



Sir Matthew Hale Universal History Archive/Getty Images

Draft Overturning Roe v. Wade Quotes Infamous Witch Trial Judge With Long-Discredited Ideas on Rape

Justice Alito's leaked opinion cites Sir Matthew Hale, a 17th-century jurist

who conceived the notion that husbands can't be prosecuted for raping their wives, who sentenced women to death as "witches," and whose misogyny stood out even in his time.

by Ken Armstrong

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When U.S. Supreme Court Justice Samuel Alito, in a [draft opinion](#) obtained and published this week by Politico, detailed his justifications for overturning Roe v. Wade, he invoked a surprising name given the case's subject. In writing about abortion, a matter inextricably tied to a woman's control over her body, Alito chose to quote from Sir Matthew Hale, a 17th-century English jurist whose writings and reasonings have caused enduring damage to women for hundreds of years.

The so-called marital rape exemption — the legal notion that a married woman cannot be raped by her husband — traces to Hale. So does a long-used instruction to jurors to be skeptical of reports of rape. So, in a way, do the infamous Salem witch trials, in which women (and some men) were hanged on or near Gallows Hill.

Hale's influence in the United States has been on the wane since the 1970s, with one state after another abandoning his legal principles on rape. But Alito's opinion resurrects Hale, a judge who was considered misogynistic even by his era's notably low standards. Hale once wrote a long letter to his grandchildren, dispensing life advice, in which he veered into a screed against women, describing them as "chargeable unprofitable people" who "know the ready way to consume an estate, and to ruin a family quickly." Hale particularly despaired of the changes he saw in young women, writing, "And now the world is altered: young gentlewomen learn to be bold" and "talk loud."

pany to entertain. They know the ready way to consume an estate, and to ruin a family quickly ; but neither know nor can endure to learn or practice the ways and methods to save it or increase it: and it is no wonder that great portions are expected with them, for their portions are commonly all their value, and commonly within a few years, nay, possibly a few months, they run their husbands into debt, or spend as much money as their portions come to ; and then they are a sort of chargeable unprofitable people, they neither know how to housewife or manage what is left unspent ; nor to

An excerpt from Hale's "Letter of Advice." Via Google Books

Hale became Lord Chief Justice of England in 1671. In his time (Hale's contemporaries included Oliver Cromwell and Charles II), Hale was a respected, perhaps even venerated, jurist known for piety and sober judgment. He wrote a two-volume legal treatise, "The History of the Pleas of the Crown," that has proved influential ever since.

Alito, in his draft opinion, invokes "eminent common-law authorities," including Hale, to show how abortion was viewed historically not as a right, but as a criminal act. "Two treatises by Sir Matthew Hale likewise described abortion of a quick child who died in the womb as a 'great crime' and a 'great misprision,'" Alito wrote.

Even before "quickening" — defined by Alito as "the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy" — Hale believed an abortion could qualify as homicide. "Hale wrote that if a physician gave a woman 'with child' a 'potion' to cause an abortion, and the woman died, it was 'murder' because the potion was given *unlawfully* to destroy her child within her," Alito wrote.

Courts have long leaned on precedents established by old cases and the scholarship of legal authorities from centuries gone by. But what happens when you trace citations back to their ancient source? In Hale's case, you sometimes find a man conceiving precepts out of thin air. Other times it was the opposite, as he clung to notions that were already becoming anachronistic in the last half of the 17th century.

Consider the marital rape exemption. In "Pleas of the Crown," Hale wrote, "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." So, according to Hale, marriage, for a woman, amounts to contractual forfeit, in which she loses legal protection or recourse should her husband sexually assault her.

Hale's pronouncement became the accepted common law and served as foundation in the United States for immunizing a husband accused of raping his wife. And where did Hale's pronouncement come from? What did he base it upon? Who knows? "Hale appears to have been the first to articulate what later would become an accepted legal principle, that a husband cannot be charged with raping his wife," according to a footnote in one [law review article](#). Another law review article, titled "[The Marital Rape Exemption: Evolution to Extinction](#)," called Hale's pronouncement "an unsupported, extrajudicial statement" lacking in authority.

Starting in the 1970s, states began to abandon the marital rape exemption, in whole or in part. In 1981, the [Supreme Court of New Jersey wrote](#) that it could find no support for Hale's proposition among earlier writers. Hale's declaration, the court found, "cannot itself be considered a definitive and binding statement of the common law, although legal commentators have often restated the rule since the time of Hale without evaluating its merits." In 1984, the [Supreme Court of Virginia wrote](#): "Hale's statement was not law, common or otherwise. At best it was Hale's pronouncement of what he observed to be a custom in 17th century England." The Virginia court went on to note, "Moreover, Hale cites no authority for his view nor was it subsequently adopted, in its entirety, by the English courts."

Like the marital rape exemption, the so-called Hale Warning to jurors caused centuries of misfortune in the American courts.

In “Pleas of the Crown,” Hale called rape a “most detestable crime.” Then, in words quoted many times since, he wrote, “It must be remembered, that it is an accusation easy to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”

Hale evoked the fear of the false accuser — and made for that fear a legal frame, which lasted for more than 300 years. In weighing the evidence in cases of alleged rape, jurors (all men, in Hale’s time and for long after) needed to consider a series of factors, Hale wrote. Did the woman cry out? Did she try to flee? Was she of “good fame” or “evil fame”? Was she supported by others? Did she make immediate complaint afterward?

Hale’s words and formulation became a standard feature of criminal trials in the United States, with jurors instructed by judges to be especially wary of allegations of rape. The effect was predictable: Charges of rape were frequently rejected. In the United States, one early example was chronicled by historian John Wood Sweet in his soon-to-be-published book, “The Sewing Girl’s Tale.” (I was allowed to read an advance copy.)

In 1793, in New York City, an aristocrat, Henry Bedlow, was accused of raping a 17-year-old seamstress, Lanah Sawyer. Bedlow hired six lawyers, including a future U.S. Supreme Court justice, who used Hale’s framework to destroy Sawyer. Sawyer said she screamed. But, one attorney asked the jury, did she also stamp her feet? Witnesses spoke of Sawyer’s good fame, according to the trial record. But “she may have had the art to carry a fair outside, while all was foul within,” the same attorney argued. “Ultimately, the defense team’s dizzying effort to dispute and distort reality had been part of a relentless effort to transform a young woman who mattered into one who didn’t,” Sweet wrote. The jury took 15 minutes to acquit.

Starting in the 1970s and 1980s, courts in the United States began moving away from instructing juries with Hale’s admonition to be particularly skeptical of rape claims. The repudiation of Hale became so complete that when a Maryland lawmaker, in 2007, invoked Hale’s words in a state legislative hearing, it was met with “outrage,” according to the Washington Post.

Despite those legal changes, the fear of the false rape accuser still persists in the justice system, at times leading to horrendous outcomes. I began researching Hale when writing, with T. Christian Miller, “An Unbelievable

Story of Rape,” published by ProPublica and the Marshall Project. The story reconstructs what happened when a young woman in Lynnwood, Washington, reported being raped. We later expanded the story into a book, “Unbelievable,” in which we described Hale’s influence in rape cases at greater length. (The story also became a Netflix series.)

Then there was Hale’s role in what today is synonymous with the perversion of justice: witch trials.

In 1662, Hale presided at a jury trial in Bury St. Edmunds in which two women, Amy Denny and Rose Cullender, were accused of being witches. In a book on this case, “A Trial of Witches,” authors Ivan Bunn and Gilbert Geis wrote that by 1662, “belief in witches was in retreat in England.” Hale, however, was not part of that retreat. He believed witches were real. “Hale represented not a mainstream position but rather one rapidly becoming anachronistic,” Bunn and Geis wrote.

What’s more, Hale instructed the jurors that witches were real. A written record of the trial recounts what Hale told them: “That there were such creatures as witches he made no doubt at all; for first, the scriptures had affirmed so much. Secondly, the wisdom of all nations had provided laws against such persons, which is an argument of their confidence of such a crime.”

The jury convicted Denny and Cullender, after which Hale sentenced both women to hang. (Four years before, Hale had also sentenced to death another woman convicted of being a witch.)

Hale’s influence, once again, extended beyond the immediate case and his time. Thirty years later, his handling of the trial in Bury St. Edmunds, preserved in written record, served as a model in Salem, Massachusetts, in the infamous witch trials in 1692. “Indeed, the Salem witch-hunts might not have taken place if there had not been a trial at Bury St. Edmunds: the events at Salem notoriously imitated those at Bury,” Bunn and Geis wrote.

Hale is known mostly for his legal treatises. But his views toward women are perhaps best revealed in a letter he wrote to his grandchildren, titled “Letter of Advice.” (In a twitter thread this week I said Hale’s letter was 182 pages long. I may have understated it. I’ve since found a version online that goes on for 206 pages.)

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LETTER OF ADVICE

TO HIS

GRANDCHILDREN,

MATTHEW, GABRIEL, ANNE, MARY, AND FRANCES HALE.

BY SIR MATTHEW HALE,

LORD CHIEF JUSTICE IN THE REIGN OF CHARLES II.

Now first published.

BOSTON:

PUBLISHED BY WELLS AND LILLY.

**SOLD BY VAN WINKLE AND WILEY, NEW-YORK; WEBSTERS AND
SKINNER, ALBANY; AND M. CAREY, PHILADELPHIA.**

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1817.



The title page of Hale's letter. Via Google Books

In this letter, Hale prescribes individualized counsel for three granddaughters.

Mary, he wrote, possessed great wit and spirit, and “if she can temper the latter, will make an excellent woman, and a great housewife; but if she cannot govern the greatness of her spirit, it will make her proud, imperious, and revengeful.”

Frances, he wrote, possessed great confidence: “If she be kept in some awe, especially in relation to lying and deceiving, she will make a good woman and a good housewife.”

Ann, he wrote, possessed a “soft nature.” “She must not see plays, read comedies, or love books or romances, nor hear nor learn ballads or idle songs, especially such as are wanton or concerning love-matters, for they will make too deep an impression upon her mind.”

Hale complained in his letter that young women “make it their business to paint or patch their faces, to curl their locks, and to find out the newest and costliest fashions.” And with that, he was just getting started. Hale followed with a 160-word sentence that is a marvel in its depth of disdain.

“If they rise in the morning before ten of the clock, the morning is spent between the comb, and the glass, and the box of patches; though they know not how to make provision for it themselves, they must have choice diet provided for them, and when they are ready, the next business is to come down, and sit in a rubbed parlour till dinner come in; and, after dinner, either to cards, or to the exchange, or to the play, or to Hyde Park, or to an impertinent visit; and after supper, either to a ball or to cards; and at this rate they spend their time, from one end of the year to the other; and at the same rate they spend their parent's or husband's money or estates in costly clothes, new fashions, chargeable entertainments: their home is their prison, and they are never at rest in it, unless they have gallants and splendid company to entertain.”



Some observers have been taken aback that Alito referenced Hale. But not everyone was surprised. Eileen Hunt, a Notre Dame political science professor who has written extensively about Mary Wollstonecraft, author of the path-breaking 1792 treatise “A Vindication of the Rights of Woman,” tweeted:

“It is a truth universally acknowledged that a conservative Supreme Court justice will cherry-pick an Enlightenment-era man as a timeless authority on reproductive rights but ignore #Wollstonecraft’s pivotal philosophical views on women, mothering, and the sexual double standard.”

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