
RESPONSE

PANEL EFFECTS, WHISTLEBLOWING THEORY, AND THE ROLE OF LEGAL DOCTRINE

DEREK J. LINKOUS[†] & EMERSON H. TILLER^{††}

In response to Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319 (2009).

In her recent article, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*,¹ Pauline Kim wades into the increasingly contentious scholarly debate about the determinative variables at play in judicial decisionmaking in three-judge panels of the federal courts of appeals.² Professor Kim's article sets out to test "two competing explanations of panel effects—one emphasizing deliberation internal to a circuit panel, the other hypothesizing strategic behavior on the part of circuit judges."³ She finds "strong evidence that the preferences of the full circuit [but not the Supreme Court] influence panel effects," which she claims are "precisely [the results] that are predicted by a strategic account of panel decision

[†] J.D. Candidate, Northwestern University School of Law, 2011; B.A., Northwestern University, 2008.

^{††} J. Landis Martin Professor of Law and Business, Northwestern University School of Law.

¹ Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319 (2009).

² In recent years, both Cass Sunstein et al., from whose study Professor Kim draws her data set, and Judge Richard Posner have written books on this topic, and new articles are frequently cropping up in law journals. See generally RICHARD A. POSNER, *HOW JUDGES THINK* (2008) (arguing that judges are pragmatic and assess the policy consequences of their decisions); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) (analyzing data impacting whether "appellate judges can be said to be political").

³ Kim, *supra* note 1, at 1319.

making.”⁴ The paper makes a nice empirical contribution to the growing study of strategic judging and political-alignment effects.⁵

In Professor Kim’s determination to distinguish her findings, however, she needlessly and erroneously “reject[s]”⁶ a leading theory of circuit court panel effects—the now well-known Whistleblowing Theory (WT) of circuit panel decisionmaking set out by Frank Cross and Emerson Tiller over a decade ago in the *Yale Law Journal*.⁷ That theory applies equally to deliberative and strategic accounts of circuit panel decisionmaking.⁸ Unlike the strategic-alignment model tested by Professor Kim, WT’s key insight is that *legal doctrine interacts with panel diversity* to constrain political discretion.⁹ Mere alignment between the panel and a higher court (whether it be the circuit en banc or the Supreme Court)—the key feature of Professor Kim’s test of the alignment hypothesis—is not essential to the strategic prong of WT and not relevant to the deliberative prong. Professor Kim appears to misunderstand this central thesis of WT—that it is legal doctrine’s interaction with panel diversity (not merely the interactive effect of a diverse judicial panel with politically aligned or unaligned higher courts) that produces “panel effects”—and nothing in her findings justifies rejecting the theory. If anything, her results are consistent with WT.

⁴ *Id.* at 1368. Professor Kim’s conclusions to some extent track Dean Richard Revesz’s findings in his early work on circuit decisionmaking, which tested the “hierarchical restraint hypothesis” on Environmental Protection Agency (EPA) challenges in the D.C. Circuit. See Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1747-50 (1997) (defining the hypothesis as positing “that judges act more ideologically when their decisions are less likely to be reviewed” and finding support for the hypothesis “with regard to Republican judges”).

⁵ See, e.g., Max M. Schanzbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 716, 732-36 (2008) (finding political-alignment effects in criminal sentencing in a larger-scale study matching identified judges with sentenced offenders); Max M. Schanzbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24, 46-53 (2007) (finding statistically significant alignment effects in federal district court sentencing); Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61, 69-81 (2002) (finding strategic lower court behavior in environmental law cases based upon assumed, but not tested, higher court political alignment); see also Revesz, *supra* note 4 (finding support for similar patterns of judicial behavior).

⁶ Kim, *supra* note 1, at 1343.

⁷ Frank B. Cross & Emerson H. Tiller, Essay, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998).

⁸ *Id.* at 2159, 2174.

⁹ See *id.* at 2161 (“[D]octrine does matter because it is a real constraint upon the court majority’s ability to pursue policy goals.”).

I. WHAT WHISTLEBLOWING THEORY POSITS

Along with Professor Kim, we are skeptical of attitudinal and ideological theories that suggest that judges are “naïvely voting their [policy] preferences” when deciding cases on the circuit courts.¹⁰ Much of the literature establishing this position comes from studying the voting patterns of the Supreme Court,¹¹ but as Judge Posner points out, the Supreme Court is “an extraordinary judicial institution” free from the “usual external constraints on judicial discretion,” and the only internal constraint facing it is the judge-made doctrine of stare decisis.¹² At the circuit court level, there are greater internal and external constraints on judges, such as the binding effect of precedent and doctrines, that induce them to behave in both deliberative and strategic ways.

WT, like the alignment theory that Professor Kim tests, tries best to explain the phenomenon of circuit “panel effects,” in which the political makeup of the judicial panel seems to affect the votes of individual judges in the majority or minority of the panel. At its core, WT is “[a] [t]heory of [c]ompliance with [d]octrine,”¹³ not merely disobedience to it (the feature Professor Kim singularly stresses in her critique). Two premises undergird WT: (1) “[j]udges are more likely to obey legal doctrine when such doctrine supports the partisan or ideological policy preferences of the court majority” than when doctrine does not support the preferred outcome (the legal-disobedience dimension) and (2) “courts are more likely to comply with doctrine (rather than to decide based solely on their political preferences) when the judicial panel is politically or ideologically divided” *and* doctrine supports the outcome preferred by the minority judge (the legal-obedience dimension).¹⁴ It is this second premise that makes WT stand out from other strategic or deliberative theories of circuit panel decisionmaking because, as opposed to other deliberative and strategic models, the legal-doctrine variable of WT allows changes in judicial voting behavior to be measured empirically. The other theories treat legal doctrine as a black box or as a functionally irrelevant byproduct, doing little more than perhaps describing a policy outcome from a case.

¹⁰ Kim, *supra* note 1, at 1325.

¹¹ For examples of such literature, see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) and JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

¹² POSNER, *supra* note 2, at 274.

¹³ Cross & Tiller, *supra* note 7, at 2158.

¹⁴ *Id.* at 2159.

WT addresses both strategic and deliberative models of panel effects and does not give preference to one of these mechanisms over the other as both may be at work. On the strategic side, a political-minority judge whose position is supported by the relevant legal doctrine may force an external check to a majority judge's implementation of her individual policy preferences; specifically, when doctrine is not adhered to by the majority, there is a threat of dissent by the minority judge that may produce "exposure and possible reversal" by the reviewing en banc circuit or the Supreme Court.¹⁵ According to WT, by "threaten[ing] to highlight the disobedience externally to a *higher court*," the minority panel member induces the majority to "keep its decision within the confines of doctrine."¹⁶ In this sense, if the majority judges (or minority judges) change their votes because of the prospect of higher court review and the presence of unfavorable (or favorable) legal doctrine, rather than choose their attitudinally preferred outcome, then we might conclude that strategic forces are at work.

WT also addresses the effects of legal doctrine and political diversity in the deliberative process. Specifically, WT posits that when a circuit panel is politically diverse, whistleblowing may act as an internal, deliberative check because a majority judge will temper his true preferences to accord with the "rules of the game"—adhering to legal doctrine—when a minority judge (a judge who is of a different political party and whose policy preferences will be realized from application of the doctrine) points out the relevance of doctrine to the outcome.¹⁷ Judges, like any students of the law, are taught to follow precedent, and this lesson affects how they render their decisions.¹⁸ Through the deliberative process, a minority member of the panel who prefers an outcome that doctrine would instruct "force[s] the majority to acknowledge its subconscious disobedience to doctrine and

¹⁵ *Id.*

¹⁶ *Id.* (emphasis added).

¹⁷ *Id.*

¹⁸ Patricia Wald, the former Chief Judge of the D.C. Circuit, has written that

for the vast majority of federal judges, there is a sincere commitment to carry out the law, the will of Congress, or the precedents of prior courts . . . Federal judges are acutely aware that they are being watched at all times—by the parties, the legislature, the academics, the press, peers, and ultimately by the populace. And the judge herself is being judged for her adherence to constitutional or statutory text, as well as *stare decisis*.

Patricia M. Wald, *Reflections on Judging: At Home and Abroad*, 7 U. PA. J. CONST. L. 219, 231-32 (2004).

therefore to mend its ways.”¹⁹ If the panel were not made up of politically diverse members—i.e., if the panel were politically unified—then doctrine may be easily, or even inadvertently, ignored. Doctrine, therefore, provides a meaningful constraint on how judges make decisions when deliberation among politically diverse panel members takes place.

The insight of WT is not that judges may disobey or ignore doctrine—political scientists and legal realists laid claim to that finding long ago. Rather, the key point of WT is that *legal doctrine matters*, and it matters most when the judicial panel is politically diverse. Specifically, when a panel is politically diverse and legal doctrine supports the preferred outcome of the minority member, legal doctrine can act as a constraint on ideological voting by the panel majority.

II. WHY WHISTLEBLOWING THEORY WITHSTANDS PROFESSOR KIM’S CRITICISMS—IT’S ABOUT LEGAL DOCTRINE

Professor Kim appears to reject WT for three reasons. First, after mischaracterizing the strategic prong of WT as being strictly a circuit panel–Supreme Court model rather than a circuit panel–higher court model, she shows that, in the area of employment discrimination, panel dynamics are not affected by political alignment with the Supreme Court but instead are affected by political alignment with the circuit court en banc.²⁰ She concludes that this empirical result is inconsistent with WT. It is not inconsistent; nor are we surprised by the empirical result, as it is consistent with the prediction of WT: the circuit panel is responsive to a higher court (the full circuit en banc, in this case).²¹ Contrary to Professor Kim’s intimations that WT is inhe-

¹⁹ Cross & Tiller, *supra* note 7, at 2174.

²⁰ See Kim, *supra* note 1, at 1367 (“These findings contradict Cross and Tiller’s whistleblowing theory . . .”).

²¹ Professor Kim’s confusion here may result from the original WT paper’s reference to the *Chevron* doctrine as part of an empirical test of WT. Cross & Tiller, *supra* note 7, at 2162. The *Chevron* doctrine originally emanated from the Supreme Court. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Professor Kim may have concluded that since the Supreme Court generated the doctrine, WT was about the circuit panel’s relationship to the Supreme Court. In explaining the empirical results of their study, Cross and Tiller also opined on the role of the Supreme Court and how the unlikelihood of review by that Court might favor the deliberative model as an explanation. For clarity, Cross and Tiller could have opined on the effect of circuit preferences in *Chevron*, but they did not. In any case the source of the doctrine is not the determinative factor for WT in deciding to which higher court the panel is responsive. All that is required is that a higher court (the circuit en banc, the Supreme Court, or perhaps both) recognizes that an established doctrine controls and is compelled at some level to enforce it. That is all that the theory commands.

rently tied to the certiorari process of the Supreme Court, WT does not demand that the Supreme Court be the “higher court” reviewing the panel; the circuit court en banc can just as easily be the relevant “higher court.” Note also that the reviewing court need not be *politically* aligned with the minority whistleblower (another condition Professor Kim seems to wrongly attribute to WT) for WT to work; all that is necessary is that the reviewing court be compelled (either politically or through its proper judicial role) to enforce doctrine on review of the panel decision. Much of Professor Kim’s rejection of WT is based on these two incorrect assumptions.

Second, Professor Kim claims that Cross and Tiller’s empirical test of doctrinal effects in WT is not an accurate description of the doctrine involved (the *Chevron* doctrine). To be sure, the *Chevron* doctrine allows either deference or nondeference to agency interpretations of statutes depending on a variety of factors, although it is generally agreed that the thrust of *Chevron* was toward deference. And it is true that it is difficult to know if the doctrine was disobeyed in any given case, given that deference or nondeference could be a legitimate outcome in any given case. According to Professor Kim, Cross and Tiller’s “account [of WT] implies that legal doctrine provides clearly correct outcomes such that departures from doctrine can be identified easily and that judges deliberately disregard the law.”²² She claims that “[n]either assumption is justified, nor is either necessary to a strategic theory of judicial decision making.”²³

We agree with Professor Kim’s conclusion that these are not necessary features of a strategic or deliberative theory of judicial decisionmaking. In fact, contrary to Professor Kim’s description, Cross and Tiller do not claim that legal doctrine provides clearly correct outcomes in every single case, nor that disobedience can be easily identified in any given case. According to Cross and Tiller,

When examining an individual opinion striking down a rule, it can be difficult to identify disobedience. The opinion will justify its nondeference through reference to statutory language, legislative history, and doctrine itself. While one may disagree with the rationale and even question its sincerity, it is impossible to demonstrate conclusively that any particular opinion’s rationale for nondeference is insincere or dis-

For a theory of doctrine creation and its role in ensuring lower court obedience (a theory that Professor Kim appears to inadvertently collapse into WT), see Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326 (2007).

²² Kim, *supra* note 1, at 1343.

²³ *Id.* (footnote omitted).

obedient. Nevertheless, the opinion may be disobedient, as conclusive demonstrations of sincerity are also lacking. *By looking at a pattern of cases, we strive to test for disobedience.*²⁴

It is the uneven application of the *Chevron* doctrine over a “pattern of cases” that allows Cross and Tiller to identify disobedience. To be sure, no clear outcome in any given case can be said to be disobedient. Distilling a finding of disobedience to legal doctrine comes from examining a large number of cases and observing features particular to judges (political ideology) and panel makeup (politically unified or divided) that predict systematically uneven application of the doctrine. Empirically, Cross and Tiller show that *Chevron* deference and nondeference were applied in a systematically biased manner—more *Chevron* deference when a minority panel member’s preferences aligned with the policy outcome associated with deference and less deference when the panel had no minority member (a politically unified panel) such that deference would not advance the presumed policy preferences of that majority.²⁵ This lack of evenhanded application of the law is what Cross and Tiller (and WT) identify as disobedience. Such is the power of social science: one need not conclude that any given outcome was an act of disobedience. The implication comes through the distillation of effects from larger numbers of cases that illustrate inconsistent application of the law over a variety of controlled conditions (and that such inconsistent application can be moderated by a whistleblower minority judge).

Finally, Professor Kim criticizes Cross and Tiller’s characterization of judges as “disobedient” in WT as overly “tendentious” and not justified.²⁶ Disobedience in the sense used in WT is merely a descriptor used to denote the non-neutral application of doctrine to a set of cases when policy preferences are accounted for. The concepts of doctrine and precedent suggest neutral application. Thus, describing non-neutral application—even if only measurable by statistical analyses of aggregated data—as “disobedience” does not to us seem unfair or overly tendentious. Professor Kim also protests that the “whistleblower” terminology carries with it “normative judgments about judicial

²⁴ Cross & Tiller, *supra* note 7, at 2165 (emphasis added).

²⁵ See *id.* at 2173 fig.2 (finding a 33% rate of adherence to *Chevron* by 3-0 partisan-aligned panels where doctrine does not support the panels’ presumed policy preferences and an 81% rate of adherence by 3-0 or 2-1 panels where doctrine supports the majority’s presumed policy preferences).

²⁶ See Kim, *supra* note 1, at 1343 (“I avoid Cross and Tiller’s whistleblower terminology because it suggests normative judgments about judicial motivation that are not empirically supported and are unnecessarily tendentious.”).

motivation that are not empirically supported.”²⁷ Since the usual meaning of “whistleblower” is someone who identifies another’s disobedience to the law, and because WT is a theory about obedience and disobedience to legal doctrine, the “whistleblowing” term captures the idea and is certainly no worse than the commonly used phrase “prisoner’s dilemma” to describe a host of decision situations in noncriminal contexts. We think that the use of the terms “whistleblowing” and “disobedience” is hardly a reason to reject the only theory of panel effects that attempts to engage the central element of judicial decisionmaking—legal doctrine.

We also point out that Professor Kim’s empirical results measuring the impact of the strategic-judging theory are consistent with WT. Professor Kim finds that if a minority panelist is aligned with the circuit court as a whole, the effect of that minority member’s presence will be stronger.²⁸ This finding, however, is difficult to disaggregate from the likelihood that where the higher court is aligned with the minority panel member, the higher court has set out or endorsed a doctrine more in line with its policy preferences. If this supposition is true, the strength of the minority’s position in these situations could largely be due to the minority member alerting the majority panelists to the doctrinal inconsistency with the reviewing court’s precedent—consistent with WT.²⁹

III. THE IMPORTANCE OF CODING DOCTRINE

It is Professor Kim’s failure to address legal doctrine that draws into question the importance and accuracy of her study. The strategic mechanism may in fact match up with Professor Kim’s favored explanation that alignment is crucial to understanding how appellate panels work, but because her test ignores doctrine, it is difficult to disambiguate the effect alignment has from the role that doctrine is actually playing. Professor Kim’s study is of limited value because it does not go the extra step and do the hard work of trying to develop a coding scheme for the role doctrine obviously plays in judicial decisionmaking. Only the most ardent of legal realists would assert that doctrine plays no role in judicial decisionmaking. Inherent in the legal profession, from whose ranks judges are culled, is the notion that rules are to be followed. Doctrine, to be sure, is hard to code for, and

²⁷ *Id.*

²⁸ *Id.* at 1363-64.

²⁹ Cross & Tiller, *supra* note 7, at 2159.

undoubtedly, there may be issues with trying to transform a legal principle, standard, or rule into a codable variable. But her failure to try leaves Professor Kim in the same position as the attitudinal purists she criticizes—proposing too simple a view of the world of judicial decisionmaking.

In defending her decision not to code legal doctrine, Professor Kim notes that “[l]egal commands are often open-ended, requiring the exercise of discretion,”³⁰ thus making it difficult, if not impossible, to know how to code a doctrine or any effect that doctrine is having on the decision in a given case. Coding for a rule, like the one laid out in *Chevron*, is admittedly easier than transforming a legal standard—e.g., the three elements needed to prove disparate impact outlined in *Griggs*³¹ and *Albemarle Paper*³²—into a codable variable.³³ But as Cross and Tiller illustrate in their study, one need not know whether a doctrine was honestly adhered to in any given case. It is the uneven application over a series of cases, controlled for politics, diversity, policy outcomes, and other variables, that allows one to understand the role of legal doctrine in panel effects. The failure to code and analyze doctrine calls into question the explanatory power of Professor Kim’s findings.

Unfortunately, Professor Kim is not alone in failing to adequately account for legal doctrine. Scholars who prefer internal deliberative explanations of panel effects, like Sunstein et al., do not give due credence to the power of legal doctrine.³⁴ In their comprehensive study on panel effects of nearly 7000 decisions across many areas of substantive law (including cases addressing abortion, obscenity, piercing the corporate veil, and affirmative action³⁵), Sunstein et al. afford little more than a cursory discussion of the “speculation” posited by WT—that legal doctrine is a central lever—in their consideration of the causal mechanisms of panel effects.³⁶ We do not believe that align-

³⁰ Kim, *supra* note 1, at 1343 n.95.

³¹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

³² *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), *superseded by statute*, Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189.

³³ See I SUSAN M. OMIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 11:10 (2008) (discussing the evolution of Title VII disparate impact law). For a graphical representation of the difference between a rule and a standard, see Jacobi & Tiller, *supra* note 21, at 332 fig.1.

³⁴ See SUNSTEIN ET AL., *supra* note 2, at 63-69 (attributing panel effects to collegial concurrence, conformity, entrenchment, and dampening).

³⁵ *Id.* at 17-18.

³⁶ *Id.* at 78-82.

ment effects from the strategic models or the varied psychological effects from the deliberative models will go away once doctrine is controlled for; in fact, their explanatory value may even increase. But to ignore, theoretically and empirically, what is perceived publicly (and within the judiciary) to be the central mechanism of legal decision-making—the evenhanded application of legal doctrine—would seem to us to miss a key opportunity to address the role of law within a judicial system.

CONCLUSION

Legal doctrine is a variable that distinguishes judicial decision-making from that of other decisionmakers. Doctrine plays a key role in appellate decisionmaking as an external check through the strategic mechanism or an internal check through the internal deliberative mechanism. In either scenario, WT suggests that the quality of justice improves when there is a political minority judge (a whistleblower) on a circuit court panel who can bring to the fore doctrinal inconsistencies caused by the majority's otherwise unchecked implementation of its political or ideological preferences.³⁷ Professor Kim's study of Title VII sex discrimination, and her rejection of WT, focuses too narrowly on the political alignment of the minority judge with the reviewing higher court as the key explanatory mechanism; it could be that the alignment effect is produced by legal doctrine already set down or endorsed by the reviewing court (doctrine that can certainly reflect political preferences generally). The study does keep the debate over appellate decisionmaking going, but, unfortunately, it does not address a key piece of the puzzle—the role of legal doctrine.

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³⁷ For a judicial-reform proposal based on this principle, see Emerson H. Tiller & Frank B. Cross, Colloquy, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215 (1999).