TUESDAY OPINION

DANA MILBANK

Alito's medieval court is just getting started

Many have speculated that Samuel Alito, in his draft opinion overturning *Roe v. Wade*, is trying to take us back to the 1950s, when White Christian men still ruled.

The Supreme Court justice is actually revisiting the *1250s*, when the judge Henry de Bracton completed his summation of English law and custom "De Legibus et Consuetudinibus Angliae." Alito's opinion, after mocking the *Roe* decision for its "discussion of abortion in antiquity," then provides a discussion of abortion in medieval times: "Henry de Bracton's 13th-century treatise explained that if a person has 'struck a pregnant woman, or has given her poison, whereby he has caused an abortion, if the foetus be already formed and animated . . . he commits homicide.' "

Case closed?

Over the weekend, "Saturday Night Live's" cold open featured a 13th-century Benedict Cumberbatch proposing such a law against abortion (like the "law we have against pointy shoes") and then threatening to burn a witch.

In fairness, Bracton's treatise makes no mention of witches or pointy shoes, according to a searchable version of his work provided by Harvard Law School. But Bracton does have a lot to say about monsters, duels, bastardy, concubines, sturgeon "and other royal fish," the "pillory and the ducking-stool," and "a judgment with infamy."

"Where he ought to be executed by the sword he shall not be put to death in any other way, neither by the axe nor the spear, by cudgels nor by the rope," Bracton informs us. "Similarly, those condemned to be burned alive ought not to be injured by floggings, whippings, or tortures, since many perish while under torture."

So true! Let's take a closer look at the 13th-century work from which Alito draws in his cruel and unusual draft — and perhaps glimpse more of the world to which Alito and his fellow conservatives on the court would return us.

In Bracton's account, "Women differ from men in many respects, for their position is inferior to that of men." Alito didn't cite that passage.

Bracton also outlines procedures for "viewing a woman to discover whether or not she is pregnant" in which "discreet women" should in certain instances "carefully examine her by feeling her breasts and abdomen and in every way" to make sure she wasn't faking. If the exam was inconclusive, the woman could be locked in a "castle at her own cost" where the exam would be repeated daily. Once the woman was found to be pregnant, "the time of conception, how, when, and where, and at what time she believes she is to give birth" was to be made "known to our justices at Westminster."

Should there be suspicion of fraud, Bracton details a requirement to calculate "from the time at which she alleged that she conceived" to determine true fatherhood, as well as the view that "the woman cannot exceed the gestation period by a single day, even where the issue dies in utero or turns into a monster."

Welcome to the post-*Roe* world!

In the treatise Alito leans on, women do have certain rights — if they are chaste. "When a virgin is defiled," Bracton writes, "let her defiler be punished in the parts in which he offended. Let him thus lose his eyes which gave him sight of the maiden's beauty for which he coveted her. And let him lose as well the testicles which excited his hot lust." The truth of the victim's accusation would "be ascertained by an examination of her body, made by four law-abiding women sworn to tell the truth as to whether she is a virgin or defiled."

Alito's model does not offer much hope for those trying to salvage American democracy. "The king has no equal within his realm" and "is the vicar of God," Bracton writes, and "there is no greater crime than disobedience." Some men "are above others and rule over them," including dukes, earls and barons, whom kings invest "with great honour, power and name when they gird them with swords, that is, with sword belts. . . . Belts gird the loins of such that they may guard themselves from the luxury of wantonness."

It might surprise today's Republicans that there are more than two genders in Alito's 13th-century inspiration. "Mankind may also be classified in another way: male, female, or hermaphrodite," Bracton writes.

But his view of personhood might raise questions in 21st-century America. Bracton categorizes slaves as property: "this slave, this estate, this horse, this garment." And he explains that "those born of unlawful intercourse, as out of adultery and the like, are not reckoned among children." Those children "born of prohibited intercourse . . . are fit for nothing."

You won't find those passages in Alito's draft opinion, either. But this medieval court is just getting started.

ELI HILLER/BLOOMBERG NEWS

Republican Senate candidate J.D. Vance, left, and former president Donald Trump in Delaware, Ohio, on April 23.

PERRY BACON JR.

Trumpism is terrible. It also might be popular.

Authoritarianism, American-style fascism, Trumpism — or whatever other term you choose for the radical turn that the American right has taken — is terrible for our nation and the world. But something can be both terrible and popular.

Political observers have suggested a variety of reasons for the successes of the increasingly Trumpist Republican Party. Some argue that social media is disseminating misinformation that bolsters right-wing conspiracy theories and politicians who lie. Centrist Democrats say their party's left wing is annoying voters and making the GOP an appealing alternative. Those on the left say the political system, even under Democratic leadership, is failing to make Americans' day-to-day lives better, leaving them open to a right-wing, "burn it all down" ideology.

But there are also reasons to think that Trumpism appeals to a lot of Americans — that they are turning to this style of politics simply because they like it.

After all, we see many market indications of this appeal. GOP primaries are now largely races over which candidate is the Trumpiest; media-bashing, disdaining institutions and getting the former president's endorsement are the easiest ways to rise in the party. Incumbent Govs. Greg Abbott of Texas and Ron DeSantis of Florida look likely to win this fall after pushing agendas centered on antipathy to some groups (migrants, transgender Americans) and alignment with others (conservative Christians, rural voters). Fox News personalities who leave the network to pursue a more moderate conservatism on other platforms rarely succeed, while their replacements at Fox News thrive by becoming more radical.

Most important, we have the results of the 2020 election: Though Donald Trump lost, he won 11 million more votes than he did in 2016, including a significantly higher share of the Latino electorate.

It's not that Trumpism is more popular than alternative approaches. Center-left Democrats won the presidential popular vote in seven of the past eight elections. The most recent Republican popular-vote winner was George W. Bush, whose conservatism is much less radical than Trump's. But based on the results of the 2016, 2018 and 2020 elections, Trumpism is popular *enough* — and it's easy to imagine Trump or someone like him running at the right moment (say, during a recession) and winning more than 50 percent of the national vote.

So why is Trumpism decently popular?

I think the most important explanation is that the sentiments that Trump-style politicians tap into are in some ways human nature. Defining some group of people or institutions (the media, the left, immigrants, a minority religious or ethnic group) as apart from everyone else and then blaming them for creating problems and subverting the true will of the people has been a successful political tactic in any number of times and places. There is no reason to think Americans are immune to it.

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And the fact that some non-Christians and voters of color are drawn to Trumpism doesn't disprove the idea that it's based on identity or even bigotry. The current Republican Party might be animated by nostalgia for an America dominated by White male Christians, but it also signals that "good" elements of other groups are welcome in its coalition: Latinos who immigrated through the traditional process or whose families have been here for generations; Black people who support the police and express gratitude for being Americans; LBGTQ people who don't emphasize that part of their identity.

"That US fascism is racist and white supremacist is a given. That it is all-white is not. The assumption of static fascism blinds one to fascism organizing small but significant numbers in communities of color, particularly through Christian nationalism," says Dartmouth professor Jeff Sharlet, who has written extensively about Christian fundamentalism in America. (The quote comes from an extended Twitter conversation that helped inspire this column.)

Relatedly, there is another very American reason that the radicalism of the current GOP might be popular: its reliance on anti-Black sentiment, which has been a critical force in other successful U.S. political movements. White voters, particularly in the South, coalesced around anti-Black sentiment after the Civil War, after the passage of the Voting Rights Act in 1965, and again after the election of Barack Obama in 2008. As the Brookings Institution's Vanessa Williamson wrote in an assessment of Trumpism in 2020, "Racial authoritarianism has existed within and alongside our democracy from the beginning."

Today, right-wing attacks on Black Lives Matter, critical race theory, the New York Times's 1619 Project, Supreme Court Justice-designate Ketanji Brown Jackson and other Black ideas and people are stoking a narrative that Black people are not only the main drivers of American problems — from struggling schools to crime — but are also insufficiently grateful about living in one of the richest nations in the world. Unfortunately, all signs are that it is working pretty well. Many Americans, including some Black ones, strongly dislike left-wing activists of all races who correctly argue that the systemic inequalities Black people face are because of long-standing policies. To them, anti-"woke" rhetoric that essentially defends America from broad charges of racism has a pseudo-patriotic appeal.

Third, Trumpist Republicans are tapping into other widely held resentments, from misogyny and sexism to Islamophobia — and a more generalized frustration that the government and the media give too much attention to certain minorities. The wave of GOP laws passed this year targeting transgender people is a good example of both demagoguing a small, vulnerable group and stoking resentment against those (Democrats) seeking to accommodate it. I suspect that if *Roe v. Wade* is overturned, Republicans will further lean into misogyny to create a counternarrative to liberal arguments that the GOP is anti-woman.

I don't think the radicalized GOP is destined to win over the majority of Americans. The Democrats did win in 2018 and 2020, after all. But when I look at Trump and DeSantis, I see autocratic politicians whose messages resonate deeply with huge numbers of voters. I see the business community and other institutions underestimating the Trumpist threat but also acting cautiously because they have seen how DeSantis, Trump and other politicians of this ilk seek to use government power to punish those who cross them. I see the Democratic Party underappreciating the real appeal of this kind of politics, clinging to a self-absorbed view that the rise of Trumpism is simply because of the failings of the left.

It's certainly possible that Democrats could gain votes by delivering more real-world benefits to Americans, moving to the right on racial and identity issues or — my preferred approach — laying out a real, sustainable vision for a more equitable society.

But sadly, it's also possible that no matter what anyone does, a growing number of Americans have gotten a taste of Trump-style politics — and liked it.

Alito cites a judge who treated women as property

BY JILL ELAINE HASDAY

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."

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.

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