



STATUTORY RESOLUTION

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Reviewing

EINER ELHAUGE, *STATUTORY DEFAULT RULES* (Harvard 2008)

AS A LAW STUDENT in the late 1960's and early 1970's, I encountered many new fields of study, not to mention new ways of thinking. I do not recall, however, any course materials or class discussion focusing on statutory interpretation, a mainstay of academic discourse in subsequent decades, and part of my daily fare as a judge on a state's highest court. Now comes Professor Einer Elhauge to offer his ideas about how judges like me should (and do, if perhaps fitfully and subconsciously) go about resolving statutory ambiguity when the time-honored toolkit for divining legislative meaning – text, purpose, and legislative history or some combination thereof – seems to come up short.

I

PROFESSOR ELHAUGE'S ANALYTICAL FRAMEWORK

As a first order of business, Professor Elhauge rejects the “dominant answer” for filling the gap when legislative meaning is unclear: the exercise of judicial judgment (3). Unlike many schol-

Susan P. Read sits on the New York Court of Appeals. References to Professor Elhauge's work in the text are indicated by page numbers in parentheses.

ars, he does not view this answer as inescapable because of “the inevitable imprecision of legislative language, and the necessity of having judges resolve the legal disputes that such imprecision creates” (4). As an alternative to judicial judgment or other possible paths that a court might pursue, Professor Elhauge proposes adopting statutory default rules designed to maximize political satisfaction by deferring to “enactable preferences.” These are defined as “the set of political preferences that would be enacted into law if the issue” – the meaning of the ambiguous statutory provision being parsed by a court – “were considered and resolved by the legislative process” (7).

Maximizing political preferences when statutes are ambiguous, he argues, is the interpretive approach most consistent with our representative democracy: opinions inevitably vary as to the correct way to deal with a policy issue, and we generally settle these conflicts, within constitutional bounds, through the legislative process, not by delegating the task to judges. Further, he contends, political preferences should be measured only by the extent to which they are “enactable” for two reasons: consistency¹ and the untrammelled discretion otherwise vested in judges to follow their own penchants in the guise of executing legislative commands.

Professor Elhauge divides his default rules into four categories – current preferences default rules, enactor preferences default rules, preference-eliciting default rules, and supplemental default rules – to be applied sequentially. In 334 pages of densely packed analysis, he explains his proposed rules, arguing that they impose principled restraints on judicial discretion, and, in addition, generally reflect how judges (or at least the Justices of the United States Supreme Court) already grapple with statutory uncertainty, although under a different name or only implicitly. In so doing, Professor Elhauge tries to anticipate and answer the likely objections to his analytical framework. In this regard, he serves up something of a refresher

¹ “If unclear statutory language were not interpreted to maximize enactable preferences, then the statutory results that governed the unclear portions of statutes would reflect preferences that conflict with the preferences reflected in the clear portions” (29).

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course on various theories of statutory interpretation and related political science models.

1. Current Preferences Default Rule

Essentially, Professor Elhauge's current preferences default rule presents a twist on Learned Hand's technique of imaginative reconstruction, whereby a judge tries to envisage how the enacting legislature would have wanted an ambiguous statute to be applied to the situation at hand in light of its original purpose and historical context.² In Professor Elhauge's view, by contrast, the most faithful way for a judge to interpret an ambiguous statutory provision is to track *current* enactable preferences, assuming they may be reliably determined. He hypothesizes that any sitting legislature would, if given the choice, likely opt for courts to interpret *all* statutes enacted in the past so as to correspond to its current preferences rather than bank on the judiciary to preserve its own legislative choices in the future. In short, "[p]resent influence over *all* statutes might well be far more desirable than *future* influence over a *subset* of statutes" (42). As a result, Professor Elhauge counterintuitively asserts that a judge best honors the enacting legislature's intent by interpreting statutory ambiguities to reflect the current legislature's policy views. Unsurprisingly, this proposition is controversial.³

² See e.g. *Borella v Borden Co.*, 145 F2d 43, 44 (2d Cir 1944).

³ One commenter has called Professor Elhauge's assertion "questionable," especially "in the context of high-stakes legislation." See Amanda L. Tyler, "Continuity, Coherence, and the Canons," 99 Nw U L Rev 1389, 1411 (Summer, 2005) (discussing an earlier iteration of Professor Elhauge's analytical framework). In Professor Tyler's view,

legislators may well prefer a framework in which the ground rules (in the form of presumptions or canons) are known to them *ex ante*, which – at least where applied consistently by the courts – allows legislators to predict how their work will be later interpreted. Of course, it may be true that which default rules legislators would truly prefer can only be answered by empirical study, of which there has been very little to date.

Id. at 1412). She advocates an interpretive framework grounded in consistent application of *stare decisis* and the canons so as to promote continuity, coherence, and predictability.

Professor Elhauge places “some important limitations” on his current preferences default rule, however (58). First, he stresses that current preferences should never trump clear statutory meaning: his default rules only come into play where statutory meaning is ambiguous. Further, the current preferences must be truly enactable, and therefore memorialized in some official action such as “agency decisions interpreting the statute,” especially after notice-and-comment rulemaking, or “recent statutes that, although they do not amend the relevant provision, do indicate where current enactable preferences lie” (64-65). Indeed, Professor Elhauge explains the *Chevron* doctrine (and its exceptions) as *de facto* current preferences default rules whereby deference varies with the likelihood that an agency’s action accurately reflects current enactable preferences.

2. Enactor Preferences Default Rules

But what if there are no agency decisions or related legislation from which a court might infer current enactable preferences? In that event, “courts must turn to making their best estimate of the enactable preferences of the original polity that wrote the statutory language,” with legislative history playing the starring role (115). Professor Elhauge emphasizes, however, that he does not advocate for or against using legislative history to interpret what a statute means or the enacting legislature specifically intended. Rather, “where [the] inquiry into meaning” by whatever means the judge favors “is inconclusive, legislative history should be used to make frankly probabilistic estimates about which statutory interpretations are most likely to reflect enactable political preferences” (*id.*). Further, Professor Elhauge defines legislative history broadly to include such things as executive views, contemporaneously enacted related provisions, and information about events prompting the legislation’s passage or the forces at play during the relevant historical period.

Professor Elhauge classifies the canons on avoiding constitutional invalidity and favoring severability, unless the legislature indicates otherwise, as enactor preference default rules of a more general nature. In his view, these canons necessarily maximize the political

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preferences of the enacting polity by preserving as much of its handiwork as possible. Similarly, he looks upon the absurdity doctrine, which counsels courts to avoid literal interpretations when they conflict with common sense or a statute's obvious purpose, as an enactor preference rule.

3. Preference-Eliciting Default Rules

In Professor Elhauge's analytical framework, a court's next best option for resolving legislative ambiguity is to adopt an interpretation designed to provoke a legislative reaction, which by definition "embodies enactable preferences more accurately than any judicial estimate could" (152). He concludes that familiar canons – for example, those favoring the powerless and linguistic canons of construction – serve this preference-eliciting function. When viewed in this way, he contends, the perceived inconsistency in their application vanishes because "the pattern of canon use can frequently be explained by whether or not the conditions for using a preference-eliciting default rule are met" (153). These conditions are that the interpretation chosen must fall within the range of plausible statutory meanings; the issue must motivate a politically influential group on one side, which enhances the odds of legislative correction and reduces the risk of inaction or stalemate; and any interim costs imposed by the chosen interpretation are not too large or uncorrectable.

Take the rule of lenity, for example. By resolving any ambiguity in a criminal statute's scope in favor of lenity, this canon runs counter to the most likely legislative preference since, in Professor Elhauge's view, "[m]ost legislative polities are hostile to criminal defendants" (168). Professor Elhauge theorizes that preference-eliciting analysis explains this seeming anomaly:

By providing the most lenient reading in unclear cases, the rule of lenity forces legislatures to define just how anti-criminal they wish to be, and how far to go with the interest in punishing crime when it runs up against other societal interests. If instead courts broadly (or even neutrally) interpreted criminal statutes in cases of unclarity, this would

often produce an overly broad interpretation that would likely stick, because there is no effective lobby for narrowing criminal statutes. In contrast, an overly narrow interpretation is far more likely to be corrected by statutory interpretation, because prosecutors and other members of anti-criminal lobbying groups are heavily involved in legislative drafting, and can more readily get on the legislative agenda to procure any needed overrides (169).

Professor Elhauge also considers another familiar canon – the plain meaning rule – to be preference-eliciting. Specifically, where legislative purpose or history or absurdities do not yield a sufficiently clear meaning, “a court might well be uncertain about legislative preferences, and thus have good grounds to use a preference-eliciting default rule that relies only on the plain meaning of the text” (196). He cites empirical evidence purporting to show that statutory interpretations relying on a statute’s plain meaning are more than three times as likely to be overridden by Congress as are those grounded in legislative history or statutory purpose.

Finally, Professor Elhauge explains the seemingly uneven application of statutory *stare decisis* – the doctrine that a court should stick with a statutory interpretation once made since the legislature could always have overridden it if displeased – as a preference-eliciting rule. From his perspective, “[t]he possibility that legislative conditions have changed explains why the presumption of statutory *stare decisis*, while strong, is not conclusive” (221).

4. Supplemental Default Rules

Professor Elhauge proposes supplemental default rules to be applied to the “residual” case where there is no alternative; that is, statutory meaning is ambiguous, a reliable estimate of enactable preferences (current or past) may not be made, and the conditions for a preference-eliciting interpretation are not met. In short, these are “the default rules that apply (by default) when the other default rules don’t” (227).

Professor Elhauge suggests that canons tracking the political preference of a subordinate government, when ascertainable, are

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supplemental default rules in this sense: “This explains many canons that interpret ambiguous federal statutes to incorporate state law, avoid preempting state law, or protect state autonomy,” although “some applications of the latter seem explicable only as means of enforcing otherwise underenforced constitutional norms of federalism” (233).

As a very last resort, Professor Elhauge suggests judicial judgment. While this seems contrary to the beginning point of his analysis, he emphasizes that “the judiciary should exclude those policy preferences it is confident could not get enacted in the current political process,” and stresses the narrow range of cases that remain unresolved after application of his other proposed default rules (234). He considers the canons that statutes should be interpreted to be consistent with the common law and to avoid constitutional difficulties “as the means by which high courts constrain lower courts and limit variance when legislative preferences are unknown” (236).

II

SOME EMPIRICAL DATA

Does Professor Elhauge’s statutory framework provide an accurate picture of how courts, in fact, resolve statutory ambiguities? I certainly do not think that it depicts how the New York Court of Appeals carries out this task, but I thought it might be interesting to examine just those few recent decisions involving statutory issues subsequently addressed by the Legislature through the lens of Professor Elhauge’s framework.

From January 1, 2006 through July 2008, the Court handed down 436 full opinions; 195 of these decisions – just under half – construed one or more New York statutes. The Legislature has enacted legislation somehow related to the statutes considered in seven of the 195.⁴ In six of these decisions, all the judges of the

⁴ I am indebted to my law clerk, Brian J. Dunne, for assembling these data for me.

Court agreed about how to interpret the statutes at issue.⁵ In one of the decisions, there was a one-judge dissent.⁶

1. Harkavy

This appeal required the Court to determine whether Correction Law § 402 (covering the transfer of mentally ill prisoners to psychiatric hospitals) or Mental Hygiene Law article 9 (covering involuntary civil commitment) supplied the procedures for determining whether convicted sex offenders should be involuntarily committed to a psychiatric hospital at the conclusion of their prison sentences because they suffered from mental abnormalities predisposing them to reoffend. The State took the position that article 9 (which is less restrictive than § 402) applied to the petitioners in this habeas corpus proceeding because they were not still serving prison sentences when they were actually committed as mentally ill. The petitioners argued that since they were incarcerated when they were *evaluated* for commitment, § 402 governed.

Clearly, the Legislature had not designed either article 9 or § 402 with recidivist sex offenders in mind. Forced to choose, the Court concluded that

[b]y providing that Correction Law § 402 applies to inmates “undergoing a sentence of imprisonment,” the Legislature intended the procedures of Correction Law § 402 to be

⁵ See *Harkavy v Consilvio*, 7 NY3d 607 (2006); *Kolnacki v State of New York*, 8 NY3d 277 (2007); *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454 (2007); *Ehrenfeld v Bin Mahfouz*, 9 NY3d 501 (2007); *People v Sparber*, 10 NY3d 457 (2008); and *Preserver Ins. Co. v Ryba*, 10 NY3d 635 (2008).

⁶ See *People v Kozlow*, 8 NY3d 554 (2007) (Smith, J., dissenting as to the majority’s reading of the statute). This rate of unanimity is not unusual; most of the 195 cases were decided unanimously. This is not always the case, of course. In *Tzolis v Wolff*, 10 NY3d 100 (2008), for example, the Court recently split 4-3 over the issue of whether members of a limited liability company may bring derivative suits on the company’s behalf in the absence of any provision authorizing such suits in the Limited Liability Company Law. The majority and the dissent strongly disagreed about what (if anything) to infer from the legislative history; particularly, the enacting legislature’s excision of a proposed derivative-suit provision from the finally-adopted bill.

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used to evaluate for commitment all imprisoned persons, regardless of when an inmate is scheduled to be released. Focusing only on whether a person remains imprisoned at the precise moment of commitment, rather than during the precommitment examination and application, renders the statute's procedural protections ineffective since they can be easily avoided, as was done here, by waiting until the person is nearing a release date. The psychiatric evaluation process preceding involuntary commitment under Correction Law § 402 is intended to benefit and protect the prisoner from administrative abuse of discretion. Thus, the Correction Law's statutory scheme is meant to protect an inmate throughout the evaluation process leading to involuntary commitment, absent an emergency as contemplated by Correction Law § 402(9).⁷

Accordingly, the Court decided that “in the absence of a clear legislative directive in regard to inmates nearing their release from incarceration,” § 402 was “the appropriate method for evaluating an inmate for postrelease involuntary commitment to a mental facility. Once the sentence expires, however, any further proceedings concerning the continued need for hospitalization are governed by the Mental Hygiene Law.”⁸

Under Professor Elhauge's framework, this decision arguably demonstrates preference-eliciting judicial behavior – a narrower interpretation favoring a highly disfavored population (violent sexual predators) and therefore likely to provoke a legislative correction reflecting enactable preferences. There was certainly nothing from which the court might have gleaned current or past enactable preferences in any of the ways that Professor Elhauge proposes.

Indeed, a few months after the Court handed down *Harkavy*, the Legislature enacted the “Sex Offender Management and Treatment Act.”⁹ This legislation created a new article 10 in the Mental Hygiene Law to provide for either the civil commitment or outpatient

⁷ *Harkavy*, 7 NY3d at 613 (internal quotation marks and citation omitted).

⁸ *Id.* at 614.

⁹ L 2007, ch 7.

supervision and treatment of recidivist sex offenders upon their release from prison. Yet, it is difficult to conclude that the Legislature adopted new article 10 in direct response to *Harkavy*. Civil commitment legislation was being considered – although agreement between the two houses of the Legislature had consistently proven to be elusive – well before the Court’s decision. Moreover, *Harkavy* did not render civil commitment impossible under existing law, and new article 10 hardly makes it easier.

2. *Kozlow*

The defendant in *Kozlow* was convicted of attempted dissemination of indecent material to minors in the first degree (Penal Law § 110, former Penal Law § 235.22). He claimed that his Internet communications with a 14-year-old (who turned out to be an undercover investigator) did not “depict” any prohibited conduct, as required under the statute, because they consisted solely of words and non-obscene pictures. The Court “rejected[ed] defendant’s contention that the Legislature intended to limit the scope of Penal Law § 235.22 to sexual predators who use images, rather than words, to lure minors.”¹⁰ Although remarking that the word “depict” possesses a longstanding “standard sense of *represent or portray in words*,”¹¹ the Court relied heavily on § 235.22’s legislative history to support its decision. While conceding that “depict” is a synonym for “describe,” the dissent concluded that “[f]rom a reading of article 235 as a whole,” the Legislature was “using ‘depicts’ in its primary, narrow sense” referring to visual representations only; and, in any event, “[i]n construing a criminal statute, [the Court] should not give [‘depicts’] a broader interpretation than the one a reasonable reader would draw from its text.”¹²

Interestingly, the day before oral argument in *Kozlow* the Governor signed legislation clarifying § 235.22’s meaning by adding the phrase “or describes, either in words or images” after the word “de-

¹⁰ *Kozlow*, 8 NY3d at 559.

¹¹ *Id.* at 558.

¹² *Id.* at 562 (Smith, J., dissenting).

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picts.”¹³ The Legislature adopted this legislation after the Appellate Division reversed Kozlow’s conviction and dismissed the indictment on the ground that his communications could not have “depicted” sexual conduct within the meaning of § 235.22 because they were not pictorial.¹⁴ The Appellate Division’s decision (which the Court reversed) would seem to qualify as a rule-of-lenity-like preference-eliciting decision under Professor Elhauge’s framework; the Court’s decision would seem to meet the requirements for a rare species of current preferences default rule, since the Legislature amended the exact language that the Court was considering.

3. *Kolnacki*

The State of New York has waived its sovereign immunity against suits for money damages, which must be brought in the Court of Claims. Because the Legislature has conditioned the State’s waiver upon a claimant’s compliance with the substantive and procedural requirements of the Court of Claims Act, the Court of Appeals has “consistently held that nothing less than strict compliance” with these jurisdictional prerequisites, narrowly construed, is necessary.¹⁵

In *Kolnacki*, the claimant sued for damages for injuries allegedly suffered when she fell in a State park. She did not specify the amount of monetary damages sought although Court of Claims Act § 11(b) at the time required every claim to state the “total sum claimed.” She argued principally that because she was bringing a personal injury action as opposed, for example, to an action for breach of contract, her damages were hard to quantify at the pleading stage. The Court nonetheless decided that the claim was jurisdictionally deficient and should be dismissed, noting that “[a]lthough the result may be harsh, it is for the Legislature, not this Court, to set the terms of the State’s waiver of immunity.”¹⁶

¹³ See L 2007, ch 8.

¹⁴ See *People v Kozlow*, 31 AD3d 788 (2d Dept 2006).

¹⁵ *Kolnacki*, 8 NY3d at 281.

¹⁶ *Id.*

The Court's literal approach to interpreting the Court of Claims Act is susceptible to being analyzed as preference-eliciting behavior in the way that Professor Elhaug hypothesizes for plain meaning rules. In the event, the Legislature overruled *Kolnacki* by drawing the distinction that the Court was unwilling to make for it, and excepting personal injury actions from § 11(b)'s requirement to state "the total sum claimed."¹⁷

4. Data Tree, LLC

Data Tree, LLC, a company that provides on-line land records to its customers, sent a request to a county under the Freedom of Information Law (FOIL) asking for various public land records from 1983 to present to be supplied in the electronic format maintained by the county, or, if the county did not store the information electronically, on microfilm. The clerk did not respond to the request within the time period specified by the statute, thereby constructively denying it. After losing an administrative appeal, Data Tree brought a proceeding seeking a judgment directing the clerk to provide the records sought.

To justify denying the request, the clerk made several arguments, including that disclosure would contravene FOIL's privacy exemption. This exemption authorizes agencies to deny access to records that, if disclosed, would amount to an "unwarranted invasion of personal privacy,"¹⁸ a phrase defined by a nonexclusive list of examples.¹⁹ One of these examples was the "sale or release of lists of names and addresses if such lists would be used for *commercial* or fund-raising purposes."²⁰ The clerk also contended that he would have to create a new record – something that FOIL does not require – in order to provide the information in the electronic format requested by Data Tree.

¹⁷ See L 2007, ch 606.

¹⁸ Public Officers Law § 87(2)(b).

¹⁹ Public Officers Law § 89(2)(b)(i)-(vi).

²⁰ Public Officers Law former § 89(2)(b)(iii) (emphasis added).

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The Court, interpreting the privacy exemption narrowly, concluded that a “question of fact exist[ed] ... as to whether the privacy exemption appli[ed] ... because some of the documents requested [might] contain private information, such as Social Security numbers and dates of birth,”²¹ and remitted the matter to the trial court for in camera inspection and possible redaction. The Court also decided there were questions of fact for the trial court to resolve with respect to “whether disclosure may be accomplished by merely retrieving information already maintained electronically by the Clerk’s Office or whether complying with Data Tree’s request would require creating a new record.”²²

The Legislature thereafter amended FOIL, spelling out how agencies must respond to and charge for requests for records in a medium other than paper, and addressing property records explicitly.²³ This legislation specifically provides that “[a]ny programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record.”²⁴ In addition, the amended law states that “when a record or group of records relates to the right, title or interest in real property, or relates to the inventory, status or characteristics of real property, ... disclosure and providing copies of such record or group of records shall not be deemed an unwarranted invasion of privacy.”²⁵ Further, the Legislature substituted the word “solicitation” for the word “commercial” in the example of an unwarranted invasion of privacy in § 89(2)(b)(iii). Again, a narrow judicial interpretation seems to have spurred the Legislature to update and clarify a statute for application to situations that could not have been foreseen by its original drafters.

²¹ *Data Tree, LLC*, 9 NY3d at 463.

²² *Id.* at 466.

²³ L 2008, ch 223.

²⁴ Public Officers Law § 89(3)(a).

²⁵ Public Officers Law § 89(2)(c)(iv).

5. *Ehrenfeld*

Ehrenfeld wrote a book accusing bin Mahfouz, a Saudi businessman, of supporting terrorism. The book was published in the United States, but 23 copies were purchased in England, where bin Mahfouz sued Ehrenfeld for defamation and obtained a default judgment. He reported the contents of the judgment on his website, which was accessible in New York. Ehrenfeld subsequently brought suit in federal court seeking a declaratory judgment that bin Mahfouz could not prevail on a libel claim against her in light of her free-speech protections under federal and State law, and that the default judgment was unenforceable against her in the United States.

The United States District Court for the Southern District of New York, sitting in diversity, dismissed the lawsuit for lack of personal jurisdiction over bin Mahfouz under New York's longarm statute; specifically, CPLR 302(a)(1), which confers personal jurisdiction if the defendant transacts business in New York and the claim arises from it. The Second Circuit subsequently certified to the Court of Appeals the question of whether CPLR 302(a)(1) confers personal jurisdiction over a person "(1) who sued a New York resident in a non-US jurisdiction; and (2) whose contacts with New York stemmed from the foreign lawsuit and whose success in the foreign suit resulted in acts that must be performed by the subject of the suit in New York."²⁶ The Court answered the question in the negative, refusing to give the State's longarm statute the more expansive reading urged by the plaintiff but never endorsed by the Legislature.

The Legislature then enacted the "Libel Terrorism Protection Act."²⁷ This statute bars recognition in New York of defamation judgments secured in foreign jurisdictions providing less protection for freedom of speech and press than the United States and New York constitutions afford;²⁸ and specifies when New York courts are

²⁶ *Ehrenfeld v Mahfouz*, 489 F3d 542, 545 (2d Cir 2007).

²⁷ L 2008, ch 66.

²⁸ CPLR 5304(b)(8).

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vested with personal jurisdiction so as to render declaratory relief with respect to liability for such a judgment, and/or whether the judgment “should be deemed non-recognizable” in New York pursuant to CPLR 5304.²⁹ Thus, the Court’s narrow decision in *Ehrenfeld* obviously prompted the Legislature to make its preferences clear about a phenomenon (so-called “libel tourism”) that the original drafters of New York’s longarm statute could never have envisaged.

6. *Sparber*

Sections 70.00(6) and 70.45(1) of the Penal Law mandate that sentences for certain violent felons must include a period of postrelease supervision, which “constitute[s] an additional punishment.”³⁰ In *Sparber* and its companion case, *People v Garner*,³¹ the Court disposed of six appeals where the defendants’ postrelease supervisory periods were apparently imposed administratively by the courts or, in *Garner*, by state prison officials rather than by sentencing judges in open court. The defendants claimed that they therefore did not have to serve a term of postrelease supervision at the conclusion of their incarceration.

The relevant statutes – Criminal Procedure Law §§ 380.30 and 380.40 – call for judges to “pronounce sentence in every case where a conviction is entered” and command that “the defendant must be personally present at the time sentence is pronounced.” The Court was unwilling to read these provisions broadly to hold, for example, that a clerk’s preparation and execution of a commitment sheet, bearing a judge’s name, fulfilled the statutory mandate. The Court denied the defendants the relief they requested, however, and instead remitted for resentencing since “the failure to

²⁹ CPLR 302(d). The *Ehrenfeld* case has also encouraged federal legislators to take up the cudgels to protect American authors and publishers from libel tourism. See Arlen Specter and Joe Lieberman, “Foreign Courts Take Aim at Our Free Speech,” *Wall St. Journal*, July 14, 2008, at A15, available at http://online.wsj.com/article/SB121599561708449643.html?mod=googlenews_wsj.

³⁰ *Sparber*, 10 NY3d at 469.

³¹ 10 NY3d 358 (2008).

pronounce the required sentence amount[ed] only to a procedural error, akin to a misstatement or clerical error, which the sentencing court could easily remedy.”³²

The Legislature subsequently adopted legislation establishing procedures for reviewing sentencing minutes as well as timetables for courts to schedule resentencing hearings where postrelease supervision periods were not properly imposed by the sentencing judge.³³ The measure also stipulates that the court may, if the district attorney consents, waive postrelease supervision when resentencing, and that counsel must be provided to those inmates or parole releasees who need to be resented. The Court’s decision in this case at least arguably fits within Professor Elhauge’s framework as preference-eliciting along the lines of the rule of lenity.

7. Preserver Insurance Company

This appeal called upon the Court to decide whether a liability insurance policy actually delivered in New Jersey by a New Jersey insurer to a New Jersey insured was “issued for delivery” in New York within the meaning of Insurance Law former § 3420(d), which applied to liability policies “delivered or issued for delivery” in New York. Under the policy’s terms, the risk covered was located in New York. The Court concluded that a policy was “issued for delivery” in New York only if it “cover[ed] both insureds and risks located in this state.”³⁴

The Legislature subsequently struck the imprecise phrase “issued for delivery” from § 3420(d), which now covers those liability policies that are “issued or delivered in this state.”³⁵ This clarifying amendment was, however, but a small part of a revision of the Insurance Law to relax New York’s late-notice rule for disclaimer of coverage (which the Court had consistently declined to abolish) for claims arising out of personal injury or death, and to allow an in-

³² 10 NY3d at 472.

³³ L 2008, ch 141.

³⁴ *Preserver Ins. Co.*, 10 NY3d at 642.

³⁵ See L 2008, ch 388.

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jured party or other claimant to initiate an action for declaratory judgment where coverage has been disclaimed for late notice. The insurance industry and the trial bar, two politically influential groups, hotly contested the advisability of revising the late-notice rule.³⁶ Again, narrow interpretations of statutory provisions by the Court at least arguably played a role in prompting new legislation.

CONCLUSION

Whether or not one agrees with Professor Elhauge's framework for dealing with statutory ambiguity, normatively or descriptively, his scholarship is impressive (to say the least); his ideas are thought-provoking. Accordingly, his book should find a place on the bookshelf of anyone who cares about the whys and wherefores of statutory interpretation – and what judge doesn't?



³⁶ See Stashenko, "New Late-Notice Rule Shifts Burden to Insurer," *NYLJ*, July 29, 2008, at 1, col 5.