ZARELLA, J., with whom NORCOTT, J., joins, concurring in part and dissenting in part. Today, the majority subjects the defendant to another trial for capital felony and murder by adopting, for the first time in the state of Connecticut, the born alive rule. In so doing, the majority, in an opinion of more than 160 pages, fails to demonstrate that the murder statute encompasses the acts alleged to have been committed, adds a substantive element of proof that does not appear in the statutes governing murder, thus making the killing of a fetus that dies after birth a new substantive offense not contained in our Penal Code, fails to establish that the born alive rule was ever adopted by the legislature, provides no convincing support for its view that the rule was a part of the common law of Connecticut and resorts to the legislative history of an act enhancing the penalty for an assault on a pregnant woman to conclude that the legislature has accepted the rule under our murder and capital felony statutes. In addition, the majority ignores the plain language of the murder statute, ignores or fails to address our precedent in the area of what constitutes the common law of Connecticut, disregards the due process rights of the defendant by relying on the legislature's purported acceptance of the rule more than four years *after* the crime was committed, fails to employ the rule of lenity to resolve the ambiguities in our murder and capital felony statutes as applied to the facts of this case,[1] and, for the first time in *any* jurisdiction that I am aware of, establishes the proposition that the criminal act of murder does not require that the intent to murder be present either before or during the commission of the crime.

I cannot agree with this deeply flawed approach because, no matter how horrific or despicable the crime, it does not justify ignoring our precedent and the constitutional protections guaranteed to all defendants. Accordingly, I concur in part I of the majority opinion, in which the majority concludes that the trial court properly denied the defendant's motion to suppress his written confessions and other evidence tying him to the murder of Demetris Rodgers, but respectfully dissent with respect to parts II through V,[2] in which the majority adopts the born alive rule, devises a legal standard for its implementation and remands the case for a new trial that will require the state to prove that the baby was alive at birth by disproving the irreversible cessation of all brain function. I also generally agree with Justice Schaller's concurring and dissenting opinion because the majority's retroactive application of the born alive rule clearly deprives the defendant of his due process right to fair notice.

I

Justice Oliver Wendell Holmes once observed in a similar context: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." O. Holmes, "The Path of the Law," Address at Boston University School of Law (January 8, 1897), in 10 Harv. L. Rev. 457, 469 (1897); cf. *State* v. *Muolo*, 118 Conn. 373, 378–79, 172 A. 875 (1934).[3] Justice Holmes' observation is particularly apt in the present case because the dearth of medical knowledge that prompted articulation of the born alive rule in the early 1300s no longer exists, and, therefore, the grounds for its adoption have vanished.[4]

It is well documented that the born alive rule evolved during a time of limited medical knowledge, when it was necessary to establish that a fetus was alive at the time of the criminal act. See, e.g., C. Forsythe, "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms," 21 Val. U. L. Rev. 563, 575 (1987) ("As a result of . . . primitive knowledge of human life in utero, the health of the child in utero could not be established unless and until the child was observed outside the womb. . . . [L]ive birth was required to prove that the unborn child was alive and that the material acts were the proximate cause of death, because it could not otherwise be established if the child was alive in the womb at the time of the material acts."); see also *Commonwealth* v. *Cass*, 392 Mass. 799, 806, 467 N.E.2d 1324 (1984) (rationale offered for born alive rule since 1348, namely, that "it [was] difficult to know whether [the defendant] killed the child," no longer exists because "[m]edical science now may provide competent proof as to whether the fetus was alive at the time of a defendant's conduct and whether his conduct was the cause of death" [internal quotation marks omitted]). The born alive rule thus was used as an evidentiary tool to confirm that the fetus had died due to the perpetrator's actions rather than to natural causes or other reasons that could not be identified by then existing diagnostic techniques. See *State* v. *Lamy*, 158 N.H. 511, 516, 969 A.2d 451 (2009) ("born alive rule emerged in fourteenth century England as an evidentiary standard requiring observation of the child to prove the corpus delecti[5] in the killing of an infant"). As one nineteenth century expert on medical jurisprudence more fully explained: "It is well known that, in the course of nature, many children come into the world dead, and that others die from various causes soon after birth. In the latter, the signs of their having lived are frequently indistinct. Hence to provide against the danger of erroneous accusations, the law humanely presumes that every new-born child has been born dead, until the contrary appears from medical or other evidence. The onus of proof is thereby thrown on the

prosecution; and no evidence imputing murder can be received, unless it be made certain, by medical or other facts, that the child survived its birth and was actually living *when the violence was offered to it*." (Emphasis added.) A. Taylor, Medical Jurisprudence (5th Am. Ed. 1861) p. 317; see also J. Reese, Text-book of Medical Jurisprudence and Toxicology (7th Ed. 1907) p. 216.[6] Accordingly, prosecution for homicide under the born alive rule, as originally understood, did not depend on whether the fetus was born alive and thus became a "person" prior to its death but on whether the fetus was alive when the fatal injury was inflicted. See, e.g., C. Forsythe, supra, 571 ("[m]edical treatises and writings on medical jurisprudence during the [sixteenth] through [nineteenth] centuries testify to the primitive state of medical technology and the resulting evidentiary limitations which gave rise to . . . the born alive rule"); see also *Commonwealth* v. *Cass*, supra, 806. In other words, if medical technology had been capable of assessing the health of the fetus in times past, there would have been no reason for creating the born alive rule. The perpetrator very likely would have been prosecuted for homicide regardless of whether the fetus had died before or after its birth. See C. Forsythe, supra, 589 ("[i]n practice, the born alive rule was applied to proscribe as homicide the killing of a child even if the mortal injuries were inflicted while the child was still in utero").

Recognizing the evidentiary basis for the born alive rule and the advances in medical science that have made the rule obsolete,[7] the overwhelming majority of our sister states have rejected it in favor of legislation defining homicide to include the death of an unborn child or fetus from injuries inflicted in utero. See Ala. Code § 13A-6-1 (a) (3) (Cum. Sup. 2009) (defining "person," in referring to victim of homicide, as "a human being, including an unborn child in utero at any stage of development, regardless of viability"); Alaska Stat. §§ 11.41.150, 11.41.160 and 11.41.170 (2008) (proscribing murder, manslaughter and criminally negligent homicide with respect to unborn child); Ariz. Rev. Stat. Ann. §§ 13-1102, 13-1103, 13-1104 and 13-1105 (Cum. Sup. 2008) (for purposes of negligent homicide, manslaughter and first and second degree murder statutes, victim can include unborn child in mother's womb at any stage of development); Ark. Code Ann. § 5-1-102 (13) (B) (i) (a) (Sup. 2009) (for purposes of Arkansas homicide statutes, term "person" includes "an unborn child in utero at any stage of development"); Cal. Penal Code § 187 (a) (Deering 2008) ("[m]urder is the unlawful killing of a human being, or a fetus, with malice afterthought"); Fla. Stat. Ann. § 782.09 (West 2007) ("[t]he unlawful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed murder in the same degree as that which

would have been committed against the mother"); Idaho Code Ann. §§ 18-4001 and 18-4006 (Cum. Sup. 2009) (including within definition of "human being," for purposes of murder and manslaughter statutes, "a human embryo or fetus"); 720 Ill. Comp. Stat. Ann. 5/9-1.2, 5/9-2.1 and 5/9-3.2 (West 2002) (proscribing homicide of unborn child from fertilization to birth); Ind. Code Ann. §§ 35-42-1-1 (4), 35-42-1-3 (a) (2) and 35-42-1-4 (d) (LexisNexis 2009) (proscribing murder and manslaughter of viable fetus); Kan. Stat. Ann. § 21-3452 (d) (2007) (extending definition of "person" in Kansas' murder, manslaughter and vehicular homicide statutes to include "an unborn child," regardless of viability); Ky. Rev. Stat. Ann. §§ 507A.010 (1) (c) and 507A.020 through 507A.050 (LexisNexis 2008) (proscribing "fetal homicide," which includes intentional or reckless killing of unborn child from conception); Md. Code Ann., Crim. Law § 2-103 (LexisNexis Sup. 2009) (proscribing murder or manslaughter with respect to viable fetus); Mich. Comp. Laws Serv. § 750.322 (LexisNexis 2003) (designating as manslaughter wilful killing of "an unborn quick child"); Minn. Stat. Ann. §§ 609.266 (a) and 609.2661 through 609.2665 (West 2009) (proscribing murder and manslaughter with respect to unborn child, which is defined as "the unborn offspring of a human being conceived, but not yet born"); Miss. Code Ann. § 97-3-37 (1) (2006) (for purposes of Mississippi's homicide statutes, "the term 'human being' includes an unborn child at every stage of gestation from conception until live birth"); Neb. Rev. Stat. §§ 28-389 (2) and 28-391 through 28-394 (Cum. Sup. 2006) (delineating various degrees of homicide with respect to killing of unborn child at any stage of development in utero); Nev. Rev. Stat. § 200.210 (2007) (designating wilful killing of "unborn quick child" by any injury committed against child's mother as manslaughter); N.D. Cent. Code §§ 12.1-17.1-01 through 12.1-17.1-04 (1997) (proscribing murder, manslaughter and negligent homicide with respect to unborn child, which is defined as child conceived but not yet born); Ohio Rev. Code Ann. §§ 2903.01 through 2903.06 (West 2006 and Sup. 2009) (classifying unlawful termination of pregnancy as homicide); Okla. Stat. Ann. tit. 21, § 691 (A) and (B) (West Sup. 2010) (killing of unborn child constitutes homicide); 18 Pa. Cons. Stat. Ann. §§ 2603 through 2605 (West 1998) (proscribing murder and manslaughter with respect to unborn child); R.I. Gen. Laws § 11-23-5 (2002) (proscribing wilful killing of "an unborn quick child" by any injury to mother that would be murder if it resulted in death of mother); S.C. Code Ann. § 16-3-1083 (c) (Cum. Sup. 2009) (intentional killing of unborn child "punished [as] murder"); S.D. Codified Laws § 22-16-1 (2006) ("[h]omicide is the killing of one human being, including an unborn child, by another"); Tenn. Code Ann. § 39-13-214 (2006) (viable fetus included in term "person" for purposes of Tennessee homicide statutes); Tex. Penal Code Ann. § 1.07 (49) (Vernon Cum.

Sup. 2009) (term "death," with respect to unborn child, includes "the failure to be born alive" for purposes of Texas Penal Code and its homicide provisions); Utah Code Ann. § 76-5-201 (1) (a) (2003) (person commits criminal homicide when he causes death of another human being, including unborn child at any stage of development); Va. Code Ann. § 18.2-32.2 (2009) (proscribing killing of fetus); Wash. Rev. Code Ann. § 9A.32.060 (1) (b) (West 2009) (designating as first degree manslaughter unlawful and intentional killing of unborn quick child by infliction of injury on mother of such child); W. Va. Code Ann. § 61-2-30 (LexisNexis 2005) (recognizing embryo or fetus as distinct victim for purposes of West Virginia's homicide statutes); cf. Ga. Code Ann. § 16-5-80 (2007) (treating killing of unborn fetus as "feticide"); La. Rev. Stat. Ann. §§ 14:32.5 through 14:32.8 (2007 and Sup. 2010) (designating killing of unborn child as feticide); Wis. Stat. Ann. § 940.04 (West 2005) (proscribing intentional destruction of life of unborn child but not classifying such crime as homicide). The Supreme Judicial Court of Massachusetts also implicitly rejected the born alive rule when it determined that a defendant may be charged with homicide for causing the death of a viable fetus in utero. *Commonwealth* v. *Cass*, supra, 392 Mass. 807; see also id., 799 (ruling that viable fetus is within ambit of term "person" in vehicular homicide statute).[8] The legislatures in Alabama, Arkansas, Idaho, Kansas, Mississippi, Oklahoma, South Dakota and Utah also have amended their penal codes to include an unborn child or fetus in the definition of a "person" or "human being," thus emphasizing that the critical focus of the fetal homicide statutes is on life rather than birth. This is consistent with the rationale for creating the born alive rule in the first instance, because the rule always presumed that a viable fetus was a person. The requirement of a live birth was merely a mechanism to prove that the death of the fetus was caused by the defendant's act and not by some other cause.

The majority's adoption of the born alive rule has at least three deleterious consequences. First and foremost is that the court invades the legislative prerogative to define what is, and what is not, a crime, because the rule, as understood and applied by the majority, has the effect of amending the definition of a "person" under our murder statutes; see General Statutes § 53a-3 (1) (defining "person" as "a human being"); to include a fetus that is born alive but subsequently dies from injuries inflicted in utero, thus making the killing of such a fetus a new substantive offense. This court has acknowledged that, "in light of established doctrines implicit in the separation of powers, the primary responsibility for enacting the laws that define and classify crimes is vested in the legislature . . . ." (Citations omitted.) *State* v. *Joyner*, 225 Conn. 450, 460, 625 A.2d 791 (1993); see also *State* v. *Hanson*, 210 Conn. 519,

529, 556 A.2d 1007 (1989) ("Where statutory language is clearly expressed . . . courts must apply the legislative enactment according to the plain terms and cannot read into the terms of a statute something which manifestly is not there in order to reach what the court thinks would be a just result. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is the function of the legislature." [Citation omitted; internal quotation marks omitted.]); Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. § 53a-4 (West 2007), comment, p. 324 (court not "free to fashion additional substantive offenses" not included in Penal Code). Accordingly, in adopting the born alive rule and, in effect, amending the statutory definition of "person," the court exceeds its jurisdiction.

Second, the born alive rule, stripped of its relevance as an evidentiary tool, is logically incoherent and thus introduces a significant incongruity into our criminal law. As interpreted by the majority, the rule contains the inherent contradiction that a viable fetus that is fatally injured but subsequently born alive is considered a person under our murder and capital felony statutes but is not considered a person if it is not born alive. Thus, a viable fetus that is fatally injured in utero may or may not be a person for purposes of prosecuting an accused for murder or capital felony depending on the entirely random fact of its status at the time of its death, which may depend on such unforeseen factors as how soon the injured mother receives medical attention, how quickly the medical staff is able to perform the delivery, and the accuracy of the observations and tests administered by the delivery team to determine if the baby is born alive. This makes no sense whatsoever. Moreover, the majority's focus on the status of the fetus at the time of its death is completely at odds with the underlying rationale of the born alive rule, which considered whether the fetus was alive at birth only to establish its condition *in utero* at the time of the fatal injury. The majority thus severs the temporal connection between the criminal conduct and the status of the victim when the fatal injury was inflicted and allows pure happenstance to determine whether a perpetrator may be prosecuted for murder and subjected to the death penalty.

This, in turn, raises serious due process concerns regarding the right to fair notice because whether criminal liability will attach for the death of a fetus in any particular case will not be evident to the perpetrator at the time the crime is committed. See *State* v. *Aiwohi*, 109 Haw. 115, 136, 123 P.3d 1210 (2005) (Acoba, J., concurring). The defendant in the present case also will have been denied his due process rights because the majority's retroactive application of its newly adopted construction of our murder statute will have deprived him of notice and fair warning regarding the conse-

quences of his actions.

In summary, because the born alive rule developed as a rule of causation and is no longer necessary due to advances in medical science that now permit a determination to be made regarding the health of a fetus, there is no evidentiary justification for its perpetuation. Accordingly, adoption of the rule will have the effect of amending the definition of "person" under our Penal Code to include a fetus that is fatally injured but subsequently born alive. Amending our criminal statutes violates the separation of powers because it is well established that the legislature, not the court, has the undisputed authority to define crimes. In addition, the rule engenders confusion and threatens due process because it lacks logical consistency and deprives potential defendants of fair warning as to the consequences of their actions. The defendant in this particular case also will be deprived of fair notice because of the majority's decision to apply the rule retroactively. In my view, these reasons strongly militate against the rule's adoption.

II

The majority nonetheless embraces the born alive rule, concluding that, as long as the fetus that is fatally injured is subsequently born alive, the perpetrator can be charged with the murder of a person. Recognizing that this appears to be problematic, however, the majority states that Connecticut's murder statute does not require that the fetus be a person at the time of the criminal conduct but only that it *become* a person before it dies by being born alive. This interpretation of the murder statute is not only in direct conflict with the rule's original purpose of establishing that the fetus was alive when the fatal injury was inflicted, but requires a major rewriting of General Statutes § 53a-54a.

The majority claims that there is nothing in our Penal Code or § 53a-54a (a) suggesting that application of the born alive rule is barred by the requirement of a temporal nexus between the defendant's criminal conduct and the victim's status as a person, and that it is unaware of any other authority that requires one. I find this reasoning unpersuasive because an examination of the language of the murder statute, its relationship to other statutes, the authorities on which the majority relies and other authorities unequivocally demonstrate otherwise.[9] See *State* v. *Gibbs*, 254 Conn. 578, 601–606, 758 A.2d 327 (2000) (applying well settled principles of statutory interpretation to determine if temporal nexus between multiple murders is absolute prerequisite to proving that murders took place in course of single transaction for purposes of General Statutes [Rev. to 1991] § 53a-54b [8]). In addition, all four cases from other jurisdictions cited by the majority[10] for the principle that no temporal nexus is required involved statutes that, unlike our murder statute, contained no element

of intent and have been superseded by fetal homicide statutes, which eliminated the born alive rule and effectively repudiated the legal rationale for its adoption in those jurisdictions.

General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person . . . ." There can be no clearer expression of a temporal nexus between the intent necessary to commit the crime and the act of committing the crime than this language. The use of the term "when" *mandates* that the defendant must have the intent to cause the death of a person prior to, or contemporaneously with, the act that is the cause of death.

The statute's reference to the death "of such person or of a third person" further suggests that the unintended victim, as well as the intended victim, must be a person when the fatal injury is inflicted because the term "such person" relates back to the time of the criminal act and is linked with the term "third person" by the word "or." This court previously has stated that, "[a]mong the definitions of the word 'or' is 'the synonymous, equivalent, or substitutive character of two words or phrases . . . .' Webster's Third New International Dictionary." *Seymour* v. *Seymour*, 262 Conn. 107, 112, 809 A.2d 1114 (2002). It is thus very clear that the intended and unintended victims of the defendant's criminal conduct must occupy an equivalent status as persons at the time the injury is inflicted. Indeed, if the victim is not a person when the injury is inflicted, it is hard to understand, without engaging in logical and linguistic acrobatics, how the defendant's conduct can cause the victim's subsequent death. Furthermore, the majority cites no other statute in our Penal Code that lacks the requirement of a temporal nexus between the criminal conduct in question and the status of the victim as a person. Accordingly, the language in the statute clearly instructs that a defendant cannot be found guilty of murder unless the intended and unintended victims are persons when the injuries are inflicted.

The majority's attempt to parse the statutory language by turning to the dictionary definition of the word "when" in support of its assertion that no temporal nexus is required is unavailing. Webster's Third New International Dictionary defines "when" in relevant part as "at or during the time that," which unquestionably establishes that a temporal nexus must exist because the link created between the element of intent and the criminal act by the use of the word "when" necessarily requires that the victim be a person at the time the act is committed, it being self-evident that there can be no intent to kill a person if the law does not recognize that the victim is a person.

The majority also relies on four cases from other

jurisdictions. These include *Cuellar* v. *State*, 957 S.W.2d 134 (Tex. App. 1997), in which the court stated that "[i]t is not necessary that all of the elements of a criminal offense be immediately satisfied at the time of the defendant's conduct"; id., 139; and *State* v. *Cotton*, 197 Ariz. 584, 588–89, 5 P.3d 918 (App. 2000), *State* v. *Hammett*, 192 Ga. App. 224, 225, 384 S.E.2d 220 (1989), and *Jones* v. *Commonwealth*, 830 S.W.2d 877, 880 (Ky. 1992), all of which concluded that it is not the status of the victim at the time of the injury that determines the nature of the crime but the victim's status at the time of death. *In all four jurisdictions*, however, the statutes in question lacked the element of intent that supplies the requisite temporal link between the criminal conduct and the status of the victim as a person in Connecticut's murder statute. See *State* v. *Cotton*, supra, 586 (defendant charged under Arizona's second degree murder statute, which provides in relevant part that offense is committed when person "without premeditation . . . [and] [u]nder circumstances manifesting extreme indifference to human life . . . recklessly engages in conduct which creates a grave risk of death and thereby causes the death of another person," but convicted under Arizona's manslaughter statute, which provides in relevant part that offense is committed by "[r]ecklessly causing the death of another person" [internal quotation marks omitted]), quoting Ariz. Rev. Stat. Ann. §§ 13-1104 (A) (3) and 13-1103 (a) (1) (Cum. Sup. 1999); *State* v. *Hammett*, supra, 224 (defendant charged under Georgia's second degree homicide by vehicle statute, which provides in relevant part that "[a]ny person who causes the death of another person, without an intention to do so, by violating [certain] provision[s] of [the Georgia motor vehicle and traffic laws] commits the offense of homicide by vehicle in the second degree when such violation is the cause of said death" [internal quotation marks omitted]),[11] quoting Ga. Code Ann. § 40-6-393 (b) (1989); *Jones* v. *Commonwealth*, supra, 877 (defendant charged under Kentucky's second degree manslaughter statute, which provides in relevant part that offense is committed when one "wantonly causes the death of another person" [internal quotation marks omitted]), quoting Ky. Rev. Stat. Ann. § 507.040 (Michie 1985); *Cuellar* v. *State*, supra, 136–37 (defendant charged under Texas' intoxication manslaughter statute, which provides in relevant part that offense is committed when person "[1] operates a motor vehicle in a public place, an aircraft, or a watercraft; and [2] is intoxicated and by reason of that intoxication causes the death of another by accident or mistake" [internal quotation marks omitted]), quoting Tex. Penal Code Ann. § 49.08 (a) (Vernon 1994).

The significance of the element of intent in Connecticut's murder statute, and what distinguishes it from the foregoing statutes, is that it is specific and must exist *contemporaneously* with the act that causes the victim's

death. In other words, the intent to cause the victim's death must exist in the mind of the perpetrator at the moment the fatal injury is inflicted, which cannot occur when the victim is a fetus because a fetus is not a person under Connecticut law. Indeed, I can think of no case in which this or any other court has determined that the specific intent to kill a person can be found to exist *after* the act is completed. The language of the statutes in the cases on which the majority relies thus does not support the conclusion that a temporal nexus must exist between the criminal conduct and the status of the victims as persons, as the language of the murder statute in the present case does, because the element of intent is lacking and there is no other requirement of a contemporaneous relationship among the elements of each of the crimes enumerated in those statutes.

Furthermore, all four jurisdictions have since enacted fetal homicide or feticide statutes and thus have repudiated the rationale of the born alive rule in order to avoid the legal inconsistencies that inevitably arise when the criminal conduct is severed from the status of the victim as a person at the time of the fatal injury.[12] See Ariz. Rev. Stat. Ann. §§ 13-1102, 13-1103, 13-1104 and 13-1105 (Cum. Sup. 2008); Ga. Code Ann. § 16-5-80 (2007); Ky. Rev. Stat. Ann. §§ 507A.010 (c) and 507A.020 through 507A.050 (LexisNexis 2008); Tex. Penal Code Ann. § 1.07 (49) (Vernon Cum. Sup. 2009).

The majority also declares that it is "perfectly clear" that no temporal nexus is required because New York's "homicide statutes . . . are materially identical to our homicide statutes"; footnote 42 of the majority opinion; and a New York appellate court applied the born alive rule in affirming a conviction under New York's second degree manslaughter statute.[13] See *People* v. *Hall*, 158 App. Div. 2d 69, 76, 557 N.Y.S.2d 879, appeal denied, 76 N.Y.2d 940, 564 N.E.2d 679, 563 N.Y.S.2d 69 (1990). I disagree. Although our Penal Code is modeled in part after the New York Penal Law, the New York statute at issue in *Hall* pertained to second degree reckless manslaughter, not murder, and, therefore, like the statutes at issue in the Arizona, Georgia, Kentucky and Texas cases that involved reckless conduct, the New York statute is distinguishable from Connecticut's murder statute because it lacks the element of intent that must exist when the fatal injury is inflicted. Accordingly, it is not "materially identical" to our murder statute, and *Hall* cannot assist this court in interpreting § 53a-54a.

The majority asserts that it is unaware of any authority in support of the view that a temporal nexus is required between the criminal conduct and the victim's status as a person. I find this assertion surprising when there is so much authority to be found. The reason why the overwhelming majority of states have abandoned the born alive rule and adopted fetal homicide laws, and why two other states have enacted laws expressly

limiting the definition of a "person" to one who has been born and is *alive at the time of the criminal act*; see Colo. Rev. Stat. § 18-3-101 (2) (2009) (" '[p]erson,' when referring to the victim of a homicide, means a human being who had been born and was alive at the time of the homicidal act"); Or. Rev. Stat. § 163.005 (3) (2009) (" '[h]uman being' means a person who has been born and was alive at the time of the criminal act"); is that they wished to *restore* the temporal connection between the criminal conduct and the status of the victim as a person that is necessarily broken when the born alive rule no longer functions as a rule of causation. Indeed, the Supreme Court of Hawaii in *State* v. *Aiwohi*, supra, 109 Haw. 115, after considering the benefits and flaws of the born alive rule as applied to the prosecution of mothers and third parties who inflict fatal injuries on a fetus, expressly concluded that the more cogent rule is that "the defendant's conduct must occur at a time when the victim is within the class contemplated by the legislature." Id., 126. The majority's assertion as to the lack of other authority regarding the requirement of a temporal nexus is, therefore, without foundation.[14]

The majority claims that the enactment by other states of fetal homicide statutes that amend the definition of "person" to include an unborn child or fetus "does not *exclude* from its purview the infliction of injuries on a viable fetus that is born alive and that subsequently dies from those injuries." (Emphasis in original.) Footnote 67 of the majority opinion. The majority thus reasons that "[fetal] homicide statutes *broaden* the class of victims protected thereunder by redefining that class, an innovation that bears no relevance to the issue of whether our murder statute contains the kind of temporal requirement that [this concurring and dissenting opinion] says it does." (Emphasis added.) Id. The majority then concludes that, "because [the born alive rule] now is viewed by those states [that have abolished it] as unnecessarily *underinclusive* with respect to the category of victims that it protects . . . it would make no sense to reject the rule . . . without replacing it with a broader rule, namely, one that includes the killing of a fetus." (Emphasis in original.) I agree that, insofar as the born alive rule previously has been recognized in *other* states, the adoption of fetal homicide statutes in those states constitutes a repudiation, or abandonment, of the rule. Such statutes not only criminalize conduct that causes the death of a fetus, regardless of whether it is born alive, but, to the extent that the rule has lost its meaning as a rule of causation, they also restore the temporal connection between the element of intent and the status of the fetus at the time of the criminal act.[15] See, e.g., *People* v. *Ford*, 221 Ill. App. 3d 354, 367, 581 N.E.2d 1189 (1991) (expressly acknowledging legislature's rejection of born alive rule in criminalizing acts directed

against unborn child), appeal denied, 143 Ill. 2d 642, 587 N.E.2d 1019 (1992). This court's failure to recognize the born alive rule, however, would not constitute a similar "repudiation" of the rule because it has not heretofore been recognized in this jurisdiction and thus cannot be abandoned.[16]

The majority claims, to the contrary, that the born alive rule is "well established in the common law of this state . . . ." This claim is without merit. The majority ignores the fact that, even if the born alive rule had been accepted as part of the common law of this state prior to 1969, which I submit it had not, "[*a*]*doption of the* [*P*]*enal* [*C*]*ode* [*in 1969*][17] *abrogated our common law of crimes.*" (Emphasis added.) *State* v. *Ross*, 230 Conn. 183, 197, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995); accord *Valeriano* v. *Bronson*, 209 Conn. 75, 92, 546 A.2d 1380 (1988); see also *State* v. *DeJesus*, 288 Conn. 418, 515, 953 A.2d 45 (2008) (*Katz*, *J.*, dissenting) (relying on *Valeriano* for proposition that Penal Code abrogated common-law rules, and savings clause of code precludes court from readopting them); Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. (West 2007) § 53a-4, p. 324 (court not "free to fashion substantive offenses" formerly considered common-law crimes but not included in Penal Code because "*the* [*c*]*ode precludes . . . the notion of common law crimes*" [emphasis added]). Accordingly, no matter how many pages or how much passion the majority devotes to its common-law analysis, it cannot overcome the very conspicuous and simple fact that such an analysis is irrelevant following this state's adoption of the Penal Code. Nevertheless, because the majority places so much emphasis on the common-law roots of the born alive rule, including a lengthy discussion of legislative history in an attempt to show that the legislature expressly accepted the rule when it enacted Public Acts 2003, No. 03-21 (P.A. 03-21), entitled "An Act Concerning Assault of a Pregnant Woman," approximately five years *after* the crime in this case was committed, I am compelled to respond because I believe that much of the majority's analysis is either misleading or legally incorrect.

The common law, as distinguished from statutory law, "comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs . . . ." Black's Law Dictionary (6th Ed. 1990). This means that, in order to demonstrate that the born alive rule is "well established in the common law of this state," there must be evidence that the rule was a well known usage or custom in the colony or the state of Connecticut, or that reviewing courts have issued

judgments and decrees enforcing the rule over the past 200 years. Even giving the majority the benefit of the doubt, I submit that no such evidence exists.

The majority relies on a single treatise, written in 1796 by a former Chief Justice of the Connecticut Supreme Court, Zephaniah Swift,[18] that explains the born alive rule in the context of the common-law definition of murder, and on three trial court decisions, a single Appellate Court decision, the Model Penal Code and the common-law principles that govern criminal matters in this state. Swift, however, authored the treatise several years before he became a judge of the Superior Court in 1801, and nearly twenty years before he became Chief Justice of this court in 1814. See 2 Z. Swift, A Digest of the Laws of the State of Connecticut (1823), memoir of the author. Swift's treatise thus does not represent his understanding of the decisional law rendered by Connecticut courts during his time on the bench. In addition, others have observed that Swift's treatise "not only covered Connecticut law but encompassed the law 'generally.' " *Valeriano* v. *Bronson*, supra, 209 Conn. 91 n.10, citing P. O'Sullivan, "Biographies of Connecticut Judges," 19 Conn. B.J. 181, 192 (1945). Notwithstanding this limitation, the revised version of Swift's treatise, which was published in 1823 before advanced medical technology permitted a determination to be made as to whether a fetus was alive in utero, explains that the reason why the killing of a fetus that dies in utero is not considered murder is because "the circumstance[s] of its death cannot be ascertained with sufficient precision," not because the fetus does not satisfy the definition of a "person."[19] 2 Z. Swift, supra, p. 267.

With respect to the three trial court decisions that allegedly recognize the born alive rule, the issues raised in two of those decisions, one of which was published in 1955 before the availability of advanced medical technology, did not involve criminal conduct but, rather, required the court to determine whether a cause of action could be brought against a *negligent* wrongdoer for injuries inflicted in utero to a viable fetus and a nonviable[20] fetus. See *Simon* v. *Mullin*, 34 Conn. Sup. 139, 147, 380 A.2d 1353 (1977) (nonviable fetus); *Tursi* v. *New England Windsor Co.*, 19 Conn. Sup. 242, 248, 111 A.2d 14 (1955) (viable fetus). Consequently, neither decision supports the majority's view that the born alive rule is well established in the common law of this state because "[d]iffering objectives and considerations in tort and criminal law foster the development of different principles . . . ." *People* v. *Greer*, 79 Ill. 2d 103, 115, 402 N.E.2d 203 (1980); see W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 2, pp. 7–9.

This leaves *State* v. *Anonymous (1986-1)*, 40 Conn. Sup. 498, 516 A.2d 156 (1986) (*Anonymous*), in which the issue before the court was "whether an unborn but viable fetus is a 'human being' *within the meaning of*

the Connecticut statutes defining murder." (Emphasis added.) Id., 499. In concluding that such a fetus is not a "human being," the court first examined the legislative history of Connecticut's Penal Code and noted that the murder section was based in part on the revised New York Penal Law and in part on the Model Penal Code; id., 500; which define the terms "person" and "human being," respectively, as one "who has been born and is alive." N.Y. Penal Law § 125.05 (1) (McKinney 2009); accord Model Penal Code § 210.0 (1) (1980). The court thus concluded that "[i]t is obvious that neither the word 'person' nor the words 'human being' would include an *unborn fetus* under the [revised] New York Penal [Law] or the Model Penal Code." (Emphasis added.) *State* v. *Anonymous (1986-1)*, supra, 501. The court then examined this state's homicide statutes and determined that the Connecticut legislature "did not intend to define a 'human being' as an unborn but viable fetus." Id. The court finally observed that, under common-law principles dating back to seventeenth century England, "an unborn fetus," regardless of viability, cannot be the subject of a homicide. Id., 502. The court cited nine cases from other jurisdictions in support of this principle, all of which concluded that the killing of a fetus in utero is not a homicide because, under the born alive rule, a fetus is not considered a person. Id., 503. In closing, the court noted that "any redefining of the word 'person' must be left to the legislature, which has the primary authority to define crimes." Id., 505. The court also observed that its decision related only to the crime of murder, and not to tort law, because American courts that have afforded to fetuses "the benefits of tort law" in the civil context have declined to treat the killing of a fetus in utero as a homicide and thus have refused to change the born alive rule in criminal cases, relying on the "[d]iffering objectives and considerations in tort and criminal law . . . ." (Internal quotation marks omitted.) Id., quoting *People* v. *Greer*, supra, 79 Ill. 2d 115.

Anonymous has little, if any, precedential value in the present context because the issue before the trial court was whether an *unborn* fetus, rather than a fetus that is fatally injured but is subsequently born alive, is a "human being" under Connecticut's murder statute, and the court specifically stated that any redefinition of the term "person" must be left to the legislature because *that body alone* has the authority to define crimes. *State* v. *Anonymous (1986-1)*, supra, 40 Conn. Sup. 505. Moreover, eight of the nine jurisdictions cited by the court that did not consider the killing of an unborn fetus a homicide have since enacted fetal homicide or feticide statutes and discarded the born alive rule.[21] Insofar as the court stated that "the codes from which our Connecticut law was drawn limit the words 'human being' to those who have been born alive"; id., 501; the statement suggests nothing with respect to

whether the infliction of a fatal injury on a fetus that is subsequently born alive constitutes murder; rather, it simply means that a human being is one who is born and is alive. Indeed, it is absolutely clear from the discussion that precedes and follows this quoted language that the court was referring *only* to the killing of an unborn fetus because "Connecticut's legislature did not intend to define a 'human being' as an unborn but viable fetus." Id. Although the court also stated in dictum that, under the born alive rule, an unborn fetus is not considered a person; see id., 503; its passing reference to the born alive rule incorrectly describes the rule, which did not reject the idea that the killer of an unborn fetus could be prosecuted for murder but merely required evidence that the fetus had been born alive to prove that it was alive when the criminal act was committed. Lastly, the trial court's conclusion that the killing of an unborn fetus is not a homicide did not require the court to adopt the born alive rule because the issue in that case was whether an *unborn fetus* was a human being under Connecticut's murder statute. Id., 499. Thus, the trial court's reasoning in *Anonymous* hardly supports the majority's assertion that the born alive rule was adopted in that case or that the rule "is well established in the common law of this state," and the majority's attempt to suggest otherwise by also citing to *In re Valerie D.*, 25 Conn. App. 586, 591, 595 A.2d 922 (1991), rev'd on other grounds, 223 Conn. 492, 613 A.2d 748 (1992), which involved the termination of parental rights and quoted certain language from *Anonymous*, is misguided, at best.[22]

The majority also seeks support for its view in the Model Penal Code, but its reasoning is internally inconsistent and reflects a misunderstanding of the code. On the one hand, the majority concedes that "it is not entirely clear" whether the Model Penal Code intended the definition of "human being" to apply to a fetus that is born alive but later dies from injuries inflicted in utero. Footnote 35 of the majority opinion. The majority further concedes that "it [is] more likely that the [related] commentary to the Model Penal Code was intended to clarify that the killing of a fetus in utero does not constitute the crime of homicide, and that [the Model Penal Code] definition [of 'human being'] does not expressly address the more specific issue of whether it is a homicide when an infant, having been injured in utero, is born alive and then dies of his or her injuries." Id. On the other hand, the majority asserts that, "[b]ecause our statutory scheme is patterned after the Model Penal Code," we must presume that our legislature would have "expressly repudiat[ed]" the born alive rule if it had not intended it to apply.[23] Id. The majority thus cites the Model Penal Code as authority for adopting the born alive rule in Connecticut after explicitly *rejecting* the notion that the code was intended to incorporate the rule in defining the term

"human being."

Even if the Model Penal Code's definition of "human being" could be construed as an implicit adoption of the born alive rule, which I believe it cannot, the Connecticut legislature declined to embrace that definition or the definition of "person" in the New York Penal Law when it adopted this state's Penal Code in 1969. See General Statutes § 53a-3 (1) (defining "person" for purposes of Penal Code as "a human being, and, where appropriate, a public or private corporation, a limited liability company, an unincorporated association, a partnership, a government or a governmental instrumentality"). Accordingly, even though portions of our Penal Code may be patterned after the Model Penal Code and the legislature may have been familiar with the Model Penal Code commentary, the legislature's decision to reject the definitions of "person" and "human being" in the New York Penal Law and Model Penal Code, respectively, necessarily constitutes a rejection of any affirmative implications regarding the born alive rule purportedly arising therefrom.

The majority next claims that "[t]he born alive rule has deep roots in our common law" and that it knows of "no reason . . . why the . . . rule would not have been accepted as the law of this state . . . just as [it] was accepted by virtually every other jurisdiction that had considered it." I agree that the born alive rule is derived from the common law of England and that *some* of our sister states have accepted the rule in the past. See, e.g., *State* v. *Cotton*, 197 Ariz. 584, 589, 5 P.3d 918 (App. 2000); *Ranger* v. *State*, 249 Ga. 315, 317, 290 S.E.2d 63 (1982); *People* v. *Bolar*, 109 Ill. App. 3d 384, 389, 440 N.E.2d 639 (1982); *Jones* v. *Commonwealth*, 830 S.W.2d 877, 880 (Ky. 1992); *Williams* v. *State*, 316 Md. 677, 682–83, 561 A.2d 216 (1989); *State* v. *Cornelius*, 152 Wis. 2d 272, 280–82, 448 N.W.2d 434 (App. 1989). The majority provides no citations or support, however, for its far broader assertion, presented as established fact, that the rule "has been *universally* recognized by courts and commentators throughout the country as deeply rooted in the common law"; (emphasis added); thus implying that the born alive rule has been accepted as part of the common law in all other jurisdictions. Indeed, most, if not all, jurisdictions that have rejected the born alive rule appear to have done so statutorily only following the rule's express acceptance by the courts in those jurisdictions, not because the rule inhabited the common law in some ethereal sense without judicial recognition and approval.

In addition, the majority ignores the crucial fact that the precise issue before this court never has been litigated in Connecticut, and, therefore, the rule never has been recognized and adopted in this state, a conclusion absolutely required by the cases on which the majority itself relies.[24] In fact, in one such case, this court noted

in a passage from which the majority selectively quotes that the English common law has *not* been transplanted automatically into Connecticut's legal soil but, rather, "[h]istorically, our view of the relationship of the common law of England to the law of Connecticut has been conspicuous by its *ambivalence*. During the greater part of the colonial era, the common law of England was not deemed to form a part of the jurisprudence of Connecticut, except so far as any part of it might have been accepted and introduced by her own authority. . . . Later this court accepted the doctrine that the English common law was brought here by the first settlers, and became the common law of Connecticut so far as it was not unadapted to the local circumstances of this country. . . . In more recent years we seemed to have reverted to our earlier colonial thinking by asserting that the common law of England prior to 1776 *does not necessarily represent the common law of this state*; *State* v. *Muolo*, [supra, 118 Conn. 378]; *even mutatis mutandis*. We further defined our common law in our own terms as the prevailing sense of the more enlightened members of a particular community, *expressed through the instrumentality of the courts*, as to those rules of conduct which should be definitely affirmed and given effect under the sanction of organized society, in view of the particular circumstances of the time, but with due regard to the necessity that the law should be reasonably certain and hence that its principles have permanency and its development be by an orderly process. Such a definition necessarily implies that the common law must change as circumstances change." (Citations omitted; emphasis added; internal quotation marks omitted.) *Dacey* v. *Connecticut Bar Assn.*, 184 Conn. 21, 25–26, 441 A.2d 49 (1981).

The majority responds to this clear and unambiguous statement of how Connecticut courts have incorporated the common law of England into this state's legal framework by declaring that I have a "fundamental misapprehension of the manner in which the common law is identified and applied. Even if no court of this state previously had recognized the existence of the born alive rule, we would be required to determine its existence on the basis of the case law of England, the decisions of courts of other jurisdictions, and the works of common-law scholars." Footnote 39 of the majority opinion. The majority thus appears to subscribe to the view that all of the English common law has been assimilated into the common law of this state, regardless of whether it has been recognized either statutorily or by the courts. I emphatically disagree.

In clear disregard of our precedent, the majority ignores significant portions of our analysis in *Dacey* and relies on the case law of several foreign jurisdictions, including Arkansas, Maryland, Minnesota and North Dakota to guide its common-law analysis. See id. To the extent that the majority acknowledges *Dacey*, it

takes a small passage from *Graham* v. *Walker*, 78 Conn. 130, 133, 61 A. 98 (1905), which also is quoted in *Dacey*, that the English common law " 'was brought here by the first settlers, and became the common law of Connecticut so far as it was not unadapted to the local circumstances of this country.' " The majority also quotes selectively from *Dacey* for the proposition that, at times, our view of the common law of England has been ambivalent and that the common law does not necessarily represent the common law of our state. The majority then concludes that Connecticut has demonstrated no ambivalence with respect to the common-law born alive rule. The majority, however, omits all of the surrounding language in *Dacey*, in which the court explains that the common law of England "was not deemed to form a part of" Connecticut law during the greater part of our colonial history *unless specifically introduced by our state's own authority* and that, in recent years, we have "reverted to our earlier colonial thinking by asserting that the common law of England prior to 1776 does not necessarily represent the common law of this state . . . ." (Citations omitted; internal quotation marks omitted.) *Dacey* v. *Connecticut Bar Assn.*, supra, 184 Conn. 25. In other words, the majority distorts the historical analysis in *Dacey* by quoting out of context language that it deems favorable to its view and by ignoring those portions of *Dacey*, and the Connecticut cases cited therein, that do not support its view, even though none of the cited cases has been overruled or qualified in the nearly thirty years since *Dacey* was decided. As a result, the majority's conclusion that the born alive rule is well established in the common law of this state lacks *any* convincing support because Connecticut courts never have acknowledged and applied it in the criminal context. Consequently, there can be no presumption that they would have done so had the issue been presented. Moreover, even if the born alive rule had been established in the common law of this state, it would have been superseded by our Penal Code, which, as previously discussed, requires that the victim of a murder be a person at the time of the criminal act. In fact, that is exactly what we concluded in *Valeriano* v. *Bronson*, supra, 209 Conn. 90–96, a case directly on point, in which we rejected the petitioner's argument that the English common-law year and a day rule,[25] another rule of causation that applied to prosecutions for homicide, existed in the common law of Connecticut.

In *Valeriano*, we determined that the common-law year and a day rule had never been adopted in this state and that, even if it had, it had been abrogated by enactment of the comprehensive Penal Code in 1969. Id., 95–96. Relying on reasoning similar to that which I have articulated in this opinion, we stated that (1) passing references to the rule in two prior cases were merely "part of a larger [passage] that addressed the

dispositive issue in [those cases]," which had nothing to do with the year and a day rule; id., 91; (2) "discussion in a judicial opinion that goes beyond the facts involved in the issues is mere dictum and does not have the force of precedent"; id.; (3) no other Connecticut decision had expressly "adopted and applied" the year and a day rule; id.; (4) even if the rule had existed in the common law of Connecticut prior to 1969, "adoption of the comprehensive [P]enal [C]ode in 1969 abrogated the common law and set out substantive crimes and defenses in great detail," and, there having been no mention of the year and a day rule in the Penal Code, it had not been adopted; id., 92; (5) the language of the savings clause in General Statutes § 53a-4[26] and related commentary by the commission to revise the criminal statutes indicated that the savings clause was intended to apply *only* to those statutes in the chapter in which § 53a-4 appears, namely, chapter 951 on statutory construction and principles of criminal liability, and not to the homicide statutes in chapter 952; id., 93–94; (6) the year and a day rule would be "inconsistent" with the homicide statutes because the rule "prevents conviction for a homicide [when] the victim does not die within a year and a day of the defendant's conduct causing the death," and, "given the sweeping overhaul of the criminal law wrought by the [P]enal [C]ode in 1969, it is wholly illogical that such a defense in bar not be specifically included in the code or . . . chapter [951] which is rife with 'defenses' . . . [p]articularly . . . where the crime of homicide is involved"; id., 94; (7) the "original reason for the year and a day rule developed hundreds of years ago when medical science was hardly as advanced as it [was in the 1980s]," and that reason no longer exists because it is now possible to diagnose with far greater precision the cause of the victim's death, and, therefore, "the policy behind the rule is dubious . . . in the twentieth century"; (internal quotation marks omitted) id., 94–95; (8) the rule was "in decline throughout the United States" and numerous jurisdictions already had abolished it; id., 95; and (9) although Swift's Digest of the Laws of the State of Connecticut specifically refers to the year and a day rule, Swift did not state that the rule was part of Connecticut's common law as opposed to the English common law in general, and "[i]t must be remembered that Swift's Digest not only covered Connecticut law but encompassed the law 'generally,' " and, "[u]nder the circumstances, any reliance on Swift would have been a weak position."[27] Id., 91–92 n.10.

I submit that *Valeriano must* serve as precedent in determining whether the born alive rule is embedded in the common law of this state because the born alive rule, like the year and a day rule, was a common-law rule of causation applied by English courts to determine liability in homicide cases. Accordingly, all of the reasons on which this court relied in rejecting the argument

that the year and a day rule existed in Connecticut apply with equal force to the born alive rule. These include that (1) no Connecticut court expressly has concluded that the infliction of injuries to a fetus that is born alive but that subsequently dies from those injuries constitutes murder, (2) to the extent that the Superior Court and the Appellate Court referred to the rule in *Anonymous* and *In re Valerie D.*, respectively, it was mentioned only in passing as part of a larger discussion of the dispositive issues in those cases, none of which had anything to do with the infliction of fatal injuries on a fetus that is subsequently born alive, and, thus, those references were merely dicta with no precedential value, (3) there is no support for the rule in Swift's Digest because Swift never suggested that the rule had been adopted in Connecticut, (4) even if it is assumed that the born alive rule existed in our common law, enactment of our Penal Code abrogated the rule, and it is not preserved by the savings clause, which does not apply to chapter 952 of the General Statutes, in which the murder and capital felony statutes appear, (5) the rule is inconsistent with our homicide statutes because the legislature specifically rejected any modification of the term "person" to include a viable fetus when it rejected the proposed fetal homicide bill; see Raised House Bill No. 5747 (2002); and (6) advanced medical technology has rendered the original reason for the born alive rule, as in the case of the year and a day rule, obsolete.

The majority nonetheless claims that "[c]ourts in other jurisdictions have . . . consistently concluded that the death of an infant who is born alive from injuries inflicted in utero constitutes homicide." (Internal quotation marks omitted.) Such a comparison, which might have been compelling forty or fifty years ago, is now passé. See *State* v. *Lamy*, supra, 158 N.H. 521 (describing born alive rule as "outdated anachronism often producing anomalous results"). Most other jurisdictions that have adopted the born alive rule did so at a time in our nation's history when the health of the fetus could not be monitored in utero, which is no longer the case. Although the majority concedes that "recent advances in medical science have prompted a number of state courts to depart from the born alive rule" in favor of a rule recognizing that a fetus can be the victim of a homicide, it fails to acknowledge that the "recent trend" to which it refers is more akin to a landslide, with approximately 70 percent of our sister states now rejecting the born alive rule in favor of fetal homicide laws. Indeed, many, if not most, of the cases from other jurisdictions that had adopted the born alive rule and on which the majority relies have been superseded by the fetal homicide laws enacted in those jurisdictions.[28] See, e.g., *State* v. *Cotton*, supra, 197 Ariz. 589 (born alive rule superseded by Ariz. Rev. Stat. Ann. §§ 13-1102, 13-1103, 13-1104 and 13-1105 [Cum. Sup. 2008]);

Ranger v. *State*, supra, 249 Ga. 317 (born alive rule superseded by Ga. Code Ann. § 16-5-80 [2007]); *People* v. *Bolar*, supra, 109 Ill. App. 3d 389 (born alive rule superseded by 720 Ill. Comp. Stat. Ann. 5/9-1.2, 5/9-2.1 and 5/9-3.2 [West 2002]); *Jones* v. *Commonwealth*, supra, 830 S.W.2d 880 (born alive rule superseded by Ky. Rev. Stat. Ann. §§ 507A.010 [1] [c] and 507A.020 through 507A.050 [LexisNexis 2008]); *Williams* v. *State*, supra, 316 Md. 682–83 (born alive rule superseded by Md. Code Ann., Crim. Law § 2-103 [LexisNexis Sup. 2009]); *State* v. *Cornelius*, supra, 152 Wis. 2d 280–82 (born alive rule superseded by Wis. Stat. Ann. § 940.04 [West 2005]). In short, there is no evidence that the born alive rule is "well established in the common law of this state," and the overwhelming majority of our sister states do not continue to follow the rule. Consequently, the majority's conclusion to the contrary lacks any solid basis in fact and is inconsistent with *Valeriano*.

The majority further justifies its decision on the ground that the legislative history of P.A. 03-21 (aggravated assault statute)[29] "reflects the legislature's express acceptance of the [born alive] rule" because the legislature rejected a bill[30] that would have defined "person," for purposes of the Penal Code, to include a viable fetus and enacted the aggravated assault statute in its place. This conclusion is both logically flawed and completely unsupported by the legislative history. There is no reflection in the legislative history of the legislature's express acceptance of the born alive rule, and nowhere in the legislative history does any legislator suggest that the rule is part of the common law of this state. Moreover, it is wholly irrelevant what assumptions the legislature made regarding the born alive rule because the statute was enacted nearly five years after the crime in this case was committed, and, in any event, the common law is not determined by legislative assumptions as to what the common law may be.

The majority states,[31] and I agree, that enactment of the fetal homicide bill would have constituted legislative rejection of the born alive rule, if it had been part of the common law, because treating the killing of a fetus in utero as a homicide *without evidence* that the fetus was alive at the time of the criminal act plainly conflicts with the rule's requirement that such evidence be provided in order for such a killing to constitute a homicide. The legislature's decision to treat the assault of a pregnant woman that results in the termination of her pregnancy as an *aggravated* assault, however, is not synonymous with acceptance of the born alive rule. To the contrary, the legislature consciously declined to address statutorily the controversial issue of the status of the fetus by omitting any reference to the unborn child in the aggravated assault statute and by making the offense a crime against the pregnant *woman* rather

than against the fetus. The reason why the legislature took this approach was that it wanted to punish conduct resulting in the termination of a pregnancy without becoming embroiled in an abortion rights debate and without granting the fetus independent legal recognition, which would have been granted under the fetal homicide bill. In other words, the aggravated assault statute was not intended to punish the perpetrator for a crime against the fetus but to provide pregnant women with additional protections by increasing the existing penalty for the assault of a pregnant woman if the assault results in the termination of her pregnancy. Compare P.A. 03-21 (designating assault of pregnant woman that results in termination of her pregnancy as class A felony) with General Statutes § 53a-59a (designating assault of pregnant woman in first degree as class B felony). Although this may appear to be a distinction without a difference, it was crucial to the enactment of the aggravated assault statute. The point is that, because the aggravated assault statute did not grant the fetus legal recognition, the statute is inconsistent with the presumption of the born alive rule that a fetus is a person as long as there is evidence that it was born alive. Accordingly, the majority's attempt to treat the legislature's refusal to expand the definition of "person" to include a fatally injured fetus as an affirmation of the born alive rule must collapse under the weight of its own faulty logic.

The majority further declares that "it is abundantly clear that . . . the legislature fully considered and rejected the possibility of abolishing the born alive rule and adopting a viability rule instead." This assertion is wrong in at least two respects. First, it implies that the born alive rule is presently followed in Connecticut because "the legislature . . . rejected the possibility of abolishing" it. As previously stated, I disagree that such a conclusion can be drawn from an objective examination of this state's common law or the legislative history of the aggravated assault statute. Second, it suggests that the legislature expressly considered the possibility of eliminating the born alive rule when it enacted the aggravated assault statute, when in fact it did not.

The only references to the born alive rule during the legislative proceedings on the fetal homicide and aggravated assault bills were made by Clarke D. Forsythe, president of Americans United for Life, and Bill O'Brien, legislative vice president of Connecticut Right to Life Corporation. Both Forsythe and O'Brien remarked in passing that that the definition of "person" in the Penal Code should be expanded to include an unborn fetus because the born alive rule had become outmoded and should be abolished in Connecticut. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2003 Sess., p. 424, remarks of O'Brien; id., pp. 663–66, written testimony of Forsythe; Conn. Joint

Standing Committee Hearings, Judiciary, Pt. 8, 2002 Sess., pp. 2403–2404, remarks of Forsythe. Forsythe admitted, however, that he was a resident of Illinois and twice explained that he was "not familiar with" or "aware of the intricacies of Connecticut law . . . ." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2002 Sess., pp. 2406, 2407. Moreover, no member of the committee or General Assembly referred to the born alive rule during the public hearings or legislative debates on the matter. The legislature understandably was concerned with the much narrower question of whether and how to penalize a perpetrator for causing the death of an *unborn* fetus. Furthermore, any positive discussion of the born alive rule would have been inconsistent with the legislature's express unwillingness to create a new capital offense. See id. pp. 2429–30, remarks of Representative Michael P. Lawlor (stating that creation of "new capital offense" was "real issue" and that he was "extremely reluctant" to expose potential defendants to capital punishment for killing unborn fetus). Accordingly, because the record demonstrates that the legislature did not discuss, or take any action that could be construed as recognizing, the born alive rule at any time during the proceedings, it cannot be said that the legislature "fully considered and rejected" abolishing the born alive rule in Connecticut.[32]

In reaching the opposite conclusion, the majority takes what can only be described as extreme liberties in interpreting the legislative history. For example, the majority unequivocally declares, in sometimes overblown language, that "the legislature opted to preserve the born alive rule," "our legislature has decided to retain the rule," "judicial abrogation of the born alive rule would lead to a result that is both unprecedented and absurd," "the obvious intent of the legislature [in enacting the aggravated assault statute was] to classify as a homicide conduct that causes an infant to die after being born alive as a result of injuries that were inflicted in utero," failing to apply the born alive rule in this case would amount to a "perverse scheme" to decriminalize the infliction of fatal injuries on a fetus that is subsequently born alive, the legislature was "carving out an exception" to the born alive rule when it enacted the aggravated assault statute, and the legislature recognized that "an infant who is born alive but subsequently dies from injuries sustained in utero already is protected by virtue of the operation of the born alive rule, pursuant to which the infant's death is treated as a homicide." Even more misleading is the majority's statement that, "as a consequence of the enactment of [the aggravated assault statute], this court *lacks the authority* to reject the born alive rule . . . ." (Emphasis added.) To those who have not read the legislative history, these assertions convey the impression that the legislature expressly recognized that the infliction of fatal injuries on a fetus that is subsequently born alive is presently

considered murder in Connecticut and that the aggravated assault statute was enacted to complement the rule by providing a remedy for the death of a fetus that dies in utero. The majority appears to base its assertions on the limiting language of the aggravated assault statute, the testimony of pro-life and pro-choice witnesses during the judiciary committee hearings on the fetal homicide and aggravated assault bills and the passing references to the born alive rule by Forsythe and O'Brien, who testified as pro-life advocates before the committee. *Nothing* in the legislative history, however, demonstrates that the legislature expressly, or even implicitly, recognized the born alive rule when it considered either bill. In fact, exactly the opposite is true.

With respect to language in the aggravated assault statute limiting its application to "the termination of pregnancy that does not result in a live birth"; P.A. 03-21; the language implies nothing more than it says. The statute was enacted in direct response to the sensational killing of a pregnant woman and the acute public concern that followed regarding the lack of a penalty for the death of her unborn fetus. See 46 S. Proc., Pt. 4, 2003 Sess., p. 1009, remarks of Senator Andrew J. McDonald ("this bill arises out of, has generally become known as Jenny's bill and it deals with the situation where a woman is assaulted while pregnant and the assault causes her pregnancy to terminate without a live birth"); id., p. 1010, remarks of Senator Donald E. Williams, Jr. ("Jenny's law . . . refers to a specific case [involving] a young woman . . . [who] was pregnant at [the] time [she was shot and murdered]"). Consequently, the bills and those who testified at the committee hearings focused exclusively on a remedy for the killing of an unborn fetus. In restricting application of the statute to the death of such a fetus, the legislature was not acknowledging that a penalty presently exists for the killing of a fetus that is born alive and subsequently dies but, rather, was directing its attention to the specific issue at hand and expressing its intention *not* to address circumstances beyond those giving rise to the statute ultimately enacted. The majority's declaration that the existence of the born alive rule was the "only . . . possible reason why the legislature opted to include within the protection of [the aggravated assault statute] only those fetuses that are not born alive"; footnote 54 of the majority opinion; thus misses the mark completely and raises questions as to the majority's knowledge and understanding of the legislative history of the fetal homicide and aggravated assault bills.

Insofar as the majority relies on the testimony at the legislative hearings to conclude that the enactment of the aggravated assault statute also represented legislative affirmation of the born alive rule, it misunderstands the compromise ultimately forged to bridge the stark differences expressed by pro-choice and pro-life advocates who spoke before the judiciary committee. In

often eloquent language, pro-life advocates argued that an unborn fetus should be recognized as an independent entity deserving of legal protection and, therefore, that the fetal homicide bill should be passed. See, e.g., Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2002 Sess., pp. 2425–26, 2428, remarks of Sister Suzanne Gross, on behalf of the Pro-Life Ministry of the Franciscan Life Center. In equally eloquent language, pro-choice advocates, fearing an erosion of existing abortion rights, argued that an unborn fetus should not be granted independent legal status and that restraining orders and other laws then in place to curb domestic violence were sufficient, if properly enforced, to protect pregnant women. See, e.g., id., p. 2309, remarks of Jennifer C. Jaff, on behalf of Connecticut Coalition for Choice. Pro-choice advocates thus contended that the real issue at stake was the protection of a woman's right to carry her pregnancy to term, and that it was not necessary to enact additional laws that would create new penalties for the killing of an unborn fetus. See, e.g., id., p. 2227, remarks of Jeri Reutenaur, on behalf of the Connecticut Civil Liberties Union; id., p. 2311, remarks of Jaff. Significantly, no witnesses, other than Forsythe and O'Brien, referred to the born alive rule, presumably because the rule never had been publicly recognized in this state and thus was generally unknown.

After considering the foregoing arguments, the legislature was unwilling to choose sides. It thus crafted a solution in which each side got some, but not all, of what it sought in order to garner broad public support. See, e.g., 46 S. Proc., Pt. 4, 2003 Sess., p. 1010, remarks of Senator Williams ("[T]here's broad support for this bill. The National Organization of Women and the Connecticut Coalition [for] Choice are joined by the Conference of Catholic Clergy in a unique alliance in support of this legislation."); id., p. 1013, remarks of Senator Catherine W. Cook (praising "extraordinary work" of former state Representative Peter Nystrom preceding year "in crafting that very unusual compromise between the pro-life folks and the pro-abortion folks"); id., p. 1014, remarks of Senator Toni Nathaniel Harp ("this bill goes a long way in reconciling some of the contradictions that may appear in the minds of those around women's right to choose"); 46 H.R. Proc., Pt. 7, 2003 Sess., p. 1982, remarks of Representative Jefferson B. Davis (stating that bill was "reasonable compromise"). To placate pro-life advocates, a new offense was created in the aggravated assault statute that increased the penalty for the assault of a pregnant woman by elevating the crime from a class B to a class A felony if it results in the termination of her pregnancy. To mollify pro-choice advocates, the legislature declined to make the new offense a crime against the unborn fetus because this would have granted the fetus legal rights independent of the mother. Thus, the essence of

the compromise was to increase the penalty for an assault on a pregnant woman that results in the termination of her pregnancy *without* recognizing the fetus as a separate legal entity. The legislature accomplished this delicate balance by omitting any reference to the fetus in the statute, by using language emphasizing that the crime is against the woman and by naming it, "An Act Concerning Assault of a Pregnant Woman."[33]

The majority fails to appreciate this fact, consistently describing the aggravated assault statute as imposing a penalty for the killing of a fetus. If this had been the legislature's intention, however, the act never would have passed. As the demise of the fetal homicide bill demonstrates, the legislature was *unwilling* to recognize independent fetal rights in light of the strong opposition of pro-choice advocates. The born alive rule, under which the killing of a fetus is considered as murder as long as there is evidence to prove that the fetus was alive when the criminal act was committed, employs exactly the same solution as the fetal homicide bill, namely, granting the fetus independent legal rights by imposing a punishment expressly related to its death, a step that the Connecticut legislature clearly was unwilling to take.[34]

As previously stated, no member of the judiciary committee engaged in a discussion of the born alive rule, even when Forsythe and O'Brien mentioned the rule during the committee hearings. In the exchange to which the majority refers involving O'Brien and Representative Farr, Farr did not affirm the existence of the rule but merely asked O'Brien to clarify his comments distinguishing the born alive rule from penalties imposed for the death of a viable or nonviable fetus by asking whether "the bill . . . is actually going from conception, but it doesn't treat it as a separate case of murder *is that what you're saying.*" (Emphasis added.) Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2003 Sess., p. 426. O'Brien responded: "That's right. It's simply talking about the woman and her pregnancy, a pregnant woman." Id. The discussion thus concerned details relating to aggravated assault statute, not the born alive rule.[35]

Finally, with respect to the majority's focus on legislative history, it is more than ironic that the majority finds the enactment of the aggravated assault statute equivalent to legislative affirmation of the born alive rule when it also declares that the statutory provisions pertaining to murder and the definition of "person," the only relevant statutes in the present case, are unclear and that the pertinent legislative history of *those* provisions "offers no guidance with respect to the issue [of] . . . whether a person who murders a pregnant woman also may be found guilty of the murder of the baby if the baby is born alive and later dies from the injuries inflicted while the baby is in utero," a conclusion shared

by the trial court in this case.

In addition to its common-law analysis, which is entirely irrelevant in light of the fact that adoption of the Penal Code in 1969 abrogated our common law of crimes; see, e.g., *State* v. *Ross*, supra, 230 Conn. 197; the majority maintains that the born alive rule fills a "gap" in the law; footnote 54 of the majority opinion; because, but for the existence of that rule, there would be no penalty for the infliction of fatal injuries on a fetus that is subsequently born alive. I agree that the aggravated assault statute was not intended to address situations in which an assault causes the death of a fetus after it is born alive. I also believe, however, that the current lack of a penalty in Connecticut for causing such a death does not represent a gap in the law. The legislature merely has determined that an assault of a pregnant woman that results in the termination of her pregnancy is a class A felony. As the legislative history of the aggravated assault statute demonstrates, the legislature declined to grant the fetus independent legal rights in the face of strong opposition by pro-choice advocates, and, therefore, it never has enacted a law directly imposing any type of penalty for causing the death of a fetus, either before or after it is born. The majority's mischaracterization of the statute as imposing such a penalty in support of its assertion that a gap in the law exists reflects, at best, a serious misunderstanding of the legislative history and, at worst, a misguided attempt to create a theoretical justification for adopting the born alive rule.[36] I agree with the majority that the lack of such a penalty is a matter of concern. The imposition of a penalty by judicial fiat in the absence of clear legislative guidance, however, defies legal and common sense, and interferes with the prerogatives of another branch of government. See *State* v. *Anonymous (1986-1)*, supra, 40 Conn. Sup. 505 ("For this court to explore new fields of crime is foreign to modern concepts of justice and raises serious questions of separation of powers between it and the legislature. Therefore, any redefining of the word 'person' must be left to the legislature, which has the primary authority to define crimes."); see also *State* v. *Gray*, 62 Ohio St. 3d 514, 518, 584 N.E.2d 710 (1992) ("[a] court should not place a tenuous construction on [a] statute to address a problem to which the legislative attention is readily directed and which it can readily resolve if in its judgment it is an appropriate subject of legislation" [internal quotation marks omitted]). Furthermore, the majority's adoption of the born alive rule means that the penalty for causing the death of a fetus that is fatally injured but subsequently born alive will be far greater than the penalty established by the legislature for the assault of a pregnant woman that results in the termination of her pregnancy. Accordingly, although there is presently no punishment for causing the death of a fetus who dies after birth from prenatal injuries, adoption of the

born alive rule will create a new legal conundrum because perpetrators now will be exposed to two different consequences for essentially the same conduct, merely on the basis of whether the fetus dies before or after it is born. Subjecting the perpetrator to two different penalties depending on how long it takes the victim to die is, to my knowledge, unheard of in any other criminal context,[37] finds no support in the legislative history of the fetal homicide bill and, as previously noted, raises serious due process concerns. Creating a second penalty with vastly different consequences for the death of a fetus that dies from prenatal injuries after birth also will have the reprehensible effect of providing an incentive for the perpetrator to conduct an even more brutal and vicious attack on a pregnant woman to ensure that the fetus dies in utero and thus escape the more serious punishment of death that will very likely follow if the fetus dies after birth. Such an absurd and bizarre result could not have been intended by the legislature.

Contrary to the majority's claim, it is the majority's adoption of the born alive rule, not my interpretation of the relevant statutes and legislative history, that will "[violate] several cardinal principles of statutory construction." These include the well established canon that "[c]riminal statutes are not to be read more broadly than their language plainly requires and ambiguities are ordinarily to be resolved in favor of the defendant. . . . [U]nless a contrary interpretation would frustrate an evident legislative intent, criminal statutes are governed by the fundamental principle that such statutes are strictly construed against the state." (Internal quotation marks omitted.) *State* v. *Salamon*, 287 Conn. 509, 542–43 n.28, 949 A.2d 1092 (2008). Statutes also must be interpreted so as to ensure consistency and to avoid bizarre results. See, e.g., *Dias* v. *Grady*, 292 Conn. 350, 361, 972 A.2d 715 (2009) ("those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results" [internal quotation marks omitted]). The majority's construction of our murder statute violates these principles because the statute does not plainly apply to the killing of a fetus that is fatally injured but is subsequently born alive. The majority thus fails to construe the statute strictly against the state.

To the extent that any lingering doubt remains as to how the murder statute should be construed, I believe that the court must rely on the well established rule of lenity, which directs that any ambiguity in a capital felony statute must be interpreted in favor of the defendant; see *State* v. *Harrell*, 238 Conn. 828, 832–33, 838, 681 A.2d 944 (1996); a point I also made in my dissenting opinion in *State* v. *Courchesne*, 262 Conn. 537, 597–99, 609–13, 816 A.2d 562 (2003) (*Zarella*, *J.*, dissenting). In *Courchesne*, the question before the court was whether, when a defendant has been convicted of capital felony

for the "murder of two or more persons at the same time or in the course of a single transaction" under General Statutes (Rev. to 1997) § 53a-54b (8), and the state seeks a death sentence, the state is required to prove the existence of the aggravating factor enumerated in General Statutes § 53a-46a (i) (4), namely, that the defendant committed the killing in "an especially heinous, cruel or depraved manner," as to both of the victims or only one of the victims. Id., 542. The majority in *Courchesne* conceded that the text of the statutes favored the defendant's interpretation that the state must prove that both of the victims had been murdered in an especially heinous, cruel or depraved manner; see id., 546–47; but declined to apply the rule of lenity to resolve ambiguities in the statute's language. See id., 555–56; see also id., 597–98 (*Zarella*, *J.*, dissenting). I disagreed with the majority for its failure to follow the rule's clear command, especially in the context of a capital felony. See id., 597–99, 609–13. We are now presented with a similar question involving a related statute, and, once again, I disagree with the majority's decision in the present case to ignore this venerable rule.

As I stated in *Courchesne*, "[t]he rule of lenity, which embodies the fundamental constitutional principles of due process and the separation of powers; see, e.g., *United States* v. *Bass*, 404 U.S. 336, 348, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971); provides that our death penalty statute should not be applied unless the legislature '*expressly* so intend[s].' " (Emphasis in original.) *State* v. *Courchesne*, supra, 262 Conn. 598 (*Zarella*, *J.*, dissenting), quoting *State* v. *Harrell*, supra, 238 Conn. 832. The reason why the rule of lenity has become an important due process consideration in this and other jurisdictions is that, "when choice has to be made between two readings of what conduct [the legislature] has made a crime, it is appropriate, before we choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite. . . . This principle is founded on two policies that have long been part of our tradition. First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should. . . . Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." (Citations omitted; internal quotation marks omitted.) *United States* v. *Bass*, supra, 404 U.S. 347–48. The rule of lenity carries added significance in

death penalty cases, in which the ultimate punishment may be imposed.

The provision now before the court is General Statutes § 53a-54a (a), which provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person . . . he causes the death of such person or of a third person . . . ." General Statutes § 53a-3 (1) defines "person" as "a human being . . . ." The majority states that the statutory provisions are unclear and that the pertinent legislative history "offers no guidance with respect to the issue [of] . . . whether a person who murders a pregnant woman also may be found guilty of the murder of the baby if the baby is born alive and later dies from the injuries inflicted while the baby is in utero, in the course of the intentional killing of the mother." The trial court, *Damiani*, *J.*, likewise indicated in its memorandum of decision on the defendant's motion to dismiss for lack of probable cause that there is no express statutory authority in Connecticut for the proposition that the definition of "person" under the murder statute includes a fetus that is born alive and later succumbs to injuries inflicted in utero. See *State* v. *Courchesne*, supra, 46 Conn. Sup. 66–67. Consequently, the majority and the trial court both have concluded that there is no express intention in the statutory scheme to impose the death penalty when the second of two deaths occurring in the course of the same transaction involves a fetus that is fatally injured but is subsequently born alive. In these circumstances, the rule of lenity not only should, but must, be applied to resolve the lack of an express intention in the statutory scheme;[38] see, e.g., *United States* v. *R. L. C.*, 503 U.S. 291, 305, 112 S. Ct. 1329, 117 L. Ed. 2d 559 (1992) (rule of lenity reserved for "those situations in which a reasonable doubt persists about a statute's intended scope" [internal quotation marks omitted]); and the majority's failure to do so constitutes a fatal flaw in its analysis.

In closing, I return to the words of Justice Holmes, who offered the following additional thoughts when reflecting on the question of whether well established rules of law should be perpetuated: "[I]f we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. . . . [W]e find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it. The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened [skep]ticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and

see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal." O. Holmes, supra, 10 Harv. L. Rev. 469. Having gotten the dragon out of his cave and examined the roots of the born alive rule, and having come to understand its creation as an evidentiary tool that was used to determine whether the fetus was alive at the time of the criminal conduct, I believe that it is clear that advances in medical science have rendered the rule obsolete, a conclusion now shared by the vast majority of other jurisdictions. It is time to slay the dragon for the purpose of creating a more useful rule that will establish criminal responsibility for the killing of a fetus, regardless of when it dies. This is a task for the legislature, not the courts, because it requires the kind of open and vigorous public debate that is unique to the exercise of legislative discretion. Until that time, the court must rely on the rule of lenity, which mandates that any ambiguity in a capital felony statute be construed in favor of the defendant absent an express intention in the statutory scheme. *State* v. *Harrell*, supra, 238 Conn. 832–33. Accordingly, I respectfully dissent with respect to parts II through V of the majority opinion.

[1] See *State* v. *Courchesne*, 262 Conn. 537, 555–56 and n.15, 816 A.2d 562 (2003) (declining to apply rule of lenity to interpretation of capital felony statutes).

[2] Because I would not address any of the defendant's penalty phase claims on the basis of my disagreement with parts II through V of the majority opinion, I decline to take any position with respect to part VI, in which the majority addresses certain of the defendant's penalty phase claims.

[3] "It is a well settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim, cessante ratione, cesset ipsa lex. This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law . . . must cease to apply as a controlling principle to the new circumstances." (Internal quotation marks omitted.) *State* v. *Muolo*, supra, 118 Conn. 378–79.

[4] In *State* v. *Lamy*, 158 N.H. 511, 969 A.2d 451 (2009), a case on which the majority relies, the New Hampshire Supreme Court acknowledged that the born alive rule is obsolete, stating, "[w]e recognize, as have many other courts, that the born alive doctrine may be an outdated anachronism often producing anomalous results. . . . However, because the legislature explicitly chose to adopt the rule as statutory law, we cannot mold, change, [or] reverse the doctrine as we could were it still common law. . . . In cases of criminal law, [i]t is the province of the legislature to enact laws defining crimes and to fix the degree, extent and method for punishment. . . . Should the legislature find the result in this case as unfortunate as we do, it should follow the lead of many other states and revisit the homicide statutes as they pertain to a fetus." (Citations omitted; internal quotation marks omitted.) Id., 521. This court, unlike the New Hampshire court, is not bound by legislative acceptance of the born alive rule. The majority nonetheless embraces it in "blind imitation of the past"; O. Holmes, supra, 10 Harv. L. Rev. 469; even though the rule has been abandoned by the majority of our sister states as "an outdated anachronism often producing anomalous results." *State* v. *Lamy*, supra, 521.

[5] "[T]he expression corpus delicti, as understood in homicide cases, means the body of the crime, and consists of two component parts, the first of which is the death of the person alleged to have been killed, and the second that such death was produced through criminal agency." *State* v. *Sogge*, 36 N.D. 262, 271, 161 N.W. 1022 (1917).

[6] The majority assails the idea that the born alive rule evolved as a rule of evidence, quoting from the work of two modern commentators who believe that it is "a substantive rule for defining legal personhood." Footnote

47 of the majority opinion, citing B. Steinbock, Life Before Birth: The Moral and Legal Status of Embryos and Fetuses (Oxford University Press 1992) c. 3, pp. 105–107, and K. Savell, "Is the 'Born Alive' Rule Outdated and Indefensible?," 28 Sydney L. Rev. 625, 633 (2006). I am not surprised that a few commentators who support the rule would attempt to diminish the large body of nineteenth century law and analysis on which Forsythe, Taylor and other respected attorneys and experts on medical jurisprudence base their views. Once advanced medical technology has made the rule obsolete, there is no other way to defend or retain it except by transforming it into a substantive element of the crime of murder and severing the temporal connection between the criminal act and the legal status of the victim at the time of the fatal injury. In this regard, both Steinbock, a philosopher, and Savell express reluctance to accept the evidentiary nature of the born alive rule because each is advocating for its retention and advancing a theory that the unborn fetus has no legally protected interests. See K. Savell, supra, 627 (arguing that "a conception of personhood that pays due regard to the intrinsic and relational aspects of [fetal] being has greater potential both to explain the existing criminal law, and to guide future developments, than does a theory based solely on the intrinsic properties of the [fetus]," and acknowledging that her personal "theory" that personhood requires relationship to external world is "consistent with retaining the 'born alive' rule"); see also B. Steinbock, supra, c. 1, p. 41, and c. 3, p. 107. Accordingly, Steinbock and Savell have no interest in acknowledging the evidentiary basis of the born alive rule because doing so would make their respective philosophical theories, neither of which, to my knowledge, appears to have been accepted by any court of law, more difficult to defend.

[7] These advances include amniocentesis, ultrasonography and fetal heart rate monitoring. See J. Williams, Obstetrics (22d Ed. 2005) pp. 328, 390, 464–65.

[8] In *Commonwealth* v. *Lawrence*, 404 Mass. 378, 383–84, 397, 536 N.E.2d 571 (1989), the court reaffirmed its earlier decision in *Cass* and upheld the defendant's conviction of involuntary manslaughter for causing the death of a twenty-seven week old fetus in the course of murdering the mother.

[9] "The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Friez*o v. *Friezo*, 281 Conn. 166, 181–82, 914 A.2d 533 (2007). "Because statutory interpretation is a question of law, our review is de novo." (Internal quotation marks omitted.) *State* v. *Orr*, 291 Conn. 642, 650, 969 A.2d 750 (2009).

[10] *State* v. *Cotton*, 197 Ariz. 584, 5 P.3d 918 (App. 2000); *State* v. *Hammett*, 192 Ga. App. 224, 384 S.E.2d 220 (1989); *Jones* v. *Commonwealth*, 830 S.W.2d 877 (Ky. 1992); *Cuellar* v. *State*, 957 S.W.2d 134 (Tex. App. 1997).

[11] The Georgia court acknowledged the more expansive nature of the statute in that state when it observed that "[n]othing in [the statute] limits consideration of the status of the victim to the moment at which the injury is inflicted, since the statute explicitly states that second degree vehicular homicide is committed when a person '*causes the death* of another person.' " (Emphasis in original.) *State* v. *Hammett*, supra, 192 Ga. App. 225.

[12] The majority also relies substantially on the outmoded rationale of *State* v. *Cotton*, supra, 197 Ariz. 584, in part IV of its opinion, in which it considers the due process issues raised by the present case.

[13] That statute provides in relevant part: "A person is guilty of manslaughter in the second degree when:

"1. He recklessly causes the death of another person . . . ." N.Y. Penal Law § 125.15 (McKinney 2009).

[14] The majority criticizes *Aiwohi*, describing it as the only case cited in this opinion for the proposition that a temporal nexus is required between

the criminal conduct and the victim's status. See footnote 67 of the majority opinion. The majority is mistaken. I also rely on *State* v. *Hammett*, supra, 192 Ga. App. 225, in which the court determined that the vehicular homicide statute at issue contained no language that required a temporal nexus, and, therefore, the defendant in that case was subject to prosecution. See footnote 11 of this opinion. I also cite statutes from Colorado and Oregon that require a temporal nexus. See Colo. Rev. Stat. § 18-3-101 (2) (2009); Or. Rev. Stat. § 163.005 (3) (2009). The principal reason why there are so few contemporary cases that discuss the issue is because the legislatures in the majority of our sister states have enacted fetal homicide statutes, thus making further judicial construction of the relevant murder statutes under the born alive rule unnecessary. See footnote 15 of this opinion. To the extent that the court in *Aiwohi* noted that "an overwhelming majority of the jurisdictions confronted with the prosecution of a third party for conduct perpetrated against a pregnant mother, causing the death of the subsequently born child, uphold the convictions of the third parties"; *State* v. *Aiwohi*, supra, 109 Haw. 123; *every one* of the cases that the court in *Aiwohi* cited were from jurisdictions that have rejected the born alive rule by adopting a fetal homicide statute, or involved a manslaughter or reckless homicide statute that did not require proof of intent, unlike the murder statute in this case. Accordingly, the majority's comments are unpersuasive.

[15] The majority misrepresents my views when it claims that (1) I "concede" that the born alive rule has been "repudiated" in other jurisdictions as unnecessarily narrow or restrictive because it does not extend to the killing of a fetus that dies in utero, and (2) my purported belief that the rule also should be repudiated in Connecticut as too narrow is "nonsensical" because it requires an assumption that the legislature intended to create an irrational statutory scheme under which it would be a class A felony to kill a fetus that dies in utero and no crime at all to kill a fetus that is born alive and that subsequently dies from injuries sustained in utero. Footnote 58 of the majority opinion. The majority completely misunderstands my discussion of this matter, and, consequently, it is the majority, not this opinion, that "sets up the proverbial straw man" to attack the opposition. Id.

As previously stated, I believe jurisdictions that have recognized and subsequently abandoned or repudiated the born alive rule in favor of fetal homicide statutes have done so not merely to expand the class of victims injured in utero, but to restore the temporal connection between the element of intent and the status of the victim at the time of the criminal act. My view that Connecticut should not adopt the born alive rule is based on the fact that the Penal Code precludes it, and, even if this was not the case, the rule has become, over time, a substantive element of the crime in which the temporal connection between criminal intent and the criminal act has been severed. I thus believe that, because the born alive rule never has been adopted in Connecticut, a decision by this court to refrain from adopting the rule in the present case neither expands nor narrows the class of criminals currently subject to prosecution for the killing of a fetus in this state.

[16] The majority's repeated assertions that I believe this court should "reject" the born alive rule incorrectly perpetuate the idea that the rule presently exists in Connecticut, a proposition with which I disagree.

[17] The legislature adopted the Penal Code in 1969, and it became effective on October 1, 1971. See, e.g., *State* v. *Skakel*, 276 Conn. 633, 776, 888 A.2d 985 (*Katz*, *J.*, concurring), cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).

[18] See 2 Z. Swift, A System of the Laws of the State of Connecticut (1796).

[19] The fact that this court sometimes has relied on Swift's treatise in other contexts is irrelevant. Even if the treatise is consulted, it explains that the purpose of the born alive rule was to determine whether the fetus was alive at the time of the criminal act, and not, as the majority insists, to impose a penalty for the killing of a fetus merely because it was born alive and thus became a person before it died. See 2 Z. Swift, supra, p. 267.

[20] I use the term "nonviable" fetus throughout this opinion to refer to a previable fetus, or a fetus that has not yet reached the stage in its development that it would be capable of living outside the mother's womb.

[21] The court in *Anonymous* cited cases from California, Florida, Illinois, Kentucky, Louisiana, Michigan, New Jersey, Utah and West Virginia. See *State* v. *Anonymous (1986-1)*, supra, 40 Conn. Sup. 503. All but New Jersey have enacted fetal homicide or feticide statutes.

[22] The majority finds fault with my failure to explain why this state would not have recognized the born alive rule under the common law. Such speculation on my part is beside the point. The issue before this court never has been raised under our homicide statutes, and, consequently, the born alive

rule never has been judicially recognized or rejected in Connecticut. Consequently, the only relevant question is whether *this* court should adopt the rule in the present case.

[23] The majority reaches this conclusion on the basis of the following commentary in the Model Penal Code: "Section 210.0 (1) defines the term 'human being' to mean a person 'who has been born and is alive.' The effect of this language is to continue the common-law rule limiting criminal homicide to the killing of one who has been born alive. Several modern statutes follow the Model Code in making this limitation explicit. Others are silent on the point, but absent express statement to the contrary, they too may be expected to carry forward the common-law approach.

"*The significance of this definition of 'human being' is that it excludes from criminal homicide the killing of a fetus.* This exclusion is warranted in order to avoid entanglement of abortion in the law of homicide. . . .

"Thus, defining 'human being' to exclude a fetus serves the valuable function of maintaining abortion as an area of distinct criminological concern not covered by the law of homicide." (Emphasis added.) Model Penal Code § 210.1, comment 4 (c) (1980).

On the basis of this commentary, the majority concludes that, because the Connecticut legislature has made no explicit statement regarding the born alive rule, it may be presumed that the rule has been adopted in this state. I disagree for all of the reasons discussed in this opinion, including that the legislature did not employ the definition of "human being" on which this portion of the Model Penal Code commentary is based and, additionally, that the focus of the commentary is on the killing of a fetus, not on the killing of a fetus that is fatally injured but subsequently born alive.

[24] See *State* v. *Muolo*, supra, 118 Conn. 378 (defining our common law as "the prevailing sense of the more enlightened members of a particular community, *expressed through the instrumentality of the courts*" [emphasis added]); *Brown's Appeal from Probate*, 72 Conn. 148, 151, 44 A. 22 (1899) ("[a]s our jurisprudence developed, *the courts* applied the principles of the [English] common law to the decision of causes, *so far as they seemed applicable to our social conditions*" [emphasis added]).

[25] See footnote 37 of this opinion.

[26] General Statutes § 53a-4 provides: "The provisions *of this chapter* shall not be construed as precluding any court from recognizing other principles of criminal liability or other defenses not inconsistent with such provisions." (Emphasis added.) The commission's comment further explains: "The purpose of this saving clause is to make clear that *the provisions of sections 53a-5 to 53a-23*, which define the principles of criminal liability and defenses, *are not necessarily exclusive*. A court is not precluded by sections 53a-5 to 53a-23 from recognizing other such principles and defenses not inconsistent therewith. *This does not mean, however, that the court is free to fashion additional substantive offenses, for the* [c]*ode precludes, by repealing section 54-117, the notion of common law crimes*." (Emphasis added.) Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. § 53a-4 (West 2007), comment, p. 324.

[27] For several reasons, I disagree with the majority's assertion that this court, in *Ullmann* v. *State*, 230 Conn. 698, 647 A.2d 324 (1994), "expressly disavowed [*Valeriano*'s] narrow reading . . . of the applicability of Swift's Digest to Connecticut law . . . ." Footnote 41 of the majority opinion. First, this court did not conclude in *Valeriano* that Swift was never applicable or relevant in construing Connecticut law, but stated that, "[u]nder the circumstances," which required the court to interpret the concept of proximate cause under Connecticut's felony murder statute, reliance on Swift's Digest was "a weak position." *Valeriano* v. *Bronson*, supra, 209 Conn. 91–92 n.10. Second, the issue in *Ullmann* involved the interpretation of a contempt statute, not a provision from the Penal Code. See *Ullmann* v. *State*, supra, 699. Thus, the court in *Ullmann* could not have disavowed our conclusion in *Valeriano* regarding the applicability of Swift's Digest to the interpretation of the Penal Code in that case. Third, although the court in *Ullmann* noted that Swift had stated in the preface to the first volume of his Digest that his "plan [was] to select from the English authorities, the rules in force here, and to combine them with our own, in a systematic view, so as to exhibit one complete code"; (internal quotation marks omitted) id., 707 n.7; the reason why the court found Swift persuasive in resolving the contempt issue was because Swift had cited English common law as authority for the Connecticut contempt statute in existence in the early nineteenth century, which was similar to the contempt statute at issue in *Ullmann*. See id., citing 2 Z. Swift, supra, pp. 359–60. In contrast, Swift's Digest did not refer to the year and a day rule or the born alive rule as authority for any Connecticut statute or court decision pertaining to those rules. In both the

Digest and its predecessor, "A System of the Laws of the State of Connecticut"; see footnote 18 of this opinion; Swift's reference to the born alive rule was followed by a footnote to the work of the renowned English commentator, Sir Edward Coke, in which Coke described the English common-law born alive rule. Furthermore, as the court indicated in *Valeriano*, a former Connecticut judge who studied the legal significance of Swift's Digest and wrote a biographical article about Swift observed that the Digest "covered the law generally and was almost as applicable to the other states as it was to his own. Undoubtedly this was the reason why the Digest was used to a considerable extent throughout the [s]tates, mainly for legal instruction but occasionally as an authority cited to and by the courts." P. O'Sullivan, supra, 19 Conn. B.J. 192. In light of the scholarly character of this biographical piece and the fact that Swift cited no Connecticut statutes or cases pertaining to the born alive rule, I do not believe that the court in *Valeriano* was mistaken in concluding that reliance on Swift was misplaced in that context or that Swift was largely a compendium of "not only . . . Connecticut law but . . . the law generally." (Internal quotation marks omitted.) *Valeriano* v. *Bronson*, supra, 91–92 n.10. Finally, even if it is presumed that Swift's Digest once was regarded as common-law authority for the existence of the born alive rule in Connecticut, such authority clearly was extinguished when the legislature adopted the Penal Code in 1969.

[28] The majority attacks my purported assertion that the born alive rule is not deeply rooted in the common law. As a fair reading of this opinion demonstrates, however, I make no such assertion but merely state that the born alive rule is not deeply rooted in *Connecticut* law. As previously explained, our legal precedent has established that "the common law of England . . . is not necessarily the common law of Connecticut"; *State* v. *Muolo*, supra, 118 Conn. 378; and that Connecticut has defined the common law in its own terms as "the prevailing sense of the more enlightened members of a particular community, *expressed through the instrumentality of the courts*, as to those rules of conduct which should be definitely affirmed and given effect under the sanction of organized society, in view of the particular circumstances of the time . . . ." (Emphasis added; internal quotation marks omitted.) *Dacey* v. *Connecticut Bar Assn.*, supra, 184 Conn. 25–26. Consequently, the majority misrepresents my views, and its conclusions reflect a basic misunderstanding of the legal precedent on which they are based.

[29] Public Act 03-21, which is codified as amended at General Statutes § 53a-59c, provides: "(a) A person is guilty of assault of a pregnant woman resulting in termination of pregnancy when such person commits assault in the first degree as provided under subdivision (1) of subsection (a) of section 53a-59 of the general statutes and (1) the victim of such assault is pregnant, and (2) such assault results in the termination of pregnancy that does not result in a live birth.

"(b) In any prosecution for an offense under this section, it shall be an affirmative defense that the actor, at the time such actor engaged in the conduct constituting the offense, did not know that the victim was pregnant.

"(c) Assault of a pregnant woman resulting in termination of pregnancy is a class A felony."

[30] Raised House Bill No. 5747 (2002). Hereinafter, all references to the fetal homicide bill are to Raised House Bill No. 5747.

[31] As I previously discussed, the majority makes conflicting assertions with respect to this issue.

[32] The majority's assertion that the legislature rejected the possibility of "abolishing the born alive rule and adopting a viability rule instead" because a report on the aggravated assault statute prepared by the office of legislative research "indicates that the legislature, in making its determination, was well aware of the trial court's express reliance on the born alive rule in the present case, as well as the application of the rule by the court in *State* v. *Anonymous (1986-1)*, supra, 40 Conn. Sup. 498," is inaccurate. As I previously discussed, the legislature did not reject the possibility of abolishing the born alive rule when it considered the fetal homicide and aggravated assault bills, and the court did not apply the rule in *Anonymous*. The majority quotes a passage in the report stating that the aggravated assault statute "does not affect the murder statutes. Under Connecticut case law, a person cannot be charged with murder of a baby unless the baby is born alive and lives for some period of time." Office of Legislative Research, Research Report No. 2003-R-0488, "Assault of a Pregnant Woman and Murder" (June 30, 2003), available at http://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-R-0488.htm (last visited May 27, 2010). The quoted passage, however, incor-

rectly represents that the born alive rule has been adopted by courts of this state. I agree with the majority that legislative reports do not constitute evidence of legislative intent. I also agree with the majority that legislative inaction does not necessarily constitute affirmation of a judicial decision. Accordingly, I do not understand why the majority states that it is reasonable to conclude that the legislature's inaction "may be understood as a validation" that the born alive rule is part of Connecticut law, especially in light of the fact that this case continues to be litigated and is currently under appeal. Finally, the majority's assertion that the legislature did not take action following *Anonymous* and the trial court's ruling in the present case is not necessarily true. The legislature's refusal to enact the fetal homicide bill because it would have created a new capital offense could well be construed as a rejection of the trial court's ruling in the present case, issued approximately three years earlier, which had the practical effect of creating a new capital offense for the murder of a fetus.

[33] In light of this legislative history, the majority's claim that "there is only one possible reason why the legislature opted to include within the protection of [the aggravated assault statute] only those fetuses that are not born alive, namely, the born alive rule . . . which operates to protect an infant who suffers injuries in utero but who is born alive and then dies from those injuries," and its corresponding claim that I "[do not posit] any other conceivable reason why [the statute] excludes from its purview an infant who is born alive but who subsequently dies from injuries sustained in utero," misrepresent the record as well as my opinion. Footnote 54 of the majority opinion. The majority also goes on to assert that it is "unwilling to assume" that the legislature could have enacted the statute in response to the specific event in question, namely, the killing of a fetus in utero, without considering the born alive rule, thus ignoring the fact that the rule is inapplicable in that context and that the statute not only was enacted in response to a very specific crime, but ultimately became known as Jenny's Law in honor of the victim. Id. I also disagree with the majority's statement that the legislature would have enacted the statute if it had not intended to recognize implicitly the born alive rule. Such comments are completely unsupported by the legislative history, which demonstrates, without question, that the legislature was attempting to achieve a compromise between pro-choice and pro-life advocates in the context of that unique situation and was not concerned with the issue of whether to penalize a defendant for inflicting fatal injuries on a fetus that is subsequently born alive.

[34] The majority reasons that the born alive rule does not have the same effect as the fetal homicide bill that the legislature rejected because, under the fetal homicide bill, a fetus would have been accorded the same treatment as a person, whereas, under the born alive rule, "the protection of the homicide statutes is extended only when the fetus is born alive and, consequently, is no longer a fetus but a child." Footnote 62 of the majority opinion. This analysis, however, is logically incoherent because, as previously noted, it requires severance of the temporal connection between the criminal act and the status of the victim, and transforms the rule into a substantive element of the crime, neither of which was contemplated under the traditional born alive rule.

[35] The majority grossly inflates and, in my view, misrepresents, the remarks by Forsythe and O'Brien at the judiciary committee hearings. The hearing on the fetal homicide bill generated approximately 110 pages of transcribed testimony by approximately thirty witnesses. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2002 Sess., pp. 2224–28, 2308–18, 2331–33, 2335–36, 2338–62, 2382–89, 2402–39, 2448–65. Only two witnesses, Forsythe and O'Brien, mentioned the born alive rule in discussing the bill. Forsythe testified in his initial presentation that he had authored professional articles addressing issues involving the born alive rule and fetal homicide; id., p. 2402; and that the "lack of [a] remedy" in Connecticut for the killing of a fetus in utero was "due to the outdated and obsolete common law born alive rule." Id., p. 2403; see also id., p. 2404 (referring to "the outdated born alive rule"). Forsythe described the rule as "a rule of location, a rule of evidence"; id., p. 2403; and, in light of modern medical knowledge, as a rule that leads to "absurd results." Id., p. 2404. Forsythe also indicated that several other states had abolished the born alive rule by adopting fetal homicide laws. See id., pp. 2412, 2414. Together, these few remarks represented less than one out of fifteen pages of his transcribed testimony and constituted nothing more than his personal opinion that the born alive rule was part of the common law of this state. Significantly, committee members asked *no* questions and made *no* comments in response to Forsythe's refer-

ences to the born alive rule, which were buried in his discussion of the fetal homicide bill. Those few questions that were directed to Forsythe concerned his knowledge of fetal homicide laws in other jurisdictions, which purport to treat the death of a fetus in the same manner as the death of a person, prosecutions for the death of a fetus in other jurisdictions, differences among the states regarding fetal viability limitations under their respective homicide laws, and the applicability of constitutional law relating to abortion. Id., pp. 2404–2409. O'Brien provided only three pages of transcribed testimony in which he never discussed the born alive rule. See id., pp. 2417–20. O'Brien was asked only one question about whether he believed the fetal homicide bill should contain a provision on viability, to which he responded in the negative. Id., p. 2420.

The hearing on the aggravated assault bill produced approximately eleven pages of transcribed testimony from six witnesses. Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2003 Sess., pp. 424–26, 461–66, 477. The *only* witness referring to the born alive rule was O'Brien, who stated in his initial presentation that the proposed legislation continued "Connecticut's adherence to [the] medically obsolete . . . born alive rule," which had been created "as a rule of evidence." Id., p. 424. O'Brien later suggested several changes to the proposed legislation. See id., p. 425. Following these remarks, and in response to a question regarding whether there should be any limitation on the age of the fetus at the time of the assault on the pregnant woman, O'Brien replied that the law should "apply at any stage of gestation. Essentially, that's what Connecticut has on the books, or at least by common law today. The problem is not that we don't recognize the unborn child in Connecticut as a person. The problem is that we have the born alive rule to prove that it's a person. It's got to take its first breath." Id., p. 426. Representative Robert Farr then asked: "But the [proposed legislation] . . . is actually going from conception, but it doesn't treat it as a separate case of murder is that what you're saying." Id., remarks of Representative Robert Farr. O'Brien responded: "That's right. It's simply talking about the woman and her pregnancy, a pregnant woman." Id. Representative Farr made one other minor comment, also unrelated to the born alive rule, before the next witness testified. Id. On the basis of this testimony, it is abundantly clear that there was no discussion of the born alive rule during the two judiciary committee hearings, as no committee member directed a single question to any witness regarding the meaning or relevance of the born alive rule under Connecticut law. Similarly, there was no discussion of, or reference to, the born alive rule during subsequent debate on the aggravated assault bill in the House and Senate chambers. Thus, the majority's repeated and unsupported assertions that the legislature considered the born alive rule because of the few *unsolicited* comments made by Forsythe and O'Brien at the hearings can be described only as a misrepresentation of the record.

[36] To the extent that the majority relies on the concept of a "gap" to justify the imposition of a penalty for the infliction of fatal injuries on a fetus that is subsequently born alive, its reasoning is flawed. Footnote 54 of the majority opinion. Any new law may be viewed as filling a "gap" because a new law, by definition, is intended to resolve an issue that never has been addressed. Thus, recognition of the fact that every new law is intended to fill a gap renders the concept of a gap to justify adoption of the born alive rule in the present case essentially meaningless.

With respect to *State* v. *Lamy*, supra, 158 N.H. 517 and n.3, on which the majority relies in claiming that my view that the legislature imposed a penalty for the termination of a pregnancy under the aggravated assault statute without implicitly recognizing the born alive rule is "suspect" because "seventeen of our sister states [and Connecticut] still retain some form of the . . . rule"; (internal quotation marks omitted); the New Hampshire court is incorrect with respect to at least nine of those states. Seven of the seventeen states cited in *Lamy*, namely, Alaska, Colorado, Maryland, Nebraska, Oregon, Virginia and West Virginia, have statutorily rejected the born alive rule, this court never has considered whether to adopt the rule, and the Supreme Court of Hawaii has stated in dictum that the more cogent rule is that "the defendant's conduct must occur at a time when the victim is within the class contemplated by the legislature." *State* v. *Aiwohi*, supra, 109 Haw. 126.

[37] I distinguish the majority's interpretation of the born alive rule, which no longer functions as a rule of causation, from the common-law year and a day rule, a rule of causation that "bars a conviction for homicide if the victim does not die within one year and one day of the conduct that caused the death." *Valeriano* v. *Bronson*, supra, 209 Conn. 77. "The year and a day

rule can be traced to [a thirteenth century English statute]. The reason assigned for that rule was that if the person alleged to have been murdered die[d] after that time, it [could not] be discerned, as the law presumes, whether he died of the stroke or poison, etc., or a natural death; and in case of life, rule of law ought to be certain. *Louisville, E. & St. Louis R. Co.* v. *Clarke*, 152 U.S. 230, 239, 14 S. Ct. 579, 38 L. Ed. 422 (1894), quoting 3 E. Coke, Institutes (2d Ed. 1648) p. 53." (Internal quotation marks omitted.) *Valeriano* v. *Bronson*, supra, 77–78 n.3. As I noted previously, Connecticut never has recognized this common-law rule.

[38] Just as I stated in *State* v. *Courchesne*, supra, 262 Conn. 611–12 n.8 (*Zarella*, *J.*, dissenting), I do not take up, in the present case, the question of whether the rule of lenity should be applied before or after resorting to other sources of statutory interpretation because I do not believe such sources assist in clarifying the statutes at issue.