the majority’s conclusion that the restriction was not excessive in relation to its non-punitive purpose. *Id.* (Melloy, J., dissenting). Key to the dissent’s reasoning on this last factor was the fact that the Iowa statute “limits the housing choices of all offenders identically, regardless of their type of crime, type of victim or risk of re-offending. The effect is quite dramatic: Many offenders cannot live with their families and/or cannot live in their home communities because the whole community is a restricted area.” *Id.* (Melloy, J., dissenting). In concluding that the statute imposed punishment, the dissent concluded that four of the five factors weigh in favor of finding the statute punitive. *Id.* at 726 (Melloy, J., dissenting).

4. Were *Hendricks*, *Smith*, and *Miller* correctly decided?

Were these three cases correctly decided? Did the courts in *Hendricks*, *Smith*, and *Miller* strike the appropriate balance between safeguarding citizens against retroactive punishment and upholding the right of the state to enact civil legislation intended to protect the public?

The answers to these questions are far from obvious and depend, in part, upon whether one accepts that the danger sex offenders pose is so great as to justify severe restrictions on their liberty that might otherwise be called punishment if applied to someone else. In this regard, both the Supreme Court and the Eighth Circuit Court of Appeals believed that sex offenders, as a group, are likely to recidivate and therefore pose a serious threat to public safety.¹²⁶

In reality, the vast majority of sex offenders are not like Leroy Hendricks. Some commit offenses many in the community would consider “non serious.”¹²⁷ Many, regardless of the type of sex crime committed, have a low risk of reoffending.¹²⁸ Most never commit another sexual offense.¹²⁹ For example, a United States Department of Justice study reported that 5.3 percent of sex offenders were rearrested for a new sex crime within three years after release from prison.¹³⁰ The Ohio Department of Rehabilitation and Correction found that 11 percent of sex offenders return to prison for a new sexual offense or a sexually related parole violation, such as possession of pornography, within ten years of release from incarceration.¹³¹ Additionally, Canadian researchers who studied 29,000 sex offenders in North America and Europe reported a 14 percent recidivism rate.¹³² While it is true that some child molesters may recidivate at higher rates than

¹²⁶ See *Smith v. Doe*, 538 U.S. 84, 103 (2003); *Miller*, 405 F.3d at 721.

¹²⁷ David A. Singleton, *Kids, Cops and Sex Offenders*, 57 *How. L.J.* 353, 386 (2013) (referring to “Romeo and Juliet” offenses involving consensual sexual acts between teens).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994*, at 24 (2003).

¹³¹ OHIO DEP’T OF REHAB. & CORR., *TEN-YEAR RECIDIVISM FOLLOW-UP OF 1989 SEX OFFENDER RELEASES 12, 24* (Apr. 2001), available at http://www.drc.state.oh.us/web/reports/ten_year_recidivism.pdf.

¹³² See R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 *J. CONSULTING & CLINICAL PSYCHOL.* 348–62 (1998); R. Karl Hanson & Kelly Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-Analysis* (2004), available at <http://www.static99.org/pdfdocs/hansonandmortonbourgon2004.pdf>.

sex offenders who have victimized adults,¹³³ the widespread belief that all sex offenders will reoffend is contradicted by the available social science research.

However, regardless of whether *Hendricks*, *Smith*, and *Miller* were correctly decided, the *Mendoza-Martinez* framework, as discussed above, is flawed. The next part will explore whether including public opinion as a factor for courts to consider would improve punishment determinations under *Mendoza-Martinez*.

II. INCORPORATING PUBLIC OPINION INTO THE *MENDOZA-MARTINEZ* FRAMEWORK

As discussed above, *Mendoza-Martinez* set forth a list of factors for courts to consider when determining whether or not a government sanction imposes punishment.¹³⁴ The Supreme Court has made clear that the *Mendoza-Martinez* factors are “non-exhaustive.”¹³⁵ However, no court has considered additional factors under *Mendoza-Martinez*. Perhaps lower courts and advocates believe the list of *Mendoza-Martinez* factors to be fixed unless and until the Supreme Court says otherwise. But lower courts need not wait for the Supreme Court to consider other factors.

Given that the Supreme Court has left the door open for courts to articulate and analyze other relevant factors, should courts take into account public opinion in determining whether a statute has a punitive effect? Would public opinion evidence help delineate the boundary between civil regulation and criminal punishment? Would consideration of public opinion as part of the *Mendoza-Martinez* analysis

¹³³ Compare Hanson & Bussiere, *supra* note 132, at 351 (reporting 20 percent recidivism rate for child molesters), with Robert A. Prentky, Austin F.S. Lee, Raymond A. Knight & David Cerce, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 LAW & HUM. BEHAV. 635 (1997) (Reporting a recidivism risk as high as 52 percent for child molesters. However, relying on the older Prentky study to draw conclusions about the recidivism rates of child molesters is unwise. The subjects of Prentky’s study were released from prison between 1959 and 1985, well before sex offender treatment became more widely available and effective. *Id.* at 640, 657. Moreover, Prentky and his colleagues described their subjects as the “worst of the worst” offenders, individuals who had been civilly committed for violent and/or repeat sexual offenses. *Id.* at 637. In light of these circumstances, Prentky and his colleagues issued the following caveats: (1) “[t]he obvious heterogeneity of sexual offenders precludes automatic generalization of the rates reported here to other samples,” and (2) “these findings should *not* be construed as evidence of the inefficacy of treatment,” since “the treatment services [available to the subjects of the study] were not provided uniformly or systematically and did not conform to a state-of-the-art mode.” *Id.* at 656–57 (emphasis in original).

¹³⁴ See *supra* notes 39–40 and accompanying text.

¹³⁵ *Smith v. Doe*, 538 U.S. 84, 97 (2003).

address any of the framework's shortcomings discussed in Part I, *supra*? Before answering these questions, it is helpful to address an important threshold question: in what contexts are public opinion surveys admissible?

A. *The Admissibility of Public Opinion Surveys in Other Contexts*

Generally speaking, public opinion surveys are admissible where relevant to a material issue in dispute.¹³⁶ Despite being hearsay, poll evidence is admissible under the state of mind exception if the respondent's state of mind is relevant to a material issue.¹³⁷ Proponents of survey evidence must also demonstrate that the data collected is reliable by showing that (1) the researchers examined the proper universe; (2) a representative sample was drawn from that universe; (3) the mode of questioning was correct; (4) the individuals conducting the surveys are experts; (5) the data was accurately reported; and (6) the overall methodology in collecting the data was consistent with accepted standards of procedure and statistics.¹³⁸

Provided these threshold requirements are satisfied, courts have admitted public opinion surveys in at least two contexts where such evidence has been deemed relevant and helpful. One of these contexts is obscenity cases, where the question is whether alleged obscene material violates community standards.

In *Miller v. California*,¹³⁹ the United States Supreme Court announced a three-part test for determining whether material is obscene. Under that test, material is unlawfully obscene if "(a) the average person applying contemporary community standards would find that the work appeals to the prurient interest; (b) the material depicts sexual conduct in a patently offensive way; and (c) lacks serious literary, artistic, political or scientific value."¹⁴⁰ Since *Miller*, several courts have admitted public opinion poll data on the question of whether the material at issue in the case is obscene. For example, in *People v. Nelson*,¹⁴¹ the Illinois Court of Appeals held that the trial court erred in refusing to admit the prosecutor's survey evidence because the survey results showed the degree of public acceptance of the

¹³⁶ See Susan J. Becker, *Public Opinion Polls and Surveys as Evidence: Suggestions for Resolving Confusing and Conflicting Standards Governing Weight and Admissibility*, 70 OR. L. REV. 463 (1991).

¹³⁷ *Id.* at 473 (citing the seminal case of *Zippo Mfg. Co. v. Rogers Imps., Inc.*, 216 F. Supp. 670 (S.D.N.Y. 1963)).

¹³⁸ *Id.* at 483–84 (citing MANUAL FOR COMPLEX LITIGATION 120 (5th ed. 1981)).

¹³⁹ 413 U.S. 15 (1973).

¹⁴⁰ *Id.* at 24.

¹⁴¹ 410 N.E.2d 476 (Ill. App. Ct. 1980).

material and “may be the only way to prove degrees of acceptability.”¹⁴²

An Indiana appellate court reached a similar result, concluding that a poll was relevant in determining community standards and its acceptance of a particular film.¹⁴³ The court then articulated a seven-pronged test for the proponent of such polling data to meet before such evidence would be accepted.¹⁴⁴ While some courts have rejected survey evidence in obscenity cases, they have usually done so because the survey itself was somehow flawed.¹⁴⁵

Surveys have also been admitted in trademark infringement cases brought under the Lanham Act,¹⁴⁶ where the issue is whether a person is attempting to “pass off his goods or business as the goods or business of another.”¹⁴⁷ Specifically, courts have admitted the results of consumer polls where the question is whether a trade name or symbol is “so confusingly similar” to a preexisting trademark or trade name established by a competitor, so long as the survey was properly conducted.¹⁴⁸ While public recognition surveys are not necessary to prove a case of trademark infringement, many courts consider them very useful.¹⁴⁹ When courts exclude such survey evidence in trademark cases, it is usually because the expert surveyed the wrong universe or there was some other flaw that undermined reliability.¹⁵⁰

¹⁴² *Id.* at 479.

¹⁴³ *Saliba v. State*, 475 N.E.2d 1181, 1187 (Ind. Ct. App. 1985).

¹⁴⁴ *Id.* at 1187–88 ((1) an expert conducted the survey; (2) the survey examined the relevant universe; (3) a representative sample from that universe was surveyed; (4) the mode of questioning was valid; (5) the design of the survey met generally accepted standards; (6) the expert accurately reported the data gathered; (7) the expert analyzed the data in a statistically correct manner).

¹⁴⁵ *See, e.g.*, *St. John v. N.C. Parole Comm’n*, 764 F.Supp. 403, 410–11 (W.D.N.C. 1991) (excluding defense expert testimony about telephone surveys because the surveys failed to convey the visual image of the alleged pornographic material that was the subject of the case); *U.S. v. Pryba*, 678 F.Supp. 1225, 1229 (E.D. Va. 1988) (defense poll inadmissible because it did not ask questions about the materials at issue in the case or other material “clearly akin” to the allegedly obscene material and because the poll did not ask whether the charged materials enjoyed community acceptance); *People v. Thomas*, 346 N.E.2d 190, 195 (Ill. App. Ct. 1976) (defense poll excluded because defense did not demonstrate methods and circumstances used in conducting the survey).

¹⁴⁶ 15 U.S.C. § 1125 (2012).

¹⁴⁷ *Standard Oil v. Standard Oil*, 252 F.2d 65, 72 (10th Cir. 1958).

¹⁴⁸ *Id.* at 72; *see, e.g.*, *First Nat. Bank in Sioux Falls v. First Nat. Bank S.D.*, 679 F.3d 763, 770–71 (8th Cir. 2012) (finding survey admissible); *Prudential Ins. Co. of America v. Gibraltar Fin. Corp. of Cal.*, 694 F.2d 1150, 1156 (9th Cir. 1982) (“Surveys are admissible, if relevant, either as nonhearsay or through a hearsay exception”).

¹⁴⁹ J. THOMAS MCCARTHY, 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:195 (4th ed. 2012).

¹⁵⁰ *See, e.g.*, *Water Pik, Inc., v. Med-Systems, Inc.*, 726 F.3d 1126, 1145 (10th Cir. 2013) (stating that the flaw was that the survey’s methodology was unsound); *Citizens*

Finally, although not involving the admission of poll evidence at a trial proceeding, the Supreme Court in *Atkins v. Virginia*¹⁵¹ cited to public opinion polls—attached to an amicus brief—in support of its holding that the execution of mentally retarded individuals violates the Eighth Amendment.¹⁵² The Court's partial reliance on opinion polls demonstrates its openness to considering opinion surveys in other contexts.

In sum, a public opinion survey is admissible where relevant to a legal issue the judge or jury must decide, provided that the survey is conducted in a methodologically sound manner. So should public opinion surveys be deemed relevant in making punishment determinations? The next subpart will argue that such surveys are relevant and helpful to drawing the line between criminal punishment and civil regulation.

B. The Relevance of Public Opinion Surveys in the Mendoza-Martinez Context

Proponents of including public opinion as a factor for courts to consider under *Mendoza-Martinez* would likely encounter a relevance objection. Distinguishing obscenity and trademark infringement cases—where public opinion surveys are relevant because the legal standard requires some assessment or quantification of community sentiment—opponents would argue that the definition of punishment does not require measurement of community sentiment. Therefore, under the opposition's argument, what the public thinks about whether a statute is punitive is not probative of a material issue the court must decide.

However, public opinion is highly relevant to determining what should be considered punitive in today's times. Much has changed in our criminal justice system since the Founding Era. When the Framers decided to prohibit governments from enacting *ex post facto* laws, the universe of possible punishments consisted of death, banishment, whipping, placement in the stockades, branding, and other shaming punishments designed to humiliate the offender.¹⁵³ Today, the predominant forms of punishment are imprisonment and probation, parole, or other types of post-release supervision.¹⁵⁴ But legislatures,

Fin. Grp. vs. Citizens Fin. Bank of Evansville, 383 F.3d 110, 121 (3d Cir 2004).

¹⁵¹ 536 U.S. 304 (2002).

¹⁵² *Id.* at 316 n.21.

¹⁵³ LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 36–50 (1993) (describing Colonial Era punishments).

¹⁵⁴ *See id.* at 77, 406–07.

under the guise of enacting civil, regulatory laws to protect the public, have retroactively imposed increasingly severe and oppressive burdens on criminal offenders that may seem like punishment to many.¹⁵⁵

Although *Mendoza-Martinez* asks whether a sanction or burden has been “historically regarded in our history and traditions as punishment,”¹⁵⁶ its analysis of whether the statute should be deemed punitive in today’s times is deficient. True, the remaining *Mendoza-Martinez* factors focus on the present, in terms of whether the statute currently imposes an affirmative disability or restraint, requires scienter, promotes deterrence or retribution, applies to conduct that is already a crime, is rationally related to a non-punitive purpose, and is excessive in relation to its non-punitive purpose. But using *Mendoza-Martinez* to define what is punitive “produces a misleading and impoverished definition of punishment no matter how close the question.”¹⁵⁷ It does so by allowing courts to dismiss individual factors that point towards punishment—such as the imposition of an affirmative restraint or the promotion of deterrence or retribution—while putting great weight on the statute’s connection to a non-punitive purpose.¹⁵⁸

But, if determining whether a statute actually has a punitive effect is the goal, then the public’s opinion about whether a statute is punitive is relevant and useful to answering that question. The Supreme Court seemed to be making this very point in *Smith v. Doe*.¹⁵⁹ Addressing the issue of whether Alaska’s registry was an historical form of punishment, the Court observed: “A historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such.”¹⁶⁰ This reasoning applies with equal force to conducting present-day surveys of lay people to determine whether they recognize government-imposed sanctions as punitive.

Public opinion is also relevant to the extent it reflects community sentiment about the fairness or unfairness of imposing a burden retroactively. As discussed earlier, one of the core purposes of the prohibition against *ex post facto* laws is to safeguard citizens against the

¹⁵⁵ See Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L.R. 1, 52 (2010) (describing the rash of burdensome sex offender laws enacted “under the guise of a nonpunitive alternative purpose”).

¹⁵⁶ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 163 (1963).

¹⁵⁷ Moseng, *supra* note 48, at 134.

¹⁵⁸ See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 361–69 (1997); *Smith v. Doe*, 538 U.S. 84, 97–105 (2003); *Doe v. Miller*, 405 F.3d 700, 719–23 (2005).

¹⁵⁹ 538 U.S. 84 (2003).

¹⁶⁰ *Id.* at 97.

unfairness that results from imposing additional punishment for conduct committed under existing law.¹⁶¹

In addition to being relevant to the punishment inquiry under *Mendoza-Martinez*, consideration of public opinion surveys would address some of the concerns critics of the framework have raised. The following subpart explains how public opinion evidence would improve punishment determinations.

C. The Benefits of Considering Public Opinion in Determining Punishment Under Mendoza-Martinez

There are several benefits to allowing courts to consider public opinion as a factor under *Mendoza-Martinez*. First, to the extent the current framework is overly deferential to the legislature, public opinion could serve as a significant counterweight to that acquiescence. Although the *Mendoza-Martinez* framework may “build[] a wall of deference around the legislative determination that a statute is civil and not criminal,”¹⁶² courts do not owe blind deference to the legislature.¹⁶³ The Framers considered the *Ex Post Facto* prohibition one of the most important structural safeguards in a democratic society.¹⁶⁴ As discussed earlier, the Clause serves two very important purposes: (1) ensuring that citizens receive “fair warning” of the consequences of wrongful conduct before engaging in it;¹⁶⁵ and (2) protecting citizens from arbitrary and vindictive lawmaking that, in the heat of passion, can be directed at “maligned individuals and groups of the moment.”¹⁶⁶ Given these underlying purposes, heightened scrutiny is warranted of legislative actions that impose oppressive

¹⁶¹ See Logan, *supra* note 10, at 1276.

¹⁶² Stinneford, *supra* note 48, at 679.

¹⁶³ See Logan, *supra* note 10, at 1292 (quoting *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (“When the Government acts to take away [a] fundamental right . . . the safeguards of the Constitution should be examined with special diligence. . . . We cannot push back the limits of the Constitution merely to accommodate challenged legislation.”)).

¹⁶⁴ Logan, *supra* note 10, at 1292.

¹⁶⁵ *Id.* at 1276–77.

¹⁶⁶ *Id.* at 1277 (quoting James Madison: “[t]he sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation, that sudden changes and legislative interferences . . . become jobs in the hands of enterprising and influential speculators . . .” THE FEDERALIST, NO. 44, at 351 (James Madison) (Hamilton ed., 1880); and quoting Alexander Hamilton: “Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves,” JOHN C. HAMILTON, HISTORY OF THE REPUBLIC OF THE UNITED STATES 34 (1859)).

retroactive burdens.¹⁶⁷ But under current law, legislatures can avoid serious scrutiny of a statute's punitive effect by classifying the law as civil rather than criminal.¹⁶⁸ Surely the Framers did not envision that legislatures could so easily thwart the *Ex Post Facto* Clause's purpose via mere nomenclature.

Allowing courts to consider public opinion would counterbalance the legislative deference *Mendoza-Martinez* embodies. Although courts must ordinarily defer to the legislature when determining the constitutionality of a statute,¹⁶⁹ this deference does not require a court to abandon its common sense when analyzing a statute's real world impact. Unlike courts, lay people are not guided by the same institutional pressures to show deference to legislative power.¹⁷⁰ Instead, ordinary citizens would define punishment using their common sense and life experience, which would bring a real world, as opposed to a legalistic, perspective to punishment determinations. Rather than breaking the definition of punishment into discrete factors which courts can easily manipulate by elevating the importance of some factors while downplaying the significance of others,¹⁷¹ lay people would likely define the concept more holistically and with an eye towards what is obviously punitive as a matter of common sense and life experience.¹⁷²

Put simply, public opinion evidence would add common sense to the *Mendoza-Martinez* analysis. Assuming sound survey methodology, public opinion results could constitute very powerful and persuasive evidence of what is, or is not, punishment, making it more difficult for courts to gloss over the *Mendoza-Martinez* factors that point to a statute's punishment, and forcing courts to render more intellectually honest

¹⁶⁷ *Id.*

¹⁶⁸ Fellmeth, *supra* note 48, at 36; Logan, *supra* note 10, at 1287.

¹⁶⁹ *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); Fellmeth, *supra* note 48, at 36; Logan, *supra* note 10, at 1287.

¹⁷⁰ See Douglas A. Berman, *Making the Framers' Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L.J. 781, 814 (2010):

[W]here a habeas jury is called upon to review the factual sufficiency of the evidence that resulted in a jury conviction at the trial court, their fresh and thorough review should not push up against the same kinds of institutional pressures to show deference to their predecessors that results when judges are the central and sole habeas adjudicators.

¹⁷¹ *Smith v. Doe*, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting).

¹⁷² See Taylor Whitten, *Under the Guise of Reform: How Marijuana Possession Is Exposing the Flaws in the Criminal Justice System's Guarantee of a Right to a Jury Trial*, 99 IOWA L. REV. 919, 929 (2014) (describing a jury as providing an "additional safeguard of community common sense"); Katelyn E. Keegan, *The True Man & The Battered Woman: Prospects for Gender Neutral Narratives in Self-Defense Doctrines*, 65 HASTINGS L.J. 259, 281 (2013) (discussing how juries "apply common sense and their own life experiences").

decisions about what does, and does not, constitute punishment.

Additionally, allowing public opinion evidence to be considered under *Mendoza-Martinez* may help courts make more informed punishment determinations. As some scholars have observed, judges are not particularly representative of the general population,¹⁷³ and thus may be limited by their particular world view in ascertaining the meaning and significance of certain facts. Specifically, “[j]udges are more predominantly male, white, and wealthy than the body politic as a whole.”¹⁷⁴ Accordingly, it is not hard to imagine how a judge’s life experience and values¹⁷⁵ could impact her decision on whether a sanction is punitive in effect.

For example, a wealthy judge could subconsciously downplay the severity of residency restrictions because, in his or her experience, there are plenty of housing options available, albeit expensive ones. How exactly these biases play out in decisions is speculative. Judges who come from wealthy backgrounds are not incapable of appreciating the obstacles that less fortunate people face; and the fact that a judge grew up poor does not mean that he or she will be sensitive to the plight of indigent sex offenders. But given the likelihood that a judge’s life experience and values affect her decision making,¹⁷⁶ allowing courts to consider public opinion in determining what is, or is not, punitive, may help the judge see around his or her blind spots.

D. Other Objections to Considering Public Opinion under Mendoza-Martinez

As discussed above, establishing the relevance of public opinion evidence and the reliability of the process used to generate the results would be the primary hurdles to introducing such evidence under *Mendoza-Martinez*. But other potential objections to considering public opinion surveys exist. The following subparts will briefly address three additional concerns.

¹⁷³ See Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishment Clause Determinations*, 64 FLA. L. REV. 549, 582 (2012); see also Henry S. Gerla, *The Reasonableness Standard in the Law of Negligence: Can Abstract Values Receive Their Due*, 15 U. DAYTON L. REV. 199, 223 (1990).

¹⁷⁴ Gerla, *supra* note 173, at 223.

¹⁷⁵ See Donald M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149 (2006) (discussing how values affect judicial decision making).

¹⁷⁶ See *id.*

1. Members of the Public Are No Better Than Judges at Objectively Determining What Constitutes Punishment

The foregoing discussion assumes that ordinary people would be more objective and honest in assessing whether a statute has a punitive effect. But is that necessarily the case? For example, given that sex offenders are the pariahs of our times,¹⁷⁷ would members of the public honestly answer the question of whether a statute is punitive if they knew that an affirmative answer would mean that the statute could not apply retroactively?

The answer depends on whether survey respondents would be aware of the legal significance of a sanction being deemed punitive. If respondents know that the survey is being prepared for litigation and that the government could be barred from enforcing the law retroactively if public opinion indicates the sanction is punitive, then respondents who fear sex offenders could be motivated to give a results-oriented answer (i.e., that the statute does not impose punishment). The way to manage this concern is simple: refrain from informing the respondents of the legal significance of a statute being found punitive. Simply asking whether the statute imposes punishment would elicit a common sense response without increasing the risk of a dishonest, results-oriented answer.

2. Consideration of Public Opinion Evidence Could Create an Inconsistent Body of Case Law

One potential argument against allowing public opinion to be considered under *Mendoza-Martinez* is that courts could decide the punishment question differently based on whether or not public opinion surveys were admitted. Thus, permitting public opinion evidence to be considered under *Mendoza-Martinez* would undermine one of the virtues of the framework: the existing factors can be analyzed in every case without the need to introduce outside evidence.¹⁷⁸

¹⁷⁷ See *supra* note 15 and accompanying text.

¹⁷⁸ Litigants are able to present evidence relevant to the seven *Mendoza-Martinez* factors. See, e.g., *Doe v. Miller*, 298 F. Supp. 2d 844, 850–65 (S.D. Iowa 2004) (describing testimony from experts and lay witnesses regarding Iowa's sex offender residency restriction).

Courts can examine the factors in every case where they are relevant, regardless of whether the litigants present evidence with respect to each factor. Specifically, the first, third, and fifth factors—whether the statute imposes an affirmative disability or restraint; whether a finding of scienter is necessary for the statute to apply; and whether the conduct to which it applies is already a crime—can be answered by simply reading the statute. The second factor—whether the statutory sanction or burden has

Survey results are an altogether different matter. If survey results are allowed under *Mendoza-Martinez*, it is unlikely they would be introduced in every case. Retaining experts to conduct methodologically sound polls could be expensive and beyond the means of many litigants.¹⁷⁹ Thus, courts could potentially rule differently based on whether or not it considered survey evidence, resulting in an inconsistent body of case law.

Addressing this objection is straightforward. While it is true that public opinion surveys would not be offered in every punishment determination case, it would be appropriate for courts to consider such evidence where it is available. As mentioned earlier, *Mendoza-Martinez* sets forth a list of non-exhaustive factors for courts to consider in determining what constitutes punishment.¹⁸⁰ The fact that the list is non-exhaustive means that courts can consider other relevant factors. Thus, courts have authority under *Mendoza-Martinez* to consider additional factors that are relevant to whether a statute has a punitive effect.

The fact that some litigants may lack resources to commission a public opinion survey should not prohibit those who have the means to do so. If that were the rule, then plaintiffs like those in *Doe v. Miller* would not be allowed to call experts that other litigants might lack the resources to retain.

historically been regarded as punishment—simply requires courts to compare the statutory sanction at issue with historical forms of punishment.

The fourth factor—whether the statute promotes the traditional aims of punishment: deterrence and retribution—similarly does not require the presentation of evidence. The deterrence question requires the court to assess the impact of the statute on an offender and how that impact could deter others from committing crime. *See State v. Cook*, 700 N.E.2d 570, 583 (Ohio 1998) (“Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior.”). Determining whether the statute promotes retribution requires the court to determine whether the statute affects future conduct or is instead “vengeance for its own sake.” *Id.*

The sixth factor—whether the statute is rationally connected to a nonpunitive purpose—is “not demanding” and is satisfied so long as the statute has a purpose other than to punish, even if “it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.” *Doe v. Miller*, 405 F.3d 700, 721 (2005) (citing *Smith v. Doe*, 538 U.S. 84, 103 (2003)). Finally, the seventh factor—whether the statutory sanction is excessive in relation to its nonpunitive purpose—is similarly non-demanding and requires the court to do nothing more than determine whether the sanction is “reasonably related” to the statute’s regulatory purpose. *Miller*, 405 F.3d at 723.

¹⁷⁹ Joseph T. Clark, *The “Community Standard” in the Trial of Obscenity Cases—A Mandate for Empirical Evidence in Search of the Truth*, 20 OHIO N.U. L. REV. 13, 20 (1993) (discussing costs of conducting surveys in obscenity cases).

¹⁸⁰ *Smith v. Doe*, 538 U.S. 84, 97 (2003); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

Finally, courts could also consider relevant public opinion surveys introduced in other reported cases. This could mitigate the concern that allowing polls in some cases but not others could result in inconsistent case law.

3. Determining the Significance of Survey Results Would Add Another Element of Subjectivity and Arbitrariness to the *Mendoza-Martinez* Analysis

Suppose that 51 percent of the public believes that the post-release civil commitment of sex offenders imposes additional punishment. Is that sufficient for a court to conclude that this factor points sufficiently towards the statute's punishment, or is a greater percentage required? This question identifies a further potential problem with allowing courts to consider public opinion under *Mendoza-Martinez*: determining the meaning of the survey results. Answering this question could add yet another element of subjectivity and arbitrariness to the *Mendoza-Martinez* analysis.

However, courts should have no problem deciding what public opinion surveys mean. For guidance, courts can look to other cases where public opinion evidence is regularly considered. For example, in obscenity cases, courts have held surveys to be relevant where the results show that a majority of respondents believed that depictions of nudity and sexual activity were acceptable under community standards.¹⁸¹ Additionally, in trademark infringement cases “[s]urvey percentages demonstrating confusion levels over 50% are always viewed by courts as persuasive evidence of likely confusion.”¹⁸² Accordingly, it would make sense for courts to conclude that public

¹⁸¹ See, e.g., *People v. Nelson*, 410 N.E. 2d 476, 478–79 (Ill. App. Ct. 1980); Clark, *supra* note 179 (1993) (“[B]efore one can say that contemporary community standards have been established, an empirical study of the community should be done to determine whether the majority of the community truly believes a publication is obscene.”).

¹⁸² *Steak Umm Co., L.L.C. v. Steak ‘Em Up, Inc.*, 868 F. Supp. 2d 415, 434 (E.D. Pa. 2012) (citing *Sears, Roebuck & Co. v. Johnson*, 219 F.2d 590 (3d Cir.1955)). However, percentages much less than 50 percent have supported findings of a likelihood of confusion in trademark cases. *Steak Umm*, 868 F. Supp. 2d at 434. This does not mean that punishment should be found in cases where less than a majority of respondents believes that a statute imposes punishment. In trademark infringement suits, plaintiffs need not establish that a majority of survey respondents have been misled, only that an appreciable number are confused by the competitor's trade symbol. See J. THOMAS MCCARTHY, 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:185 (4th ed. 2012). (“Likelihood of confusion is found by such a likelihood among a ‘substantial’ or ‘appreciable’ number of reasonably prudent customers. An ‘appreciable’ number is not necessarily a majority, and in fact can be much less than a majority.” (citations omitted)).

2015]

WHAT IS PUNISHMENT?

465

opinion results indicate punishment where at least a majority of respondents so believe.

E. Conclusion

In sum, provided their methodologies are sound, public opinion surveys would be relevant, admissible, and helpful in determining what constitutes punishment under *Mendoza-Martinez*. Such evidence would likely help judges understand the real world impact of the sanction at issue. Survey results showing that at least a majority of respondents believe the statute imposes punishment should be enough for courts to conclude that the survey results weigh in favor of finding the statute punitive.

III. DECONSTRUCTING A PUBLIC OPINION STUDY

Up until this point, the discussion has focused on the more abstract question of whether consideration of public opinion polls under *Mendoza-Martinez* is appropriate. The focus will now shift to an illustrative case study.

In 2012, I, along with two social science researchers, published an exploratory inquiry assessing the extent to which the public views residency restrictions for sex offenders and drunk drivers as punitive.¹⁸³ The motivation for conducting the study was my deep dissatisfaction with how courts determine punishment under *Mendoza-Martinez* in cases involving sex offenders. I was particularly disturbed by the ease with which courts gloss over factors that point to punishment in an apparent attempt to do whatever it took to conclude that the statute at issue did not impose punishment. Therefore, I was eager to learn whether community members, using their common sense, would agree that residency restrictions were not punitive.

Although the study has shortcomings that would likely preclude its admission in litigation, it nonetheless offers some insight into how studies of this kind can be useful to courts in determining whether a statute has a punitive effect.

A. The Study

The authors sought to “determine whether views about residence restrictions were sex offender specific, or rather, indicate a general level of punitiveness.”¹⁸⁴ Although no state or local laws forbid convicted drunk drivers from living near places that sell alcohol, the

¹⁸³ Levenson et al., *supra* note 32.

¹⁸⁴ *Id.* at 141.

authors tested respondents' views about whether such restrictions would be punitive as applied to convicted DUI offenders to learn whether the nature of the crime influenced the perception of whether the residence restriction would be punitive.¹⁸⁵ The authors hypothesized that residence restrictions for sex offenders would be viewed as less punitive than for drunk drivers. The authors believed this in part because a substantial proportion of the public drinks and drives and would likely view restrictions on where they could live if convicted of a DUI offense as harsh and punitive.¹⁸⁶

Research assistants recruited a total of 255 people in Hamilton County, Ohio to participate in the study.¹⁸⁷ The average age of the sample was thirty-seven, and gender was roughly evenly split.¹⁸⁸ Fifty-five percent of the respondents were white and 35 percent were black, with the remainder being Asian, Hispanic, or Native American.¹⁸⁹ Eleven percent of the respondents completed high school, 35 percent had "some college" education, and 48 percent had completed an undergraduate or graduate degree.¹⁹⁰ Approximately 40 percent of the respondents earned less than \$25,000 a year; 29 percent earned between \$25,000 and \$50,000 a year, and 30 percent earned more than \$50,000 a year.¹⁹¹ Thirty-six percent of the respondents were currently married, and 51 percent had never married.¹⁹² Fifty-one percent of the respondents were parents with an average of 1.4 children.¹⁹³ Thirty-seven percent reported having minor children living in their homes.¹⁹⁴ The sample "appear[ed] to be representative of the population [of Hamilton County, Ohio], though African Americans were slightly overrepresented."¹⁹⁵

Research assistants approached the respondents in public places and asked them to spend a few minutes of their time reading two brief scenarios and answering questions pertaining to those scenarios.¹⁹⁶ The assistants were trained to conduct the interviews without suggesting how the respondents should answer and were provided with

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Levenson et al., *supra* note 32, at 141.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Levenson et al., *supra* note 32, at 142.

¹⁹⁶ *Id.*

a script to follow at the beginning of each session.¹⁹⁷ They collected data at different times of the day and on different days of the week in order to diversify the pool of participants.¹⁹⁸

Research assistants gave each respondent a questionnaire consisting of two scenarios: one depicting an adult female convicted of a DUI offense, the other describing a young man who was convicted of a sexual offense as a result of having “consensual” sex with a teenager.¹⁹⁹ In order to determine whether any bias might occur depending on which scenario the respondent read first, half of the respondents were given the sex offender scenario first, and the other half were given the DUI scenario first.²⁰⁰ Each offender, as a result of his or her conviction, was subject to a residency restriction, prohibiting him or her from living within 1,000 feet of places that sell alcohol or 1,000 feet of schools, respective to the offense.²⁰¹

A series of five statements followed each scenario. These statements followed the sex offender scenario:

1. Making the sex offender leave his home imposes additional punishment on him.
2. Prohibiting the sex offender from moving to a new address within 1,000 feet of a school imposes additional punishment.
3. I believe that most sex offenders will reoffend.
4. I believe that residential restrictions for convicted sex offenders are effective in reducing crime.
5. I believe that laws designed to protect citizens from sex crimes should be enforced even if there is no scientific evidence that they are effective.²⁰²

Identical questions followed the DUI scenario, substituting appropriate terms (e.g., “DUI offender” for “sex offender” and “place that sells alcohol” for “school”).²⁰³ Respondents were asked to rate their agreement with each statement on a Likert-type scale of 1 to 5 (“strongly disagree” to “strongly agree”).²⁰⁴

The study examined two dependent variables. The variable *leave home*, mentioned in question one above, “refers to the belief that making an offender leave his or her home due to residence restrictions

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 142, app. 2 at 152–53.

²⁰⁰ *Id.* at 145.

²⁰¹ Levenson et al., *supra* note 32, app. 2 at 152–53.

²⁰² *Id.* at 144 tbl.2.

²⁰³ *Id.*

²⁰⁴ *Id.* at 142.

is a form of punishment.”²⁰⁵ The variable *prohibit move*, mentioned in question two above, “refers to the belief that prohibiting an offender from moving to a new address within 1,000 feet of a school or place that sells alcohol is a form of punishment.”²⁰⁶

Significantly, the questionnaire neither defined “punishment” nor asked respondents to consider and weigh the *Mendoza-Martinez* factors in an attempt to determine whether residency restrictions are punitive. Instead, the questionnaire left it to respondents to decide whether residency restrictions impose punishment using their life experience, background, and common sense. Though the study does not explicitly say so, the decision not to define punishment was intentional. The study’s point was to explore whether residency restrictions are punitive in the ordinary sense of the word.

In addition to the two dependent variables discussed above, the study examined three independent variables to explore how respondents viewed crime and crime policy.²⁰⁷ The variable *reoffend*, mentioned in question three above, measured whether respondents believed that the offenders described in the two scenarios would recidivate.²⁰⁸ The variable *effective*, mentioned in question four above, assessed whether respondents believed that residency restrictions are effective in reducing crime.²⁰⁹ The variable *support*, mentioned in question five above, evaluated whether respondents favored residency restrictions even absent scientific evidence that they are effective.²¹⁰

Finally, the study explored whether and to what extent social-demographic variables influenced the respondents’ perceptions of whether residency restrictions impose punishment. To that end, the study examined the following additional variables relating to the respondents: (1) age; (2) gender; (3) parental status; (4) college degree (i.e., whether the respondent had attained an undergraduate degree or higher); (5) victim status (i.e., whether the respondent or someone close to him or her had been the victim of a crime); (6) know an offender (i.e., whether the respondent or someone close to him or her had been convicted of a crime).²¹¹

²⁰⁵ *Id.* at 142–43.

²⁰⁶ *Id.* at 143.

²⁰⁷ Levenson et al., *supra* note 32, at 143.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 143, 145.

²¹⁰ *Id.* at 145.

²¹¹ *Id.*

B. The Results

Sixty-one percent of the respondents either agreed or strongly agreed that making a sex offender move from his existing home constituted punishment. However, only 39 percent either agreed or strongly agreed that prohibiting a sex offender from moving to a new address within 1,000 feet of a school imposed additional punishment.²¹² Thus, for a significant percentage of the respondents, the additional burden of having to move out of a current home made the difference in describing a residency restriction as punitive.

By contrast, 71 percent of the respondents either agreed or strongly agreed that making a convicted DUI offender leave her home imposed additional punishment compared to 55 percent that believed prohibiting a DUI offender from moving to a new address within 1,000 feet of a school imposed punishment.²¹³

Thus, the hypothesis that residency restrictions for DUI offenders would be seen as more punitive than the same restrictions for sex offenders was supported, though a majority believed that the restrictions would be punitive for either sex offenders or DUI offenders forced to move from an existing home.²¹⁴

Less than half of the respondents believed that residency restrictions were effective in preventing crime,²¹⁵ but that such laws should be enforced even absent evidence of their effectiveness.²¹⁶ Those who thought sex offenders would recidivate, which constituted 65 percent of respondents,²¹⁷ “were significantly less likely to view policies that restricted where sex offenders can live as punitive.”²¹⁸ Additionally, both older respondents and respondents who knew someone with a criminal record were less likely to consider residency restrictions as punitive.²¹⁹ Respondents who were crime victims were

²¹² *Id.* at 144 tbl.2.

²¹³ Levenson et al., *supra* note 32, at 144 tbl.2.

²¹⁴ *Id.* at 149.

²¹⁵ *Id.* at 144 tbl.2 (reporting that 23 percent of respondents either agreed or strongly agreed that residency restrictions for drunk drivers prevent crimes, and that 45 percent of participants either agreed or strongly agreed that residency restrictions for sex offenders work).

²¹⁶ *Id.* (reporting that 48 percent of respondents either agreed or strongly agreed that laws designed to protect citizens from drunk driving should be enforced even if there is no scientific evidence that they are effective, and that 51 percent believed that such laws for sex offenders should be enforced even if there is no evidence of their effectiveness).

²¹⁷ *Id.*

²¹⁸ *Id.* at 146; *see also Id.* at 148 tbl.4.

²¹⁹ Levenson et al., *supra* note 32, at 146, 149.

“2.8 times more likely to view” residency restrictions as punishment.²²⁰ Interestingly, respondents with at least an undergraduate degree were “sixty-nine percent less likely to agree” that making sex offenders leave their home imposed additional punishment.²²¹

The authors theorized that respondents viewed residency restrictions as more punitive for DUI offenders than those who commit sex crimes because, among other things, respondents believe that “this [i.e., a DUI] could happen to me,”²²² perhaps rendering the sample more sympathetic to the plight of drunk drivers and the potential consequences for a socially reprehensible but all too common behavior.”²²³

C. *What this study means for Mendoza-Martinez*

The study admittedly suffered from some limitations. For instance, “the sampling methodology was less systematic than might be ideal,” due to lack of resources and the inability to conduct more interviews in public places like malls.²²⁴

Additionally, although the authors kept the questionnaire brief to maximize participation,²²⁵ the brevity may have hampered the ability to evaluate more fully the public’s perception of what is and is not punitive and how such lay opinions could inform punishment determinations under *Mendoza-Martinez*. For example, the questionnaire did not ask respondents to give a reason why residency restrictions did or did not impose additional punishment. Because the questionnaire did not define the word “punishment” and did not ask respondents to explain their reasoning, it is impossible to know how respondents came to the conclusions they reached.

Moreover, the “use of offenders of different gender (male sex offender and female DUI offender) may have affected the results,”²²⁶ because people “tend to show more leniency toward female offenders.”²²⁷

Furthermore, respondents received no information about the impact that residency restrictions would have on the offenders’ ability to find a residence. The research assistants did not provide

²²⁰ *Id.* at 149.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 151.

²²⁵ Levenson et al., *supra* note 32, at 151.

²²⁶ *Id.*

²²⁷ *Id.* (citations omitted).

respondents with maps showing residential exclusion zones or any other information of the kind that litigants have provided to courts about the burdens imposed by residency restrictions. The absence of such information could have resulted in fewer respondents characterizing residency restrictions as punitive.²²⁸

In addition, respondents were not advised of the implications of a court determining that residency restrictions are punitive (i.e., that the prohibition could not be applied retroactively). This information was withheld to limit the risk of a respondent giving a results-oriented answer (i.e., a respondent who believes residency restrictions are punitive but says otherwise because he wants the restriction to apply retroactively). However, the survey could have concluded with questions asking if the respondent would change his answer if he knew that a court finding of punishment would mean that the statute could not apply retroactively. It would have been interesting to see to what extent the public would take a results-oriented approach to answering the punishment question.

Finally, although this study was not intended for use in *Ex Post Facto* Clause litigation, some questions about the fairness of applying residency restrictions to individuals who committed their crimes before the restriction became law would have been helpful to future litigation, given that the prevention of unfairness is one of the reasons the Framers prohibited *ex post facto* laws. For example, using the 1 to 5 Likert-type scale (“strongly agree” to “strongly disagree”), the survey could have asked a question along these lines: “It is unfair to prohibit a sex offender from moving to a home within 1,000 feet of a school under a law not in effect at the time he committed his crime.” Such a question could help a court better appreciate the real-world impact of residency restrictions.

Despite these issues, the study “lays the groundwork for some important “next steps” for researchers to consider.”²²⁹ These next steps include “unpack[ing] the meaning behind perceptions of residence restrictions as punishment” and “diversifying the scenarios to include different gradations of offenders” (e.g., repeat vs. first-time offenders).²³⁰ Future studies could remedy these flaws, enabling scholars to explore more deeply how the public defines punishment

²²⁸ Moreover, if “punitive” is a proxy for severe or harsh treatment that is unfair, the use of a male sex offender and female DUI offender could have caused more respondents to conclude that DUI residency restrictions are punitive given that many people tend to be more lenient to female offenders than male offenders.

²²⁹ Levenson et al., *supra* note 32, at 151.

²³⁰ *Id.*

and how that definition is relevant to punishment as a legal concept.

Beyond its social science implications, the study also provides insight into how public opinion surveys could help courts determine whether a statute is punitive in effect. In this regard, the study generated two particularly useful ideas that should be examined in more detail.

First, exploring whether a sanction is punitive when applied to different offender types can illuminate the extent to which offender bias plays a role in punishment determinations and may help judges understand their own biases. As discussed above, 55 percent of respondents believed that prohibiting a drunk driver from moving to a new residence within 1,000 feet of a place that sells alcohol imposed additional punishment, while only 39 percent believed that banning sex offenders from moving to a new home within 1,000 feet of schools constituted additional punishment.²³¹ The prohibition remained the same in each scenario, while the only thing that changed was the type of offender. Although it is unclear how each respondent defined punishment, assume for a moment that respondents defined punishment to mean an additional burden that was harsh and unfair.²³²

The fact that 55 percent of respondents believed that barring DUI offenders from moving to homes within 1,000 feet of places that sell alcohol would impose punishment for DUI offenders, whereas only 39 percent of respondents believed that a residency restriction prohibiting sex offenders from moving to a home within 1,000 feet of schools would be punitive, highlights society's tolerance for laws that single out "maligned individuals and groups 'of the moment'" for harsh treatment.²³³ This is precisely what the *Ex Post Facto* Clause is designed to prevent.²³⁴ While drunk driving poses a serious risk of harm to the community,²³⁵ many prominent members of society—including politicians, judges, actors, and athletes—as well as ordinary citizens, are convicted of driving under the influence and are yet able to maintain their careers and social status.²³⁶ Accordingly, it is hard to

²³¹ *Id.* at 144, tbl.2.

²³² See *Punishment*, MERRIAM-WEBSTER, <http://www.merriamwebster.com/dictionary/punishment> (last visited Jan. 6, 2015) (defining punishment as "severe, rough, or disastrous treatment").

²³³ Logan, *supra* note 10, at 1267, 1277 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810)).

²³⁴ *Id.*

²³⁵ See, e.g., *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it.").

²³⁶ See *Celebrity DUI Hall of Fame*, GEORGE C. CREAL, JR., P.C.,

imagine a legislature having the stomach to pass a law forbidding DUI offenders from living near alcohol stores, though it is possible to conceive of how such a restriction would be rationally related to a non-punitive purpose of protecting children.²³⁷ Sex offenders, by contrast, receive a great deal of public scorn²³⁸ and are perhaps more likely than any other type of offender to be subjected to fear-driven laws.²³⁹

Recognizing this dynamic—that legislatures single out unpopular groups for harsh treatment—is important. If courts are to give full meaning to the *Ex Post Facto* Clause’s prohibition against retroactive punishments, then it is important that they focus more on the impact of the statute rather than the characteristics of the offender and whether those characteristics justify the imposition of oppressive disabilities or restraints. Thus, public opinion surveys that present the same disability or restraint applied to different types of offenders—including those who are more sympathetic—may help courts see that what the legislature denominates as regulatory is really punishment targeted at an unpopular and reviled group.

Second, the fact that a majority of respondents believe sex offender residency restrictions are ineffective but should be enforced anyway is powerful evidence that these restrictions further retributive aims. The results suggest that the majority of respondents find these restrictions as an acceptable condemnation of people who commit morally reprehensible sexual crimes.²⁴⁰ Presenting survey results that show the public’s willingness to impose harsh burdens irrespective of whether those burdens protect the community may help courts appreciate the retributive nature of statutes the legislature has denominates as civil, and give that factor the weight it deserves in the *Mendoza-Martinez* framework.

<http://www.georgecreal.com/dui-hall-of-fame.html#UxTEkiWtLeI> (last visited Jan. 6, 2015) (listing, among others, former President George W. Bush, former Vice President Dick Cheney, former NBA star Charles Barkley, celebrity chef Cat Cora, pop singer Taylor Dayne, actor Ray Liotta, and federal Judge Robert Somma as DUI perpetrators).

²³⁷ Because case law does not require a statute to have “a close or perfect fit with the nonpunitive aims it seeks to advance” in order to be found rationally connected to a nonpunitive purpose, *Smith v. Doe*, 538 U.S. 84, 103 (2003), a residency restriction for DUI offenders would likely be found rational.

²³⁸ See *supra* note 15 and accompanying text.

²³⁹ Singleton, *supra* note 16, at 604–10 (discussing how media coverage of high-profile child abduction cases created a culture of fear leading to the passage of residency restrictions).

²⁴⁰ See, e.g., Scott W. Howe, *The Eighth Amendment as a Warrant Against Undeserved Punishment*, 22 WM. & MARY BILL RTS. J. 91, 98 (2013) (defining retribution as “the application of the pains of punishment to an offender who is morally guilty”) (internal quotation marks and citations omitted).

CONCLUSION

Including public opinion evidence as a factor under *Mendoza-Martinez*'s framework would not magically solve all its problems. Analysis under *Mendoza-Martinez* would continue to be subjective, given that courts necessarily must exercise judgment in deciding how to apply the factors. Courts conducting the *Mendoza-Martinez* analysis will continue to defer to legislative intent—perhaps unduly so—under controlling Supreme Court precedent.²⁴¹ The way to address the problems identified in Part II, *supra*, is to replace *Mendoza-Martinez* with a new punishment test, perhaps along the lines that Justice Stevens or Professor Fellmeth suggests.²⁴²

But unless and until the Supreme Court selects a new test, *Mendoza-Martinez* is the law, and its framework allows consideration of additional factors that are relevant to determining whether a statute has a punitive effect.²⁴³ Litigants should seize this opportunity to present opinion survey results that report the public's perception of whether a statute's effect is punitive.

The main obstacle to admitting such evidence would be relevance. While it is clear that public opinion polls are relevant in some contexts, it is less obvious that opinion polls are relevant in the punishment context. But if the question *Mendoza-Martinez* seeks to answer is whether a statute is punitive in effect (as opposed to purpose), then the real world perspectives of lay people are both relevant and helpful to the analysis. If public opinion surveys indicate that a strong majority of respondents believe that a particular statute is punitive, then it would be much harder for courts to gloss over other *Mendoza-Martinez* factors that point to a statute's punitiveness. Thus, the real value of adding public opinion as a *Mendoza-Martinez* factor may be to force courts to render more intellectually honest decisions about what constitutes punishment.

²⁴¹ See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (“[W]e will reject the legislature’s manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention to deem it civil.”) (internal quotation marks and citation omitted) (all but the first alternation as original).

²⁴² See *supra* notes 61–64 and accompanying text.

²⁴³ *Smith v. Doe*, 538 U.S. 84, 97 (2003) (describing the *Mendoza-Martinez* factors as “neither exhaustive nor dispositive”) (internal quotation marks and citations omitted).