

Opinion On Roe, Alito cites a judge who treated women as witches and property

By Jill Elaine Hasday

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In his recently leaked draft majority opinion overturning *Roe v. Wade*, Supreme Court Justice Samuel A. Alito Jr. presents what he sees as his most convincing arguments for permitting legislatures to ban abortion. So what is the best Alito can do? One of his prominent strategies is to repeatedly quote and discuss someone he describes as a “great” and “eminent” legal authority, Sir Matthew Hale.

Most Americans have probably never heard of Hale, an English judge and lawyer who lived from 1609 to 1676. Hale was on the bench so long ago that his judgeship included presiding over a witchcraft trial where he sentenced two “witches” to death.

Nonetheless, we are still living in the world that Hale helped create. And as that witchcraft trial suggests, Hale’s influence has not been a “great” development if you believe women have equal humanity with men.

Hale is best known for his “History of the Pleas of the Crown,” a treatise published posthumously in 1736 that became wildly popular with judges and lawyers in England and America. In my years studying women’s legal history, I have read hundreds of American judicial opinions quoting Hale’s treatise.

Hale was not writing for women, who were excluded from the legal profession and judiciary. But he had much to say about women. For example, his pronouncements on rape were bedrocks of American law for generations, and their influence persists.

Hale believed that authorities should distrust women who reported having been raped. In his mind, rape was “an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.” Judges and lawyers endlessly quoted Hale’s canard well into the second half of the 20th century. Echoes of Hale’s suspicion of women still reverberate in American law and culture, helping rapists avoid punishment.

Hale also wrote what became the most frequently cited defense of the marital rape exemption, the doctrine that shielded a husband from prosecution if he raped his wife. Hale explained that a woman’s agreement to marry meant that she had placed her body under her husband’s permanent dominion. In Hale’s words: “The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”

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Courts and legislatures found Hale’s explanation compelling and repeated it for centuries. Until the 1970s, no state would prosecute a husband for raping his wife — no matter the brutality, no matter the evidence.

Why did powerful men find Hale’s rationale for protecting a husband’s sexual prerogatives so convincing? One reason is that Hale’s words fit smoothly into a legal system that gave husbands control over their wives in virtually every context. That regime remained entrenched for most of American history, and important aspects persisted even after sex-based disenfranchisement became unconstitutional in 1920.

It might be tempting to suppose that modern America has wholly repudiated marital rape exemptions. But at least 21 states still treat marital rape more leniently than rape outside of marriage by criminalizing a narrower range of conduct, establishing lesser penalties or creating special obstacles to prosecution.

With this in mind, let’s return to Alito. He discusses Hale so often because he is desperate to establish that the early American legal system was opposed to abortion. He thinks this characterization of the past gives overturning *Roe* a veneer of legitimacy.

There are at least two problems with Alito’s reliance on history. First, Alito has misrepresented the actual historical record. As abundant historical research establishes, the common law that governed America in its first decades and beyond did not regulate abortion before “quickening” — the moment when a pregnant woman first detects fetal movement, which can happen as late as 25 weeks into pregnancy.

Alito reports that Hale “described abortion of a quick child who died in the womb as a ‘great crime’ ” while glossing over the key part of that passage. Hale wrote that abortion was a crime “*if* a woman be quick or great with child.” Note the “if.”

Second, Alito relies on sources such as Hale without acknowledging their entanglement with legalized male supremacy. The men who cited Hale as they constructed the early American legal order refused to give women the right to vote or to otherwise enjoy full citizenship. Relying on that history of injustice as a reason to deny modern women control over their own lives is a terrible argument but apparently the best Alito can do.

Hale was a man who believed women could be witches, assumed women were liars and thought husbands owned their wives’ bodies. It is long past time to leave that misogyny behind.