

# The *Dobbs* Leak as an Illustration of the Impasse Between Legal Ethics and Reality

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## INTRODUCTION

The creation and interpretation of legal ethics tends to exist in a vacuum. It is difficult to predict all the ways legal ethics will be interpreted and enforced. Because the interpretation and enforcement of legal ethical codes can be unpredictable, legal ethical codes cannot adequately anticipate every situation that may arise. There is no way around this reality, and this Note does not suppose there is. Instead, this Note seeks to demonstrate how the *Dobbs* leak illustrates the impasse between legal ethics and reality.

On May 2, 2022, Politico leaked what was reportedly the draft majority opinion in the high-profile case *Dobbs v. Jackson Women's Health Organization*.<sup>1</sup> The Politico article stated that the opinion was written by Justice Samuel Alito, and “[a] person familiar with the court’s deliberations said that four of the other Republican-appointed justices – Clarence Thomas, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett – had voted with Alito . . . and that line-up remains unchanged as of this week.”<sup>2</sup>

Chief Justice Roberts confirmed the authenticity of the leak the following day.<sup>3</sup> Having an entire draft of a Supreme Court opinion leaked to the press prior to the issuance of the official decision was unprecedented. The leak was followed by uproar from not only pro-choice advocates but also legal scholars who were trying to discern the impact of the leak on the justice system.<sup>4</sup> There was specific concern over how the leak would affect the legitimacy of the Court and the Court’s deliberation process.<sup>5</sup> This Note seeks to add to that conversation by

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1. Josh Gerstein and Alexander Ward, *Supreme Court has voted to overturn abortion rights, draft opinion shows*, POLITICO (May 2, 2022 8:32 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/RGQ9-ZKP3>].

2. *Id.*

3. Press Release, Supreme Court of the U.S. (May 3, 2022), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_05-03-22](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22) [<https://perma.cc/W8YR-QF7A>].

4. See, e.g., Ilya Shapiro, *Dobbs Leak Is Biggest Threat to Court Legitimacy in Living Memory*, NEWSWEEK (May 18, 2022), <https://www.newsweek.com/dobbs-leak-biggest-threat-court-legitimacy-living-memory-opinion-1707023> [<https://perma.cc/8ZNU-H7EY>]; Adam Liptak, *Critical Moment for Roe, and the Supreme Court's Legitimacy*, THE NEW YORK TIMES (Dec. 6 2021), <https://www.nytimes.com/2021/12/04/us/politics/mississippi-supreme-court-abortion-roe-v-wade.html> [<https://perma.cc/JRT8-Q3ZG>].

5. See Shapiro, *supra* note 4; Liptak, *supra* note 4.

considering what the *Dobbs* leak reveals about legal ethics, namely that the *Dobbs* leak is an illustration of the unbridgeable gap between legal ethics and reality.

The *ABA Model Code of Judicial Conduct*, the *Code of Conduct for U.S. judges*, and the *Code of Conduct for U.S. Judicial Employees* dictate that judges and their employees must refrain from making public statements about pending and impending cases before them in order to maintain impartiality.<sup>6</sup> Impartiality is vital to the judiciary and serves to promote public confidence in the court.<sup>7</sup> By effectively making a public comment about a pending case, leaking the opinion violated each of the aforementioned ethical codes.<sup>8</sup> Legal scholars expressed concern that in violating the ethical code, the *Dobbs* leak would harm the legitimacy of the Court and negatively impact the Court's ability to do its job diligently and unbiasedly.<sup>9</sup> After all, legal ethics exist, in part, to protect against these potential harms.<sup>10</sup> However, despite violating legal ethics, the leak served an important practical purpose: giving people notice that *Roe* would soon be overturned, leaving no legal protection for abortion access. The *Dobbs* leak illustrates how an action can be both a violation of legal ethics and serve a pertinent societal function.

This Note begins by first examining the purpose and limits of legal ethics in Part II before arguing the leak should be considered a violation of legal ethics despite the lack of a binding ethical code for the Supreme Court<sup>11</sup> in Part III. The American Bar Association provides a model code for judicial conduct that typically serves as an outline for states to create their own judicial ethical codes and the judicial code for most federal judges.<sup>12</sup> Despite being nonbinding, the

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6. ABA MODEL CODE OF JUDICIAL CONDUCT, Rules 2.10(A), (C), 2.12 (2020) [hereinafter MODEL CODE]; THE JUD. CONF. OF THE U.S., CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(6) (2019) [hereinafter JUDGES' CODE]; THE JUD. CONF. OF THE U.S., CODE OF CONDUCT FOR UNITED STATES JUDICIAL EMPLOYEES, Canon 3(D) (2019) [hereinafter JUDICIAL EMPLOYEES' CODE]. Model Code Rule 2.10 specifically prohibits comments "that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending." MODEL CODE Rules 2.10(A). The Annotated Model Code lists comments about the following topics as prohibited: merits of a case, decisions to be issued, and criticism of a party or lawyer in the case. ARTHUR H. GARWIN, MARY McDERMOTT, & DENNIS A. RENDLEMAN, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 228-231 (American Bar Association, 3d ed. 2016). Intent is not required, and forum is not relevant. *Id.* Further, the Reporters' Notes to the Model Code only explicitly permits judges to respond when their conduct is in question. CHARLES E. GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 42 (American Bar Association, 2009). For the purposes of this Note, these understandings of Rule 2.10 constitute a prohibition from making public statements about pending and impending cases.

7. MODEL CODE, PREAMBLE ¶ 1.

8. MODEL CODE, Rules 2.10(A), (C), 2.12; JUDGES' CODE, Canon 3(A)(6); JUDICIAL EMPLOYEES' CODE Canon 3(D).

9. *See infra* Part III.

10. *See, e.g.*, MODEL CODE, PREAMBLE ¶ 1.

11. For the purposes of this Note any reference to the Supreme Court or the Court is meant to include the justices and judicial staff of the Supreme Court.

12. *Compare, e.g.*, MODEL CODE with JUDGES' CODE.

available ethical codes can act as a basis for evaluation of the Court. This Note will proceed by considering how the leak affected the Court's legitimacy and deliberation process in Part IV. Legal scholars feared the leak would harm the Court's legitimacy and deliberation process, both of which ethical codes seek to protect.<sup>13</sup> Data suggests that these fears did not become reality,<sup>14</sup> reflecting how legal ethics' protections can be misaligned with reality. Lastly, Part V of the Note will look at the practical implications of the leak and how neither party to the *Dobbs* case was exclusively placed in an advantageous or disadvantageous position. The practical implications of the leak highlight how the leak, despite violating legal ethics, served an important purpose. In whole, the *Dobbs* leak exemplifies that there is a gap between legal ethics and reality; something can be a violation of legal ethics while still having material function.

### I. PURPOSE AND LIMITS OF ETHICAL CODES

Ethical codes help maintain the judiciary's independent and impartial nature by creating a standard of uniformity and by regulating the ethics of judicial action.<sup>15</sup> The American Bar Association has created a *Model Code of Judicial Conduct* (the *Model Code*), a nonbinding and aspirational set of standards of judicial ethics<sup>16</sup> that is meant to be used by judges and judicial staff.<sup>17</sup> The *Model Code* states that by establishing uniformity and regulation, the *Model Code* can "strive to maintain and enhance confidence in the legal system."<sup>18</sup>

The *Model Code* recognizes its own limits by stating that it is meant to establish standards for ethical conduct and is not exhaustive.<sup>19</sup> Also, in recognition of its limits, the *Model Code* states that disciplinary action need not be taken for every ethics violation.<sup>20</sup> When disciplinary action is being considered, the disciplinary body should consider various factors of the violation such as "the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity . . . and the effect of the improper activity upon the judicial system or others." By establishing these factors and acknowledging that not every violation of legal ethics warrants discipline, the *Model Code* recognizes that its own standards are not unequivocal. The *Dobbs* leak is one example of how the standards' equivocal nature can be symbolic of an action being a violation of legal ethics while still having a functional purpose. When looking at the *Dobbs* leak under each of the *Model Code*'s factors, the duality of being a violation and having a purpose

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13. See *infra* Part III.

14. See *infra* Part III.

15. MODEL CODE, PREAMBLE ¶ 2, APPLICATION ¶ 1, Comment ¶ 1.

16. MODEL CODE, SCOPE ¶ 4.

17. MODEL CODE, APPLICATION ¶ I(A), CANON 2.12.

18. MODEL CODE, PREAMBLE ¶ 1.

19. MODEL CODE, PREAMBLE ¶ 3.

20. MODEL CODE, at SCOPE ¶ 6.

becomes more visible. The *Dobbs* leak was undoubtedly a serious transgression, and there was concern about how the leak would affect the judiciary, but the facts and circumstances of the transgression arguably gave the leak purpose, namely by giving people notice that *Roe* may be overturned.<sup>21</sup>

## II. ETHICAL CODE OF THE SUPREME COURT<sup>22</sup>

The Supreme Court is not bound by any ethical code.<sup>23</sup> The Judicial Conference of the United States maintains the *Code of Conduct for United States Judges* (the *Code*), an ethical code that is binding for nearly all other federal judges.<sup>24</sup> The Judicial Conference has also developed the *Code of Conduct for Judicial Employees*, providing binding ethical guidance for nearly all employees of the federal judiciary except the employees of the Supreme Court.<sup>25</sup> States (as well as the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands) maintain their own ethical codes that are largely derived from the American Bar Association's *Model Code of Judicial Conduct* (the *Model Code*).<sup>26</sup> None of these codes regulate the ethical conduct of Supreme Court justices or their staff. The Supreme Court states that they consult the Code along with other authorities when faced with ethical dilemmas,<sup>27</sup> but ultimately the Court is not bound by a code. Consequently, there is no standardized enforcement mechanism for legal ethics on the Supreme Court.

The lack of an ethical code for the Court has been a source of controversy for years.<sup>28</sup> Supreme Court justices are routinely criticized for action or inaction that would typically be considered a violation of the previously mentioned ethical codes.<sup>29</sup> A common would-be violation is the failure of justices to recuse themselves

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21. See *Infra* Part III.

22. Since this article has been submitted for publication, the Supreme Court has adopted a code of conduct. The introduction to the Code reads: The absence of a Code . . . has led in recent years to the misunderstanding that the Justices of this Court, unlike all other jurists in the this country, regard themselves as unrestricted by any ethics rules. To dispel this misunderstanding, we are issuing this Code, which largely represents a codification of principles that we have long regarded as governing our conduct." This section give examples of how this statement has proven to be untrue for the Court on multiple occasions. Additionally, the new Code does not have any apparent enforcement mechanism, giving rise to the question of if this Code will have any meaningful impact on the Court. In short, this section remains relevant despite the Court's adoption of its Code of Conduction.

23. JUDGES' CODE, INTRODUCTION (2019).

24. *Id.*

25. JUDICIAL EMPLOYEES' CODE § 310.10(a) (2019).

26. Compare, e.g., MODEL CODE with CONN. CODE OF JUDICIAL CONDUCT.

27. SUPREME COURT, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4–5 (2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

28. See, e.g., *The Effort To Implement A Supreme Court Code of Ethics*, NPR (Apr. 17, 2022), <https://www.npr.org/2022/04/17/1093265007/the-effort-to-implement-a-supreme-court-code-of-ethics> [<https://perma.cc/4Q3J-Q3HS>].

29. See, e.g., *Code of Ethics*, FIX THE COURT, <https://fixthecourt.com/fix/code-of-ethics/> [<https://perma.cc/3KC5-MGEN>]; *Accountable to None: The Urgent Need for Supreme Court Ethics Reforms*, Alliance for Justice (2022), <https://www.afj.org/accountable-to-none-the-urgent-need-for-supreme-court-ethics-reform/> [<https://perma.cc/KL38-ECCB>].

when other ethical codes would call for recusal.<sup>30</sup> A recent and prominent example of this is Justice Thomas's failure to recuse himself from cases before the Court relating to the January 6, 2021 attack on the Capital despite evidence indicating that his wife was connected to the January 6 rally and to attempts to overturn the 2020 election.<sup>31</sup> Justice Thomas's inaction appears to be a violation of Rule 2.11(A)(2)(c) of the *Model Code* and Canon 3(C)(d)(iii) of the *Code*.<sup>32</sup> However, Justice Thomas was not required to recuse himself because there is no ethical code requiring him to do so.

Another famous example is that of Justice Kagan when she did not recuse herself from *NFIB v. Sebelius* despite being the Solicitor General when the Affordable Care Act was passed.<sup>33</sup> While Solicitor General, Justice Kagan sat in on at least one meeting that discussed potential litigation against the Affordable Care Act.<sup>34</sup> Attending meetings about specific cases as a lawyer, typically prohibits that person from later acting as a judge in matters regarding that case under Rule 2.11(6)(a)–(c) of the *Model Code* and Canon 3(C)(b), (d)–(e) in the *Code*.<sup>35</sup> Justice Kagan was not subject to the prohibition because neither of these codes (nor any other ethical codes) are binding on Supreme Court justices.

There have been numerous calls for the Court to adopt a binding ethical code and legislative pushes for Congress to impose such a code both before and after the leak.<sup>36</sup> Nothing has come to fruition. Currently, the closest thing to an ethical code for the Supreme Court is the Courthouse Ethics and Transparency Act, which creates a public database where justices and federal judges are required to make financial disclosures.<sup>37</sup> The Act was signed into law by President Biden in May 2022 after the Wall Street Journal reported that over 130 federal judges failed to recuse themselves in cases where there was a financial conflict of interest.<sup>38</sup> The Act is not comprehensive enough to be viewed as an ethical code comparable to the *Code* or the *Model Code* for the Supreme Court but is a step toward accountability for Supreme Court justices.

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30. James V. Grimaldi, Coulter Jones & Joe Palazzolo, *Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, THE WALL STREET JOURNAL (Sept. 28, 2021 9:07 AM), <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421> [<https://perma.cc/DWX8-L46G>].

31. Nina Totenberg, *Legal ethics experts agree: Justice Thomas must recuse in insurrection cases*, NPR (Mar. 30, 2022 5:00 AM), <https://perma.cc/XG9F-5LQP>.

32. MODEL CODE, RULE 2.11(A)(2)(C); JUDGES' CODE, CANON 3(C)(d)(iii).

33. Lydia Wheeler and Kimberly Strawbridge Robinson, 'New Era' of Scrutiny Brings Calls for Supreme Court Ethics, BLOOMBERG LAW (March 20, 2023 4:50 AM), <https://news.bloomberglaw.com/us-law-week/new-era-of-scrutiny-brings-calls-for-supreme-court-ethics-code-22> [<https://perma.cc/8T5D-7RF7>].

34. *Id.*

35. MODEL CODE, RULE 2.11(6)(a)–(c); JUDGES' CODE, CANON 3(C)(b) and (d)–(e).

36. See, e.g., *The Effort To Implement A Supreme Court Code of Ethics*, *supra* note 28.

37. Madeleine Carlisle, *You'll Soon Be Able to Look Up Supreme Court Justices' Wall Street Investments*, TIME (May 13, 2022 3:44 PM) <https://time.com/6176657/supreme-court-justices-ethics-rules/> [<https://perma.cc/6PYH-CN4D>].

38. Grimaldi, Jones & Palazzolo, *supra* note 30.

Because no code exists and there has been little (if any) standardized enforcement of legal ethics within the Court, the *Dobbs* leak is arguably not an ethical violation. This is not to say there would have been no repercussions for the person responsible for the leak had they been identified.<sup>39</sup> However, because the Court uses nonbinding ethical codes, the Court would have no textual basis for the consequences.

In an attempt to hold the Court accountable, this Note will consider the leak to be a violation of legal ethics despite the absence of a Supreme Court ethical code that says so. Regardless of if the leak were made by a Justice or someone else on the Supreme Court staff, the leak would be an ethical violation under the *Model Code of Judicial Conduct*, the *Code of Conduct for United States Judges*, and/or the *Code of Conduct for Judicial Employees* and should consequently be treated as a violation. Each code refers to the importance of protecting the impartiality of the judiciary by prohibiting comments on pending and impending cases.<sup>40</sup> Leaking the complete draft of an unissued opinion betrays these confidences.

### III. THE *DOBBS* LEAK'S IMPACT ON THE COURT

The *Dobbs* leak violated legal ethics but did not result in harms that the ethical codes seek to prevent, once again revealing the gap between real life and legal ethics. Ethical codes, in part, seek to bolster legitimacy in the Court while protecting confidential information.<sup>41</sup> The Supreme Court has explained that disallowing public comments on pending and impending cases is especially important for the Court so that the justices can have open and honest deliberations without fear of their statements being made public.<sup>42</sup> Disallowing public comments can also protect justices from being swayed by public pressure.<sup>43</sup> There was concern that in

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39. Predicting those consequences is difficult, given the unprecedented nature of the leak. One of the only other major leaks to come from the Supreme Court was the *Roe v. Wade* decision. A clerk had disclosed the outcome of *Roe* to a reporter on the condition it would only be reported once the Court issued its opinion. The ruling was slightly delayed, so the story hit the newsstands a few hours before the Court issued its decision. Then-Chief Justice Warren Burger sent a letter to the other justices demanding the leaker be identified and punished. The clerk approached the Chief Justice to turn in his resignation, but after explaining the situation, he was allowed to continue clerking. While the story has become a cautionary tale for clerks, there was apparently no official punishment. This leak is distinct from *Dobbs* because the clerk only leaked the outcome whereas with *Dobbs* an entire draft opinion was leaked. James D. Robenalt, *The 1973 Roe v. Wade decision also was leaked to the press*, THE WASHINGTON POST (May 2, 2022 11:48 PM), <https://www.washingtonpost.com/history/2022/05/02/leak-time-magazine-roe-wade/> [https://perma.cc/JK3M-E4XL].

40. JUDGES' CODE, CANON 3(A)(6); JUDICIAL EMPLOYEES' CODE, CANON 3(D); MODEL CODE, RULE 2.10 (A), (C).

41. JUDGES' CODE, CANON 3(A)(6); JUDICIAL EMPLOYEES' CODE, CANON 3(D); MODEL CODE, RULE 2.10 (A), (C).

42. See generally Ryan C. Black & Timothy R. Johnson, *Behind The Velvet Curtain: Understanding Supreme Court Conference Discussions Through Justices' Personal Conference Notes*, 19 J. OF APP. PRAC. AND PROCESS 223 (2018).

43. See Jan Crawford, *Roberts switched views to uphold health care law*, CBS NEWS (July 2, 2012 9:43 PM), <https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/> [https://perma.cc/M9QM-V8SK] (reporting that Chief Justice Roberts may have changed his vote because of public pressure).



violating legal ethics, the *Dobbs* leak broke those protections and that it would lead to delegitimization of the Court.<sup>44</sup> These concerns have shown to be misguided.<sup>45</sup> The leak does not appear to be exclusively responsible for decreasing legitimacy in the Court, and it does not appear to have impacted deliberations or prompted justices to change their vote.

#### A. LEGITIMACY

When the *Dobbs* decision was leaked, some legal scholars expressed concern that the ethics violation would negatively impact Americans' perceived legitimacy of the Supreme Court.<sup>46</sup> Chief Justice Roberts released a statement following the leak that read, "To the extent this betrayal of the confidences of the Court was intended to undermine the integrity of our operations, it will not succeed."<sup>47</sup> However, polls conducted following the leak found that in the time between the *Dobbs* leak and the release of the official decision, confidence in the Supreme Court was the lowest it had ever been with only twenty-five percent of Americans having confidence in the Supreme Court.<sup>48</sup> This is five percentage points lower than the prior record low and eleven percentage points lower than in 2021.<sup>49</sup> However, suggesting the leak alone is at fault for decreased confidence in the Supreme Court is misleading and untrue. Favorability toward the Court has largely been trending downward for decades among the American people.<sup>50</sup> Because the leak is unprecedented and confidence in the court had begun trending downward prior to the leak, the leak itself is likely not the sole reason for declining favorability toward the Court.

In addition to decreased favorability, Americans' ratings of the Supreme Court are more politically polarized than ever before.<sup>51</sup> Favorability and political partisanship appear to go hand in hand. For example, the Supreme Court's 2015 term included ideologically liberal rulings on the Affordable Care Act and same-sex marriage.<sup>52</sup> Also in 2015, favorable views of the Supreme Court were at a historic low largely due to Republican dissatisfaction.<sup>53</sup> The current record-low favorability toward the

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44. See, e.g., Noah Feldman, *Abortion Case Leak Shows That The Supreme Court Is Broken*, BLOOMBERG (May 3, 2022), <https://www.bloomberg.com/opinion/articles/2022-05-03/leak-of-supreme-court-roe-v-wade-draft-weakens-justices-legitimacy> [<https://perma.cc/S2XT-PDBF>]; Shapiro, *supra* note 4.

45. *Infra* Part III(A).

46. See, e.g., Feldman, *supra* note 44; Shapiro, *supra* note 4.

47. Press Release, *supra* note 3.

48. Jeffery M. Jones, *Confidence In The U.S. Supreme Court Sinks To Historic Low*, GALLUP (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx> [<https://perma.cc/7ZRN-DZD7>].

49. *Id.*

50. *Positive Views Of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RESEARCH CENTER (Sept. 1, 2022), <https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/> [<https://perma.cc/4J7F-7GJT>].

51. *Id.*

52. *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Oct. 6, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx> [<https://perma.cc/AVE8-K8J4>].

53. *Id.*

Supreme Court is driven by dissatisfaction within the Democratic party and comes after the Supreme Court's overturning of *Roe v. Wade*.<sup>54</sup> Following the *Dobbs* decision, Gallup found that "[c]onfidence in the Supreme Court is down by double digits among both Democrats (30% to 13%) and independents (40% to 25%) this year, but it is essentially unchanged among Republicans (37% to 39%),"<sup>55</sup> supporting the idea that favorability of the Supreme Court is likely influenced by partisan ideology.

Two studies conducted by Nathan T. Carrington and Logan Strother confirmed that peoples' perceptions of the Court are less swayed by the fact that there was a leak than they are by how the contents of that leak align with their political beliefs.<sup>56</sup> The first study evaluated how the public felt about specific strategic behaviors taken by the justices (e.g., coalition building, vote trading) to determine if new information about the Court's inner-workings affected how the public perceived the Court.<sup>57</sup> The study found that the revelation of this type of information did have the potential to influence the public's perception of the Court regardless of how the information was discovered. Revealing this type of strategic behavior would unveil the "unflattering inner-workings of the Court," and consequently leave people with a more negative view of the Court.<sup>58</sup> However, Carrington and Strother then conducted a second study analyzing how the attitudes found in the first study compare to people's attitudes toward leaks from the Court.<sup>59</sup> The second study evaluated how people felt about the Court after coming across leaks that revealed the Court's upcoming opinion and strategic behavior taken on behalf of the justices to reach that outcome.<sup>60</sup> This study found that the public perception of the Court was not changed by the leak itself or by the strategic behavior that the leak revealed.<sup>61</sup> Rather, people were more swayed by whether or not the contents of the leak aligned with their political ideology.<sup>62</sup>

Not only are people's perception of the Court influenced by politics, but people also believe that the Court itself is motivated by politics.<sup>63</sup> Eighty-four percent of Americans say that justices should not bring their personal political views to the bench with them,<sup>64</sup> and the *Code*,<sup>65</sup> the *Model Code*,<sup>66</sup> and the *Code of Conduct*

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54. *Id.*

55. Jones, *supra* note 48.

56. NATHAN T. CARRINGTON AND LOGAN STROTHER, PLUGGING THE PIPE: EVALUATING THE (NULL) EFFECTS OF LEAKS ON SUPREME COURT LEGITIMACY 19–20 (2022).

57. *Id.*, at 10–16.

58. *Id.*, at 10.

59. *Id.*, at 17–23.

60. *Id.*

61. *Id.*, at 19–20.

62. *Id.*

63. *Public's Views Of Supreme Court Turned More Negative Before News Of Breyer's Retirement*, PEW RESEARCH CENTER (Feb. 2, 2022), <https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/> [<https://perma.cc/6Q2S-69NS>].

64. *Id.*

65. JUDGES' CODE, CANON 3(A)(1).

66. MODEL CODE, RULE 2.3(B).



for *Judicial Employees*<sup>67</sup> uphold this belief. However, only sixteen percent of Americans believe the justices do a good job at this.<sup>68</sup> Unsurprisingly, people believe that justices nominated by a president from their party are more likely to be politically neutral.<sup>69</sup> Further, sixty-one percent of Americans believe the Supreme Court is motivated primarily by politics while only thirty-two percent believe the Court is motivated by the law.<sup>70</sup>

Both studies that found these statistics were conducted prior to the *Dobbs* leak, and qualitative data does not make it difficult to understand why these attitudes existed. In recent history, Supreme Court nominations have become interwoven with partisan politics. Robert Bork's nomination is considered to be the beginning of the entanglement.<sup>71</sup> In response to Bork's conservative ideology, Senator Kennedy famously took to the Senate floor within hours of the nomination, stating, "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, and schoolchildren could not be taught about evolution."<sup>72</sup> Kennedy's speech marked the beginning of Congress's partisan divide on Supreme Court nominees.<sup>73</sup> Years later, Merrick Garland's confirmations were blocked because it was near the end of a Presidential term, a move that was unprecedented and alleged to be motivated by politics.<sup>74</sup> People have also called for justices to retire so that their replacement can be nominated by a president with matching political ideology.<sup>75</sup> While a

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67. JUDICIAL EMPLOYEES' CODE, CANON 1, CANON 5.

68. *Public's Views Of Supreme Court Turned More Negative Before News Of Breyer's Retirement*, *supra* note 63.

69. *Id.*

70. Bryan Metzger and Oma Seddiq, *More Than 60% Of Americans Say The Supreme Court Is Motivated By Politics, While Just 32% Believe They Rule Based On Law: Poll*, BUSINESS INSIDER (Nov. 19, 2021) <https://www.businessinsider.com/61-percent-think-supreme-court-motivated-politics-not-law-poll-2021-11> [<https://perma.cc/BS76-Q6FJ>].

71. Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever'*, NPR (Dec. 19, 2012 4:33 PM), <https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever> [<https://perma.cc/B79K-PC6Y>].

72. *Id.*

73. *Id.*

74. Roxanne Roberts, *Merrick Garland was historically snubbed — but he's emerged more respected than ever: After Mitch McConnell blocked Garland's Supreme Court nomination, the judge quietly marched onward.*, WASHINGTON POST (Oct. 9, 2020), [https://www.washingtonpost.com/lifestyle/style/merrick-garland-supreme-court-nomination/2020/10/06/7098085a-0719-11eb-9be6-cf25fb429f1a\\_story.html](https://www.washingtonpost.com/lifestyle/style/merrick-garland-supreme-court-nomination/2020/10/06/7098085a-0719-11eb-9be6-cf25fb429f1a_story.html) [<https://perma.cc/XV8E-E4DJ>].

75. *See, e.g.*, Tucker Higgins, *Ruth Bader Ginsburg Fires Back Against Critics Who Say She Should Have Retired Under Obama: 'Who Would You Prefer On The Court?'*, CNBC (Sept. 18, 2019), <https://www.cnbc.com/2019/09/18/rbg-fires-back-against-critics-who-say-she-should-have-retired-under-obama.html> [<https://perma.cc/2JB4-UV4K>]; Ian Millhiser, *Sotomayor And Kagan Need To Think About Retiring*, VOX (Dec. 21, 2022), <https://www.vox.com/policy-and-politics/23507944/supreme-court-sonia-sotomayor-elena-kagan-ruth-bader-ginsburg-retire> [<https://perma.cc/H4SW-ASPE>]; Krishnadev Clamur and Nina Totenberg, *Progressives Want Justice Stephen Breyer To Retire. His Response? Not Yet*, NPR (Sept. 9, 2021), <https://www.npr.org/2021/09/09/1035092720/progressives-want-justice-stephen-breyer-to-retire-his-response-not-yet> [<https://perma.cc/24BW-65RD>].

political approach to the Supreme Court is not new, the approach does indicate that politics plays a role in the Supreme Court and Americans are aware of this.

The evidence indicates that Americans perceive politics to play a role in the judiciary, even if they do not think it should.<sup>76</sup> People are more likely to hold this belief if the judiciary is acting contrary to their political ideology.<sup>77</sup> The contrast between the harms ethical codes seek to prevent and the reality of what influences people's perception of the Court illustrates that ethical codes cannot possibly anticipate every situation where legal ethics will arise, nor can the codes anticipate how every ethical violation will affect the judiciary. In the immediate instance, the leak itself was likely not the only factor that led to the court's decreased legitimacy; whether or not the decision had been leaked, American favorability toward the Court would likely have declined because overturning *Roe* was unpopular among Americans.<sup>78</sup>

#### B. DELIBERATIONS AND PUBLIC PRESSURE

Violating the ethical code's mandate for silence about pending and impending cases did not seem to change the justices' decision-making process in any substantial way. A closer examination shows that deliberations appear to be unaffected, and public pressure did not apparently sway any justice's vote.

Some legal scholars hypothesized that the sacredness of deliberations would be compromised because justices would no longer trust that the deliberations were truly confidential after the leak, but there is no reason to assume that has become reality. Perhaps one of the most famous leaks regarding deliberations came after the *NFIB v. Sebelius* ruling, where CBS reported that Justice Roberts changed his vote because of political pressure.<sup>79</sup> There is nothing to suggest that the confidentiality of deliberations was compromised after this leak. If leaking private, unrecorded conversations does not harm the deliberation process, it is unlikely that leaking a draft opinion would do so. During deliberations, justices can make statements that are forever unheard by the public, whereas opinions are released for public consumption. Draft opinions, therefore, seem unlikely to hold information justices planned to forever keep confidential.

Further, most of the changes made in the *Dobbs* opinion between the leak and the issuance of the opinion were corrected citations and rebuttals to

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76. *Public's Views Of Supreme Court Turned More Negative Before News Of Breyer's Retirement*, *supra* note 63.

77. *Supreme Court Trust, Job Approval at Historical Lows*, *supra* note 52. Cf. CARRINGTON AND STROTHER, *supra* note 56 at 25 (finding that "policy outcomes have also been shown to moderate how people respond to procedural transgressions at the Court").

78. See, e.g., *Supreme Court Trust, Job Approval at Historical Lows*, *supra* note 52; *U.S. Public Continues To Favor Legal Abortion, Oppose Overturning Roe v. Wade*, PEW RESEARCH CENTER (Aug. 29, 2019), <https://www.pewresearch.org/politics/2019/08/29/u-s-public-continues-to-favor-legal-abortion-oppose-overturning-roe-v-wade/> [<https://perma.cc/W4QU-6JD5>].

79. Crawford, *supra* note 43.

counterarguments.<sup>80</sup> About the lack of change between the draft and the final opinion, Professor Mark Graber of the Francis King Carey School of Law stated:

This was a fairly generic argument against *Roe*, and so it's not surprising that it didn't change much. Alito already had his majority. He was never getting Chief Justice Roberts. . . . On a lot of issues people change their mind. But on something like abortion, when you've been thinking about it since you were 15, you're not changing your mind.<sup>81</sup>

This analysis suggests that while major revisions to opinions are not uncommon, it seems unlikely that the draft opinion would have gone through substantial changes prior to the final issuance.<sup>82</sup> It is unlikely that a justice was going to produce a novel legal argument about abortion that was going to change another justice's mind. Even if the opinion underwent major revisions and the dicta of the opinion had changed or *Roe* was upheld, people were not harmed by preparing for *Roe* to be overturned. People would not have been in a worse position if they had prepared for *Roe* to be overturned but later found out that *Roe* was upheld than if they had correctly predicted that *Roe* would be overturned.

Some people theorized that the leak was meant to put public pressure on justices to vote a certain way; conservative justices would be pressured to vote with the majority or conversely, the public outrage would pressure a justice to switch sides.<sup>83</sup> The ethical codes (that the Supreme Court consults but is not bound by) state that judges should not be swayed by public pressure, theoretically making this point moot.<sup>84</sup> Of course, defying public pressure is easier said than done. Allegedly, public pressure was enough to change Justice Roberts's vote in the *Sebelius* case.<sup>85</sup> However, the American public's opinion on abortion rights was already well-documented,<sup>86</sup> and it was clear that the Court's decision would likely impact people's perception of the Court.<sup>87</sup> The leak did not provide the justices with unforeseen information.

Both regarding the sanctity of deliberations and public pressure, the leak violated the ethical codes without causing the harms the code seeks to prevent. However, causing harm is not a prerequisite for being an ethical violation. In fact, the opposite

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80. John Keefe, Shania Shelton, Kaanita Iyer, JiMin Lee, Ariella Phillips, Kenneth Uzquiano & Christopher Hickey, *Track changes between the abortion decision and the leaked draft*, CNN (June 27, 2022), <https://www.cnn.com/interactive/2022/06/us/supreme-court-abortion-dobbs-decision-changes/> [<https://perma.cc/P9FA-JZ2L>].

81. Jimmy Hoover, *From Leak To Decision, Dobbs Majority Didn't Waiver*, LAW360 (June 24, 2022), <https://www.law360.com/articles/1506064/from-leak-to-decision-dobbs-majority-didn-t-waver> [<https://perma.cc/S65Q-NQ3Z>].

82. *Id.*

83. Shapiro, *supra* note 4.

84. JUDGES' CODE, Canon 2(B); JUDICIAL EMPLOYEES' CODE, Canon 2; MODEL CODE, Rule 2.4.

85. Crawford, *supra* note 43.

86. See, e.g., *U.S. Public Continues To Favor Legal Abortion, Oppose Overturning Roe v. Wade*, *supra* note 78.

87. Liptak, *supra* note 4.

is true: the leak must still be considered a violation to maintain the uniformity that the codes seek to impose.<sup>88</sup> The *Dobbs* leak highlights the gap between legal ethics and the real-world consequences of ethical violations by illustrating how an action can violate legal ethics while avoiding the harms legal ethics protects against.

#### IV. PRACTICAL IMPLICATIONS OF THE LEAK

The *Dobbs* leak served a practical purpose despite violating legal ethics, and the leak did not put either party of the *Dobbs* case in a position where they alone would be harmed or helped by the leak. The general public, on the other hand, was affected by the leak. If the *Dobbs* opinion had not been leaked, people would have been stripped of their bodily autonomy within a matter of minutes. In some states, trigger bans<sup>89</sup> would cause an immediate revocation of the right to abortion once the final ruling<sup>90</sup> came down. In states with trigger bans, people who had legally scheduled abortions would immediately have been stripped of that right with little or no recourse. Trigger laws were also introduced for the Medicaid expansion,<sup>91</sup> but these trigger laws have significant differences from the trigger bans for abortion, namely the immediacy with which the trigger laws would be enacted.<sup>92</sup>

Thirteen states had trigger bans<sup>93</sup> in place prior to the issuance of the *Dobbs* opinion, and thirteen other states were predicted to quickly move to severely restrict or ban abortions.<sup>94</sup> This means that over half of the United States was either likely or certain to ban abortion shortly after the *Dobbs* ruling. Some of these

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88. See MODEL CODE, APPLICATION ¶ 1, Comment ¶ 1.

89. A trigger law or trigger ban is a law that is currently unenforceable but will become enforceable if a certain condition is met. In this instance, “trigger ban” refers to laws set to be enacted automatically if *Roe* were overturned. Trigger laws regarding the Medicaid expansion are set to end states’ participation in the expansion if federal funding is reduced.

90. *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, GUTTMACHER INSTITUTE (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> [<https://perma.cc/9JR7-M9MU>].

91. Robin Rudowitz, *Understanding How States Access the ACA Enhanced Medicaid Match Rates*, KAISER FAMILY FOUNDATION (Sept. 29, 2014), <https://www.kff.org/medicaid/issue-brief/understanding-how-states-access-the-aca-enhanced-medicaid-match-rates/> [<https://perma.cc/5869-B6PE>].

92. For purposes of clarity, the remainder of this Note will refer to the term “trigger bans” when discussing abortion and “trigger laws” when discussing the Medicaid expansion.

93. *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, *supra* note 90. There are ongoing legal challenges to states’ trigger bans surrounding abortion. Some states issued temporary restraining orders on their trigger bans. Other states allowed their trigger bans to be enforced immediately without interference. Regardless of the outcomes to the legal challenges to trigger bans, the legal challenges do not change the fact that the right was removed or set to be removed. See Mabel Felix, Laurie Sobel & Alina Salganicoff, *Legal Challenges to State Abortion Bans Since the Dobbs Decision*, KAISER FAMILY FOUNDATION (Jan. 20, 2023), <https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-state-abortion-bans-since-the-dobbs-decision/> [<https://perma.cc/LC6C-9Z3K>]; Chris Kenning, *Legal battles over abortion ‘trigger laws’ continue across US: What to know, state by state*, USA TODAY (July 26, 2022 6:09 PM), <https://www.usatoday.com/story/news/nation/2022/06/29/abortion-trigger-laws-challenged-court/7767228001/> [<https://perma.cc/BN2S-94SJ>].

94. *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, *supra* note 90.

states also announced intentions to criminalize traveling out of the state to obtain abortions.<sup>95</sup> Even if legally permissible, it would have been difficult and impractical for people to go to other states to receive the abortion they had already planned on getting in their own state. People who had made plans for their lives that were predicated on them getting an abortion or having the option to get an abortion would have been devastated. While the leak did not completely remedy this situation, it did provide people with the opportunity to prepare for what would come. Following the leak, Google searches for IUD, Plan B, and contraception spiked.<sup>96</sup> There was an over one hundred and sixty percent increase in Google interest for “buy Plan B online,”<sup>97</sup> and traffic on the Plan C website increased ten-fold.<sup>98</sup> People announced on social media that they were stockpiling Plan B, and doctors had reported an increase in questions about IUDs.<sup>99</sup> These data evidence that people were not ready for an immediate abortion ban because the ban would influence their approach to birth control, and people needed time to consider what, if any changes, they wanted to make. Without the leak, many people would have been unable to adequately prepare for the reversal of *Roe*.

States have also created trigger laws for Medicaid expansion funding.<sup>100</sup> However, the trigger bans surrounding abortion are unique because of how they would immediately deprive people of a right. In contrast, the trigger laws regarding the Medicaid expansion are set to end states’ participation in the expansion if federal funding is reduced.<sup>101</sup> When the Medicaid expansion was announced, the announcement stated the expansion would be one hundred percent financed by the government until 2016, at which point federal funding would phase down to ninety percent by 2020.<sup>102</sup> This explicit timeframe means that it was unlikely that Americans would lose access to Medicaid overnight. In addition, the trigger laws regarding the Medicaid expansion did not criminalize an action. While a state deciding to end participation in the Medicaid expansion would be devastating for many people, the trigger law would not be creating a criminal offense. As noted

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95. Naomi Cahn, June Carbone, & Nancy Levit, *Is it Legal to Travel for Abortion After Dobbs*, BLOOMBERG LAW (July 11, 2022 4:00 AM), <https://news.bloomberglaw.com/us-law-week/is-it-legal-to-travel-for-abortion-after-dobbs> [<https://perma.cc/27A7-43H8>].

96. Abigail Higgins, *People Are Getting IUDs And Plan B Ahead Of A Possible Post-Roe Future*, WASHINGTON POST (May 10, 2022), <https://www.washingtonpost.com/lifestyle/2022/05/10/iud-birth-control-supreme-court-draft-opinion-leak/> [<https://perma.cc/2QT9-GSWE>].

97. Paulina Cachero and Fiona Rutherford, *Women Scramble To Get IUDs, Load Up On Plan B as Roe Worries Hit*, BLOOMBERG (May 3, 2022), <https://www.bloomberg.com/news/articles/2022-05-03/leaked-supreme-court-abortion-opinion-spurs-some-to-stockpile-plan-b-pill> [<https://perma.cc/55A9-TY8Q>].

98. *Id.*

99. Higgins, *supra* note 96.

100. Larisa Antonisse and Robin Rudowitz, *An Overview of State Approaches to Adopting the Medicaid Expansion*, KAISER FAMILY FOUNDATION (Feb. 27, 2019), <https://www.kff.org/report-section/an-overview-of-state-approaches-to-adopting-the-medicaid-expansion-issue-brief/> [<https://perma.cc/KX3Y-K8TN>].

101. *Id.*

102. Rudowitz, *supra* note 91.

in the preceding paragraphs, some trigger bans for abortion laws were to take effect immediately following the decision.<sup>103</sup> Without the leak, people would have been given little to no notice that their access to abortion was criminalized. Getting an abortion or giving an abortion would immediately become a punishable offense.

In addition to trigger laws, a notable feature of the *Dobbs* leak is that neither party was directly impacted by the leak. The leak did not put either party in a special position. There are instances where this would not always hold true. For example, in *Association for Molecular Pathology v. Myriad Genetics Inc.*,<sup>104</sup> the final ruling almost immediately had a negative impact on Myriad Genetics' stock price.<sup>105</sup> Had this decision been leaked, people who had heard about the leak would have had an opportunity to sell their stock in Myriad before the price plummeted, putting Myriad's market value in jeopardy prematurely, and possibly mistakenly, if the outcome of the final ruling was different from the leak; the leak may have been inauthentic, or justices may have changed their vote before the final ruling. Without a leak, the parties can prepare for the Court's decision and anticipate when the decision will come down. The Court may not announce what opinions will be issued on a given day, but the Court does announce what days opinions will be handed down, giving parties at least a general timeframe about when to expect their ruling.

*Myriad* highlights that ethical codes offer protection to the judiciary and those interacting with it. In *Myriad*, the ethical codes prevented significant harm to the participating parties by ensuring the opinion remained confidential until its official issuance. In contrast, *Dobbs* highlights that some violations may serve a practical purpose. Leaking the *Dobbs* draft opinion was not advantageous or disadvantageous for either party exclusively, but the leak gave the public time to anticipate the overturning of *Roe*.

## V. CONCLUSION

Legal ethics serve an important purpose for the judiciary and the legal system as a whole. This should not be confused with the notion that legal ethics always translate into reality the way they were intended. The leak was certainly a violation of legal ethics because of its disregard for the ethical codes' prohibition from public comments.<sup>106</sup> Recognizing the leak as such is important; uniform application of legal ethics is one of the purposes of codifying the

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103. *Supra* notes 89–95 and accompanying text.

104. 569 U.S. 576 (2013).

105. DANIEL MARTIN KATZ, MICHAEL J. BOMMARITO II, TYLER SOELLINGER, AND JAMES MING CHEN, LAW ON THE MARKET? EVALUATING THE SECURITIES MARKET IMPACT OF SUPREME COURT DECISIONS 2 (2015).

106. MODEL CODE, Rules 2.10(A), (C), 2.12; JUDGES' CODE, Canon 3B(6); JUDICIAL EMPLOYEES' CODE, Canon 3(D).



ethical standards.<sup>107</sup> However, the leak does not appear to have delegitimized the Court or impacted the Court's decision-making process.<sup>108</sup> In addition, the leak served the function of giving people notice that *Roe* would potentially be overturned. The *Dobbs* leak highlights that there is an impasse between legal ethics and reality and that ethical violations may have social significance.

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107. MODEL CODE, APPLICATION ¶ 1, Comment ¶ 1.

108. *See supra* Part III.