KATZ, J., concurring. Although many of the considerations and principles on which Justice Zarella relies in his concurring and dissenting opinion have strong appeal, both on their merits and because he reaches a result that would not expose the defendant to the death penalty, ultimately, I cannot overcome the anomalous result that his and Justice Schaller's concurring and dissenting opinions yield—a statutory scheme that makes an assault on a woman that results in the death of a fetus a class A felony under General Statutes § 53a-59c, but imposes no enhanced penalty when the assault on the pregnant woman results in a live birth and the fetus subsequently dies as a result of the assault. Therefore, I join the majority opinion in its recognition of the born alive rule as a part of our common law.

Although I agree with the majority opinion insofar as the resolution of the issues it does decide, I disagree with its decision not to address additional claims related to the penalty phase of the proceedings that are likely to arise again at a subsequent penalty phase proceeding should the defendant, Robert Courchesne, be convicted of capital felony at the guilt phase because the majority's failure to consider those claims is contrary to the interests of every participant in the trial proceedings. Many of these claims pertain to matters on which the parties and the trial court undoubtedly will need guidance should a penalty phase proceeding transpire.[1] Indeed, some of the claims would preclude the imposition of the death penalty.[2] The parties and the trial court should not have to guess at how this court would decide these issues, risk making the same mistakes if indeed the defendant's claims have merit, and go through what could turn out to be a needless, costly and time-consuming exercise. We also may unnecessarily be exposing both the victim's family to the heartbreak of reliving their tragedy in another penalty phase proceeding and the defendant to the anxiety of defending against another sentence of death. I acknowledge that the state may not convict the defendant of capital felony and caution that, by articulating the need to address these other issues, I do not mean to intimate that the defendant would be so convicted. In light of that caveat, I am less persuaded by a concern that we would be issuing an advisory opinion than I am compelled by the potential harm to the parties to the case, the victim's family and the interests of judicial economy that the majority risks by declining to address these claims.

Accordingly, I respectfully concur.

[1] Such claims include whether: (1) the trial court improperly excluded certain of the defendant's mitigation evidence, including a statement by the defendant expressing remorse for the offense, evidence regarding the reasons for the Waterbury police department's policy against electronically recording confessions, and evidence related to "the insidious allure and unyielding grasp of crack cocaine"; (2) this court should conclude, either

under the state constitution or pursuant to the exercise of our supervisory authority, that law enforcement officials may not testify at a penalty phase hearing in a capital case that the defendant did not show remorse when confessing to the offense if those officials failed to record by videotape or audiotape the confession; (3) defense counsel should be permitted to review a sealed record to determine if that record contains exculpatory material, or in the alternative, whether this court should perform such a review; and (4) the defendant was entitled to a pretrial hearing to determine whether the state's allegation that the murder was committed in an especially heinous, cruel, or depraved manner was supported by probable cause.

[2] For example, the defendant claims that the trial court improperly denied his motion to bar the imposition of the death penalty because the decision by the state's attorney to seek the death penalty was based on the race of the victims in violation of the defendant's state and federal constitutional rights as evidenced by statements allegedly made by the state's attorney to defense counsel.