****

The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion. In no event will any such motions be accepted before the "officially released" date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

The syllabus and procedural history accompanying the opinion as it appears on the Commission on Official Legal Publications Electronic Bulletin Board Service and in the Connecticut Law Journal and bound volumes of official reports are copyrighted by the Secretary of the State, State of Connecticut, and may not be reproduced and distributed without the express written permission of the Commission on Official Legal Publications, Judicial Branch, State of Connecticut.

****

SCHALLER, J., concurring in part and dissenting in part. I agree with the majority's decision in part I of its opinion that the trial court properly denied the motion of the defendant, Robert Courchesne, to suppress his written confessions and other evidence connecting him with the murder of Demetris Rodgers (Rodgers). I disagree, however, with respect to the majority's conclusions in parts II through V of its opinion concluding that the born alive rule is embodied in our Penal Code and that the defendant had fair notice that the rule would apply to his conduct, construing the doctrine of transferred intent in novel fashion, and remanding the case for a new trial, at which the state will have another opportunity to prove that Antonia Rodgers (Antonia) was alive at birth. With respect to these conclusions, I generally agree with and, in that regard, join in Justice Zarella's concurring and dissenting opinion concluding that the born alive rule is antiquated, illogical and incoherent, that Connecticut's murder statute requires that a victim be a "person" at the time of the criminal act and that the rule of lenity counsels us to resolve any ambiguity in our murder and capital felony statutes in favor of the defendant. I write separately to emphasize that, by virtue of the majority's conclusions, the defendant has been denied the due process required by the fourteenth amendment to the United States constitution, and further, will be subject to double jeopardy upon retrial.

I emphasize at the outset that in 1998, at the time of the events underlying the defendant's convictions, the termination of a pregnancy in utero resulting from an assault was not an independent criminal act, as to either the fetus or the mother.[1] The primary issue on appeal is whether *Connecticut's law, in 1998*, provided sufficient notice and fair warning to the defendant that, by stabbing Rodgers, he would be subject to the death penalty pursuant to General Statutes (Rev. to 1997) § 53a-54b (8) and (9)[2] for an assault upon a fetus—a noncriminal act—because an emergency cesarean section delivery by medical professionals approximately one hour later[3] would result in the "birth" and subsequent "death"[4] of a second, juvenile victim, Antonia.[5] In concluding that the defendant's due process rights to notice and fair warning were not violated and, therefore, upholding the applicability of our death penalty statute in this instance, the majority has relied on, not one, but two, highly questionable legal fictions. The first is the common-law born alive rule; the second is the doctrine of transferred intent. Because neither the statutes defining murder, nor their legislative history or any prior, authoritative judicial construction of those statutes gave any indication that the born alive rule had been incorporated as part of our criminal code, the defendant cannot,

consistent with federal due process principles, be charged constructively with having had knowledge and fair warning that the rule would apply to him and render him eligible for the penalty of death. Furthermore, the legislature did not provide sufficient guidance to prosecutors, judges and juries as to whether it intended the conduct at issue to be proscribed, leading to the arbitrary result of the defendant facing execution while another equally culpable individual has escaped punishment entirely for committing essentially the same act and achieving the same result. See *State* v. *Lanier*, 276 Conn. 399, 401, 886 A.2d 404 (2005). Alternatively, even if this court's adoption and retroactive application of the born alive rule in the present case somehow were constitutionally proper, because the state at trial failed to disprove that Antonia had suffered an irreversible cessation of brain activity prior to her "birth," the evidence was insufficient to establish that she was born "alive." Accordingly, it is clear that a judgment of acquittal, rather than a new trial, should be ordered with respect to the charges arising from the death of Antonia.[6] For the foregoing reasons, I respectfully dissent.

I

A

As the majority observes, to be eligible for the death penalty pursuant to § 53a-54b (8) and (9), the defendant must have been responsible for the death of two or more "persons" or the death of a "person" under sixteen years of age, respectively. See footnote 2 of this concurring and dissenting opinion. The issue of whether the defendant had notice and fair warning that the eleventh hour, emergency cesarean section delivery resulting in the "birth" and subsequent "death" of Antonia would transform the noncriminal act of an assault upon a fetus in utero into a second act of murder rendering him eligible for the death penalty, therefore, turns primarily on whether the legislature's use of the word "person" in our criminal statutes made it sufficiently clear to the defendant that his actions could lead to an additional criminal prosecution, i.e., prosecution beyond that for the murder of Rodgers.[7] With respect to the clarity required for statutes proscribing particular conduct, Justice Oliver Wendell Holmes explained that "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." *McBoyle* v. *United States*, 283 U.S. 25, 27, 51 S. Ct. 340, 75 L. Ed. 816 (1931). Simply stated, "[t]he . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." (Internal quotation marks omitted.) *Bouie* v. *Columbia*, 378 U.S. 347, 351, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964), quoting *United States* v. *Harriss*,

347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954).

"There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " *United States* v. *Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). "[T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties. . . . References to judicial opinions involving the statute, the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning."[8] (Internal quotation marks omitted.) *State* v. *Winot*, 294 Conn. 753, 759, 988 A.2d 188 (2010). "The general rule is that the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the particular facts at issue." (Internal quotation marks omitted.) *State* v. *Sorabella*, 277 Conn. 155, 192, 891 A.2d 897, cert. denied, 549 U.S. 821, 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006).

"Second, as a sort of 'junior version of the vagueness doctrine,' H. Packer, The Limits of the Criminal Sanction [(1968) p. 95], the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States* v. *Lanier*, supra, 520 U.S. 266. "Courts must avoid imposing criminal liability where the legislature has not *expressly* so intended." (Emphasis added.) *State* v. *Breton*, 212 Conn. 258, 268–69, 562 A.2d 1060 (1989). Accordingly, "[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." (Internal quotation marks omitted.) *State* v. *Jones*, 234 Conn. 324, 340, 662 A.2d 1199 (1995); see also *State* v. *Brown*, 235 Conn. 502, 517, 668 A.2d 1288 (1995); *State* v. *Hinton*, 227 Conn. 301, 317, 630 A.2d 593 (1993). Strict construction of criminal statutes is particularly apt within the context of a capital felony case in light of the unparalleled severity and irreversible nature of the penalty.[9] "It is axiomatic that any statutory construction implicating the death penalty must be based on a conclusion that the legislature has *clearly and unambiguously* made its intention known. . . . The rules of strict construction and lenity applicable to penal statutes generally are 'especially pertinent to a death penalty statute such as § 53a-54b.' "[10] (Citations omitted; emphasis added.) *State* v. *Harrell*, 238 Conn.

828, 833, 681 A.2d 944 (1996); see also *State* v. *McGann*, 199 Conn. 163, 177–78, 506 A.2d 109 (1986) (overturning trial court's novel construction of murder for hire portion of murder statute which had led to capital felony conviction).

"Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute . . . due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope . . . ." (Citations omitted.) *United States* v. *Lanier*, supra, 520 U.S. 266. "If a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect."[11] (Internal quotation marks omitted.) *Bouie* v. *Columbia*, supra, 378 U.S. 354; see also *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 806, 950 A.2d 1220 (2008). Similarly, "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect . . . where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." (Internal quotation marks omitted.) *Rogers* v. *Tennessee*, 532 U.S. 451, 462, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001).

No concrete guidelines are prescribed for courts seeking to make a substantive determination about whether a statute is vague, or whether a new interpretation of a statute is unexpected or indefensible with reference to previously stated law. See *Ortiz* v. *N.Y.S. Parole in Bronx, N.Y.*, 586 F.3d 149, 157 (2d Cir. 2009) ("[t]he due process right to fair notice is a . . . general rule of law that demand[s] a substantial element of judgment . . . and can hardly be implemented . . . mechanically" [internal quotation marks omitted]); see also 1 W. LaFave, Substantive Criminal Law (2d Ed. 2003) § 2.3 (a), p. 146 ("[t]here is no simple litmus-paper test for determining whether a criminal statute is void for vagueness"). In either due process guise, however, "the touchstone is whether the statute, either standing alone or as construed, made it *reasonably clear at the relevant time* that the defendant's conduct was criminal." (Emphasis added.) *United States* v. *Lanier*, supra, 520 U.S. 267.

In his motion to dismiss the charge of murder as to Antonia, the defendant argued both that Antonia was "not a person, as defined by . . . [General Statutes] § 53a-3 (1)" and that, should the trial court determine to the contrary, such a novel interpretation could not apply retroactively to the defendant without violating his constitutional rights to notice and fair warning. In denying the defendant's motion to dismiss, the trial court, *Damiani, J.*, concluded "that the murder and

capital felony statutes as applied to the facts of [this] case are not ambiguous" such that the rule of lenity would apply. *State* v. *Courchesne*, 46 Conn. Sup. 63, 70, 757 A.2d 699 (1999). According to the trial court, the Superior Court opinion in *State* v. *Anonymous (1986-1)*, 40 Conn. Sup. 498, 516 A.2d 156 (1986) (*Anonymous*), "can be considered to have actually given notice that the defendant's actions concerning Antonia constituted a murder separate from that of [Rodgers]." *State* v. *Courchesne*, supra, 72. In other words, the trial court held that the statutes, along with the judicial gloss provided by *Anonymous*, clearly applied to the defendant and were not unconstitutionally vague.[12] Id. The trial court, recognizing that nothing in the statutory language or legislative history of the murder statutes addressed the issue at hand, also relied on related provisions from the Model Penal Code and New York Penal Code and two criminal law treatises to interpret the statutes. I disagree with the trial court that the statutes defining murder, even with the assistance of these interpretative aids, are not unconstitutionally vague as applied to the defendant's conduct.[13]

Beginning with the statutory language, the most obvious source of fair warning as to what conduct is proscribed within a jurisdiction, § 53a-3 (1) defines a " '[p]erson,' " in relevant part, as "a human being . . . ." Because "human being" is not further defined in our statutes, the trial court relied on the Model Penal Code and the New York Revised Penal Law, both of which served as bases for our Penal Code,[14] as grounds for concluding that "the definition of a 'person' in Connecticut criminal law includes those who are born and are alive." *State* v. *Courchesne*, supra, 46 Conn. Sup. 67. The parallel definitions in those codes, however, differ significantly from the definition of " '[p]erson' " in our code. Specifically, both the Model Penal Code and the New York Revised Penal Law include express language mirroring that of the born alive rule. See 2 American Law Institute, Model Penal Code and Commentaries (1980) § 210.0 (1), p. 532 (Model Penal Code) (defining " 'human being' " as "a person *who has been born and is alive*" [emphasis added]); New York Penal Law § 125.05 (1) (McKinney 1975) (defining " 'person' " as "a human being *who has been born and is alive*" [emphasis added]). Additionally, the commentary to the Model Penal Code explains that "[t]he effect of this language is to continue the common-law rule limiting criminal homicide to the killing of one who has been born alive."[15] 2 Model Penal Code, supra, § 210.1, comment 4 (c), p. 11. Because of this *explicit*, *unambiguous* language, a defendant within a jurisdiction governed by either code clearly would be on notice that that jurisdiction had adopted the born alive rule.

By contrast, our General Assembly's conspicuous omission of the phrase, "who has been born and is alive," from Connecticut's statutory definition of "per-

son" strongly suggests a conscious legislative choice *not* to adopt the born alive rule. *State* v. *Miranda*, 274 Conn. 727, 761–62, 878 A.2d 1118 (2005) (*Vertefeuille, J.*, concurring) (interpreting legislature's failure to adopt Model Penal Code definition of "conduct" as rejection of notion, included in that code, that conduct encompasses both positive acts and failures to act); see also *Commonwealth* v. *Chretien*, 383 Mass. 123, 132–33, 417 N.E.2d 1203 (1981) (interpreting omission of term "unlawful" from statutory definition as abandonment of common-law spousal exception to sexual assault). At the very least, with respect to notice and fair warning concerns, if a defendant were inclined to engage in a statutory comparison, it would be wholly reasonable for him to conclude, on the basis of the legislature's decision not to incorporate the language of the born alive rule when defining "person," that the legislature in fact had not intended to adopt that rule. "The underlying principle [of fair notice] is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, supra, 347 U.S. 617.[16]

The majority does not explain adequately this important distinction[17] but, instead, merely asserts that "the born alive rule has been embodied in our Penal Code since its adoption nearly a quarter of a century ago . . . ." (Citation omitted.) Precisely how the born alive rule became embodied in our Penal Code, despite the legislature's omission of the relevant statutory language, the majority does not explain.[18] Moreover, the majority declines to explain why the legislature's failure to designate clearly and precisely the point at which criminal liability attaches has not led to arbitrary enforcement. Compare *State* v. *Alfieri*, 132 Ohio App. 3d 69, 78, 724 N.E.2d 477 (1998) (statutes clearly stating that unborn protected from fertilization to birth guarded against arbitrary enforcement and did not violate due process), appeal denied, 85 Ohio St. 3d 1477, 709 N.E.2d 849 (1999).[19] Finally, at best, the legislature's definition of the term "person" is ambiguous. The majority fails to explain, however, why the rule of lenity does not require that we resolve this statutory ambiguity in favor of the defendant.[20] See *Rewis* v. *United States*, 401 U.S. 808, 812, 91 S. Ct. 1056, 28 L. Ed. 2d 493 (1971); *State* v. *Jones*, supra, 234 Conn. 340.

I acknowledge that a comment to the Model Penal Code suggests that a jurisdiction need not expressly incorporate the born alive rule into its statutes for the rule to retain viability. That comment states: "The effect of [the Model Penal Code's definition of human being] 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 [Penal] 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." (Emphasis added.) 2 Model Penal Code, supra, § 210.1, comment 4 (c), p. 11. I find the notion that a jurisdiction that has omitted from its statutes a common-law definition, nonetheless can be deemed to have "adopted" such definition, deeply troubling in light of due process concerns. Moreover, the commentators' position flies in the face of the principle that "any statutory construction implicating the death penalty must be based on a conclusion that the legislature has *clearly and unambiguously* made its intention known." (Emphasis added.) *State* v. *Harrell*, supra, 238 Conn. 833.

In addition to the fact that our legislature, in promulgating the Penal Code, did not expressly adopt the born alive rule and, therefore, did not provide notice of that rule to the defendant, the history of our jurisprudence similarly fails to demonstrate that this archaic rule ever entered *Connecticut's* common law. In fact, the majority opinion has the distinction of being the first appellate court decision in Connecticut ever to rely on the born alive rule.[21] Moreover, in the years preceding the defendant's act, Connecticut appellate courts on four separate occasions decided cases involving the murders of pregnant victims that did not include charges for the deaths of the fetuses. In terms of notice to future defendants, those opinions indicated that Connecticut regarded the murder of a pregnant victim as one murder only, i.e., the murder of the mother. See *State* v. *Roman*, 224 Conn. 63, 64, 616 A.2d 266 (1992) (death of pregnant victim, one murder charge), cert. denied, 507 U.S. 1039, 113 S. Ct. 1868, 123 L. Ed. 2d 488 (1993); *Boles* v. *Commissioner of Correction*, 89 Conn. App. 596, 601, 874 A.2d 820 (2005) (victim eighteen weeks pregnant, one murder charge), cert. denied, 275 Conn. 901, 884 A.2d 1024 (2005); *State* v. *Sherman*, 38 Conn. App. 371, 375, 662 A.2d 767 (death of pregnant victim, one murder charge), cert. denied, 235 Conn. 905, 665 A.2d 905 (1995); *State* v. *Booker*, 28 Conn. App. 34, 37 n.3, 611 A.2d 878 (although state originally charged defendant for three murders, death of "unborn child" not pursued at trial), cert. denied, 223 Conn. 919, 614 A.2d 826 (1992), cert. denied, 507 U.S. 916, 113 S. Ct. 1271, 122 L. Ed. 2d 666 (1993); see also *State* v. *Yochelman*, 107 Conn. 148, 149, 139 A. 632 (1927) (prosecuting defendant for one count of manslaughter for death of woman following attempted abortion).[22]

The only acknowledgment as to the existence of the born alive rule in the history of Connecticut criminal jurisprudence[23] occurred, in dicta, in a lone decision of our Superior Court. In *State* v. *Anonymous (1986-1)*, supra, 40 Conn. Sup. 498, the state applied for an arrest warrant charging the accused with the murder of an unborn—but viable—fetus. After a review of the legislative history of our Penal Code, the statutory scheme, the common law, due process jurisprudence, and the scope of judicial authority, the trial court concluded

that an unborn, but viable, fetus did not qualify as a person within the meaning of § 53a-3 (1). Id., 500–505. In a closing aside, the court observed that its decision related to criminal law, and not to tort law, and cited to a decision of the Supreme Court of Illinois; *People* v. *Greer*, 79 Ill. 2d 103, 402 N.E.2d 203 (1980); for the proposition that "American courts which have extended the benefits of tort law to fetuses have also, in the absence of specifically inclusive language, uniformly refused to change the born-alive rule in criminal cases . . . ." (Internal quotation marks omitted.) *State* v. *Anonymous (1986-1)*, supra, 505. The substance or propriety of the born alive rule itself, however, was not otherwise discussed, applied or even directly at issue in *Anonymous*.[24]

In the present case, therefore, I disagree with the trial court that "[a]s far as it stands for the proposition that Connecticut follows the common law rule on this point, the court's decision in *Anonymous* can be considered to have actually given notice that the defendant's actions concerning Antonia . . . constituted a murder separate from that of her mother." *State* v. *Courchesne*, supra, 46 Conn. Sup. 72. Foremost, dicta from a lone decision of the Superior Court cannot be said to constitute an authoritative pronouncement as to whether Connecticut has adopted the born alive rule. Cf. *Rogers* v. *Tennessee*, supra, 532 U.S. 465 (rejecting that year and a day rule was firmly entrenched in common law of Tennessee when, although rule was briefly referenced in one early state Supreme Court case, "[t]he court made no mention of [it] in its legal analysis or, for that matter, anywhere else in its opinion"); *Valeriano* v. *Bronson*, 209 Conn. 75, 90–91, 546 A.2d 1380 (1988) (finding it "very doubtful" that year and a day rule "ever existed in Connecticut" where it only had been referred to in dicta in two decisions of this court). Indeed, that dicta does not even tether the born alive rule to any Connecticut case, but rather, refers only vaguely to unidentified "American courts." Moreover, nothing in *Anonymous* remotely indicates that Connecticut's legislature or courts ever agreed with those unidentified courts. Within the death penalty context, it is simply too far a stretch to regard the quoted dicta from *Anonymous* as having given notice to the defendant that, pursuant to the prevailing rule of law in Connecticut, the intervening circumstance of a fatally injured fetus' birth could convert an otherwise noncriminal act into an offense eligible for the death penalty.[25]

In fact, when considering whether prior judicial constructions of state statutes have provided sufficient clarification to save those statutes from vagueness challenges, the United States Supreme Court typically[26] looks to *appellate level* jurisprudence, and *only* decisions from the state whose statute is at issue.[27] See, e.g., *Bradshaw* v. *Richey*, 546 U.S. 74, 77, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) (rejecting due process

challenge to Ohio Supreme Court's application of transferred intent doctrine to aggravated felony murder statute because "Ohio [Supreme Court decisions] at the time of respondent's offense provide fully adequate notice of the [doctrine's] applicability"), reh. denied, 546 U.S. 1146, 126 S. Ct. 1163, 163 L. Ed. 2d 1015 (2006); *Ward* v. *Illinois*, 431 U.S. 767, 771, 97 S. Ct. 2085, 52 L. Ed. 2d 738 (1977) (rejecting vagueness claim because "appellant had ample guidance from the Illinois Supreme Court that his conduct did not conform to the Illinois law"); *Smith* v. *Goguen*, 415 U.S. 566, 575, 582 n.31, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974) (finding vague broad statutory language that "was . . . devoid of a narrowing state court interpretation at the relevant time in this case," while also noting existence of, but not searching for guidance in, similar statutes of federal and state governments that had been "universal[ly] adopt[ed]"); *Wainwright* v. *Stone*, 414 U.S. 21, 22, 94 S. Ct. 190, 38 L. Ed. 2d 179 (1973) (looking to Florida cases in due process challenge to Florida statute and stating that "[t]he judgment of federal courts as to the vagueness or not of a state statute must be made in the light of prior *state constructions* of the statute" [emphasis added]); *Bouie* v. *Columbia*, supra, 378 U.S. 356 (finding due process violation where South Carolina Supreme Court's interpretation of trespassing statute "has not the slightest support in prior *South Carolina decisions*" [emphasis added]); *Musser* v. *Utah*, 333 U.S. 95, 97, 68 S. Ct. 397, 92 L. Ed. 562 (1948) (recognizing that, when evaluating vagueness challenge to Utah statute, statutory language "does not stand by itself as the law of Utah but is part of the whole body of common and statute law *of that [s]tate and is to be judged in that context*" [emphasis added]); see also *State* v. *Pickering*, 180 Conn. 54, 63–65, 428 A.2d 322 (1980) (rejecting vagueness challenge to risk of injury statute because several prior decisions of this court had delineated its reach and "serve[d] as an authoritative judicial gloss on the provision"); 3 R. Rotunda & J. Nowak, Treatise on Constitutional Law (4th Ed. 2008) § 17.8 (h), p. 146 n.31 ("[i]f a law as written and construed *by appropriate courts within the jurisdiction* does not give reasonable notice to individuals that [their] conduct . . . has been made criminal, the statute could not be applied to them due to a lack of notice; such a statute should be considered 'void-for-vagueness' " [emphasis added]); 1 W. LaFave, supra, § 2.3 (a), p. 145 n.13 ("[a]ppropriate construction *by the state court* may remove the vagueness objection" [emphasis added]). Similarly, a state normally should look only to its own common law to determine whether a criminal defendant has received adequate notice of what state law proscribes. See *Rogers* v. *Tennessee*, supra, 532 U.S. 464. Thus, although authoritative pronouncements from a state's highest court interpreting its statutes and common law may provide the requisite notice and fair warning of what conduct is proscribed, the majority's complete reliance

instead on dicta from one trial court decision, secondary sources and extrajurisdictional precedent, some involving differently worded statutory provisions,[28] is highly questionable in the due process context.[29]

In its attempt to overcome the undeniable fact that, prior to the acts in question, neither our legislature nor our courts ever had adopted expressly or even considered the born alive rule, the majority takes the highly unusual approach of relying on testimony from a public hearing related to the enactment of General Statutes § 53a-59c, which occurred *four years after* the conduct underlying the defendant's convictions, to support its argument that the born alive rule was in effect at the time of the defendant's actions.[30] This directly contradicts the rule that, when evaluating a due process claim, we look only to "the law which had been expressed *prior to the conduct* in issue . . . ." (Internal quotation marks omitted.) *Washington* v. *Commissioner of Correction*, supra, 287 Conn. 806; see also *Bradshaw* v. *Richey*, supra, 546 U.S. 78 (case decided long after offense for which defendant was convicted "ha[d] no bearing on whether the law at the time of the charged conduct was clear enough to provide fair notice"); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 456, 59 S. Ct. 618, 83 L. Ed. 888 (1939) (when "[a]ppellants were convicted before [a state court opinion construing a statute], [i]t would be hard to hold that . . . they were bound to understand the challenged provision according to the language later used by the court"); *Helton* v. *Fauver*, 930 F.2d 1040, 1047 (3d Cir. 1991) (case decided subsequent to underlying crimes in appellant's case "irrelevant" to due process inquiry, because "the [c]onstitution requires *prior* notice of an expansion in the degree of punishment" [emphasis in original]); *DiLeo* v. *Greenfield*, 541 F.2d 949, 953 (2d Cir. 1976) (disagreeing that "vagueness in the statute could be cured by *subsequent* explanation . . . [because] [d]ue process requires *prior* notice of what constitutes forbidden behavior" [emphasis in original]). Because the enactment of § 53a-59c postdates the commission of the charged conduct, its legislative history is wholly irrelevant to the questions of notice and fair warning.[31]

Nonetheless, the majority quotes, at length, various speakers who testified at the public hearings concerning § 53a-59c as if that testimony constituted binding authority regarding the state of the law in Connecticut in 1998. Reliance on this irrelevant source, however, leads the majority to make a series of forward looking, then backward applying arguments, all of which confuse the due process analysis. For example, the majority rejects the defendant's contention that he should not be subjected to any greater penalty because Rodgers was eight and one-half months pregnant than if she had not been pregnant, because the majority is "unwilling to presume that the legislature intended such a result, especially in light of the clear legislative [intent of § 53a-

59c].” The majority, in so doing, rejects an argument based on the state of the law in 1998, the year when the alleged conduct occurred, by reliance on purported legislative intent that was displayed more than *four years later*. Similarly, the majority further rejects the defendant’s due process argument because it would require us to presume that, in enacting § 53a-59c, the legislature “intended to punish an assault on a pregnant woman that causes the termination of her pregnancy that does not result in a live birth, on the one hand, but intended no punishment for the same conduct if the fetus happens to be born alive but dies shortly thereafter from its injuries, on the other hand.” According to the majority, the defendant’s construction would lead to an “irrational and bizarre result” by creating a disparity, namely, that an assault on a pregnant woman that terminates her pregnancy without a live birth would be treated as criminal, while a similar assault resulting in a live birth would be treated as noncriminal. Again, the majority’s analysis is based on the law as it existed five years after the events underlying the defendant’s convictions.[32] Simply put, the enactment of § 53a-59c, and the corresponding legislative history, have absolutely no bearing on the defendant’s notice and fair warning claim. *Bradshaw* v. *Richey*, supra, 546 U.S. 78 (case decided several years after defendant’s conduct in which application of doctrine of transferred intent was rejected “ha[d] no bearing on whether the law at the time of the charged conduct was clear enough to provide fair notice”).

Pared to its core, the majority’s conclusion that the defendant had notice and fair warning of the born alive rule as the established law *in Connecticut* which, in the present context, transformed noncriminal conduct into an offense eligible for the death penalty, is based on dicta from one Superior Court criminal decision, two Superior Court civil cases addressing tort law, a Connecticut treatise[33] originally written in 1796, and testimony from citizens, some of whom did not even reside in Connecticut, at a public hearing related to legislation enacted over four years after the events underlying the defendant’s convictions. Moreover, the majority reaches this conclusion *despite* the fact that § 53a-3 (1), unlike the New York Revised Penal Code and the Model Penal Code, omits the language of the born alive rule from its definition of “person” and, further, when no appellate court in our state—until today—ever has relied upon the born alive rule. Although the defendant’s conduct in this case undoubtedly is reprehensible, “it cannot be denied that the guarantee of due process extends to violent as well as peaceful men.” *Keeler* v. *Superior Court*, 2 Cal. 3d 619, 635, 470 P.2d 617, 87 Cal. Rptr. 481 (1970). Because Connecticut’s laws, as they were expressed *prior to the defendant’s conduct*, did not provide the defendant with notice and fair warning that an intervening cesarean

delivery and the resultant "birth" and "death" of the fetus carried by Rodgers could transform noncriminal conduct into an additional count of murder—thus rendering him eligible for the death penalty, society's harshest punishment—those laws were unconstitutionally vague. Accordingly, I conclude that the defendant has been deprived of due process of law.[34]

In apparent acknowledgment that the born alive rule is being *newly* recognized in Connecticut today by virtue of this court's decision in the present case, the majority disregards the defendant's vagueness argument, and all of the law that I have cited, and instead relies heavily on the United States Supreme Court's decision in *Rogers* v. *Tennessee*, supra, 532 U.S. 451, and this court's analogous opinion in *State* v. *Miranda*, 260 Conn. 93, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002), to reject the defendant's due process claim.[35] In *Rogers*, the Supreme Court reaffirmed its holding in *Bouie* v. *Columbia*, supra, 378 U.S. 354, that a court may not expand precise statutory language by judicial construction and apply the change retroactively to conduct that occurred prior to that construction if the new construction was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." In *Rogers*, the Supreme Court considered the constitutionality of the Tennessee Supreme Court's retroactive application of its decision abolishing the common-law year and a day rule in prosecutions for homicide and held that, in the circumstances of that case, due process was not offended. Specifically, Tennessee's statute defining homicide made no mention of the rule. *Rogers* v. *Tennessee*, supra, 454. Moreover, explained the court, "[t]he year and a day rule is widely viewed as an outdated relic of the common law"; id., 462; that was "without question obsolete"; id., 463; and for that reason, had "been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue." Id. In fact, noted the court, the petitioner did "not even so much as hint that good reasons exist for retaining the rule . . . ." Id.

The United States Supreme Court next stated an unremarkable point, namely, that "[c]ommon law courts frequently look to the decisions of other jurisdictions in determining whether to alter or modify a common law rule in light of changed circumstances, increased knowledge, and general logic and experience." Id., 464. It nevertheless recognized, consistent with the vagueness jurisprudence that I have cited in this opinion, that *as a general rule*, for purposes of evaluating challenges to *retroactive* applications of those common-law courts' holdings in criminal cases, defendants should not be charged with predicting their home courts' future holdings on the basis of those courts' potential utilization of extrajurisdictional precedent. "Due process, *of course*, does not require a person to

apprise himself of the common law of all [fifty] [s]tates in order to guarantee that his actions will not subject him to punishment in light of a developing trend in the law that has not yet made its way to his [s]tate." (Emphasis added.) Id. The court nevertheless allowed that an exception was appropriate in limited circumstances, that is, when there existed an overwhelming trend in the law of other jurisdictions toward an obviously more enlightened approach. In such circumstances, the court reasoned, that trend could be taken into account *as a factor* when determining whether a state court's decision to join that trend was predictable: "At the same time, however, the fact that a vast number of jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed." Id.

"Finally, *and perhaps most importantly*," according to the United States Supreme Court, "at the time of [the defendant's] crime the year and a day rule had only the most tenuous foothold as part of the criminal law of the [s]tate of Tennessee. The rule did not exist as part of Tennessee's statutory criminal code. And while the Supreme Court of Tennessee concluded that the rule persisted at common law, it also pointedly observed that the rule had never once served as a ground of decision in any prosecution for murder in the [s]tate. Indeed, in all the reported Tennessee cases, the rule has been mentioned only three times, and each time in dicta." (Emphasis added.) Id. According to the court, those "cases hardly suggest that the Tennessee [c]ourt's decision [abolishing the rule] was 'unexpected and indefensible' such that it offended the due process principle of fair warning articulated in *Bouie* and its progeny." Id., 466. Although the rule was "a 'substantive principle' of the common law of Tennessee . . . it was a principle in name only, having never once been enforced in the [s]tate." Id. Thus, "[f]ar from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense. It did so by laying to rest an archaic and outdated rule that had never been relied upon as a ground of decision in any reported Tennessee case."[36] Id., 467.

Applying the foregoing holding to the present matter, the majority concludes that the defendant's due process claim fails because its recognition of the born alive rule was not unexpected and indefensible with reference to the law that had been expressed prior to the defendant's conduct.[37] I do not agree. Rather, I believe that application of the reasoning of *Rogers* leads clearly and unequivocally to the opposite result.

As was the case with the year and a day rule at

issue in *Rogers*, the born alive rule appears nowhere in Connecticut's criminal statutes. Moreover, also similarly to the year and a day rule at issue in *Rogers*, in fact even more so, the born alive rule has virtually no presence in the entire history of reported Connecticut jurisprudence.[38] Even if, prior to this case, it was a substantive principle of the common law in Connecticut, "it was a principle in name only, *having never once been enforced in th*[*is*] [*s*]*tate*." (Emphasis added.) Id., 466. As the United States Supreme Court emphasized in *Rogers*, the rule's lack of presence in our case law perhaps weighs "most importantly." Id., 464. Finally, just like the year and a day rule at issue in *Rogers*, the born alive rule is widely regarded as an obsolete, archaic and outmoded relic of the common law, and presently there is an overwhelming trend in the vast majority of jurisdictions toward abandoning it.[39] Given the foregoing circumstances, the United States Supreme Court concluded that the Tennessee Supreme Court's *abolition of the common-law rule* was not unexpected and indefensible.[40] The majority, however, turns that holding on its head by concluding, under virtually identical circumstances, that its *adoption of the born alive rule* today is not only expected and defensible, but in fact, is a "conventional and foreseeable example of common-law adjudication" that has brought Connecticut's "law into conformity with reason and common sense." (Internal quotation marks omitted.) I emphatically disagree.

B

I recognize that a conviction of murder on the basis of the doctrine of transferred intent may form the predicate for a conviction under our capital felony statute. *State* v. *Higgins*, 265 Conn. 35, 50, 826 A.2d 1126 (2003). In *Higgins*, we also stated, however, that "because this case does not involve the death penalty,[41] any constitutional limitations on the doctrine in that context are left for another day." Id., 60 n.25. Although I conclude that the majority's adoption and retroactive application of the born alive rule, standing alone, violates the defendant's due process rights to notice and fair warning, I also conclude that the majority's application of the doctrine of transferred intent, which, in conjunction with the born alive rule, serves as a predicate for the imposition of the death penalty on the defendant, similarly violates those rights. Because, at the time of the defendant's conduct, the intentional killing of an unborn fetus in utero was not an independent criminal act, the notion of moral equivalence between the intent to kill the mother and the constructive intent to cause the death of the fetus, which underpins the doctrine of transferred intent, is lacking. Accordingly, the majority's novel application of that doctrine, pursuant to which criminal intent is transferred toward an entity that has yet to achieve personhood status, cannot be applied retroactively to the defendant consistent with

due process of law.[42]

In *State* v. *Higgins*, supra, 265 Conn. 59, we explained that "the weight of authority supports the proposition that the common-law doctrine of transferred intent may be applied when the defendant's actual mental state and wrongful conduct *are equivalent* to the mental state and wrongful conduct that must be proved under the offense with which he is charged . . . ." (Emphasis added.) In that case, the defendant had intended to kill an adult but, instead, had killed a thirteen year old child. Id., 40. Although the lone murder of an adult would not have implicated the death penalty, the resultant death of a person under sixteen years of age constituted a crime eligible for the death penalty. See id., 37 n.2; General Statutes (Rev. to 2003) § 53a-54b (8). We concluded that the doctrine of transferred intent could support the application of the death penalty because the mental state and wrongful conduct necessary to murder a child were equivalent to the defendant's actual intent and actions as directed toward the intended adult victim. See *State* v. *Higgins*, supra, 59–60.

In the present case, however, we are not concerned with the transfer of the intent to kill an adult to a child, but rather, with the transfer of the intent to kill an adult to what, at the time of the defendant's act, was an unborn fetus, in other words, to an entity that was not considered a "person" under our law. Accordingly, the equivalence of mental state and wrongful conduct is lacking. As I noted previously in this opinion, at the time of the conduct underlying the defendant's convictions, causing the death of a fetus in utero was *not a criminal act*.

Indeed, even in cases in which courts have applied the doctrine of transferred intent to the death of a fetus, the defendant's underlying conduct carried with it criminally equivalent culpability. For example, in *State* v. *Merrill*, 450 N.W.2d 318, 323 (Minn.), cert. denied, 496 U.S. 931, 110 S. Ct. 2633, 110 L. Ed. 2d 653 (1990), the Minnesota Supreme Court held that the defendant's intent to kill a pregnant mother could be transferred to support a murder charge for the death of the fetus. In that case, however, the critical distinction was that, at the time of the defendant's conduct, Minnesota recognized that an independent act that resulted in the death of a fetus constituted either first or second degree murder.[43] Id. Consequently, both of the resultant crimes constituted independent *criminal* acts involving substantially similar criminal culpability, thereby justifying application of the doctrine of transferred intent.

As the majority has acknowledged, "[i]f a judicial construction of a criminal statute is unexpected and indefensible by reference to *the law which had been expressed* prior to the conduct in issue, [the construction] must not be given retroactive effect." (Emphasis

added; internal quotation marks omitted.) *Bouie* v. *Columbia*, supra, 378 U.S. 354. As I discussed in part I A of this concurring and dissenting opinion, on the basis of our law as it was expressed prior to the defendant's conduct, the defendant did not have notice and fair warning regarding the potential application of the born alive rule. The majority further compounds that problem of lack of notice through the application of a second legal fiction, the doctrine of transferred intent, which, prior to today, never had been employed in similar circumstances. Even assuming that the majority, as a legal matter, is correct in its determination that the two doctrines can be applied together in the present factual context, that conclusion is so novel to our jurisprudence that its retroactive application violates the defendant's due process rights to notice and fair warning. It is worth repeating that these concerns are particularly significant in the present case, because the consequence of the majority's construction unquestionably is an expanded application of our society's most severe form of punishment—the sentence of death. For the foregoing reasons, I disagree with the flawed conclusion of the majority with respect to this issue.

II

Even assuming that retroactive application of the newly recognized born alive rule to this case is constitutionally proper, a conclusion with which I disagree, I nevertheless would reverse the trial court's judgment convicting the defendant of murder for the "death" of Antonia because the evidence presented at trial was insufficient to establish that she was born alive. In light of the majority's conclusion that the defendant had sufficient notice of the potential application of the born alive rule and its novel construction of the transferred intent doctrine despite the absence of any prior legislative adoption of the born alive rule and any prior Connecticut case applying either doctrine in such a fashion, it is ironic—and deeply troubling—that the majority also has decided that the state, on the other hand, *did not have sufficient notice* of the expansion of the common-law definition of death established in *State* v. *Guess*, 244 Conn. 761, 764, 772, 780, 715 A.2d 643 (1998). Based on this glaring inconsistent treatment in favor of the state, the majority has ordered a remand of the case for a new trial—essentially, to give the state a second opportunity to attempt to prove that Antonia had brain function at the time of her birth, even though the state failed to prove that fact at the defendant's first trial and even though the state was on notice of such requirement.

It cannot be disputed that the requirement was reasonably foreseeable as a result of our expansion of the common-law definition of death in *Guess*, which was published several months *prior* to the defendant's trial. As a result of our decision in *Guess*, the state clearly

was on notice that, pursuant to our expanded definition of death, to sustain a conviction under the born alive rule, the state would have to disprove beyond a reasonable doubt *both* that, at the time of her birth, Antonia had not suffered an irreversible cessation of her circulatory and respiratory systems *and* that she had not suffered an irreversible cessation of brain activity. See id. Because the state failed to disprove that Antonia did not suffer an irreversible cessation of brain activity, the evidence was insufficient for the fact finder to conclude that Antonia was "alive" at the time of her birth and, therefore, the evidence was insufficient to prove that Antonia was a "person" under the born alive rule. The majority's conclusion that the state is entitled to retry the defendant results in a denial of the defendant's right to be free from double jeopardy. See *Burks* v. *United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

It is beyond question that the state was fully on notice of the foreseeable impact of *Guess* on a death penalty prosecution involving the born alive rule. The opening paragraph in *Guess* leaves no doubt as to what that case was about: "The sole issue on appeal is whether the term 'death,' as used in the Penal Code, may be construed to embrace a determination, made according to accepted medical standards, that a person has suffered an irreversible cessation of all brain functions." *State* v. *Guess*, supra, 244 Conn. 762. As the majority points out, prior to *Guess*, the common law defined death as occurring when a person had suffered an irreversible cessation of the circulatory and respiratory systems. In light of the state of current medical science, however, we acknowledged in *Guess* that "the traditional vital signs—breathing and heartbeat—are not independent indicia of life, but are, instead, part of an integration of functions in which the brain is dominant . . . . [Therefore] our focus must shift from those traditional vital signs to recognize cessation of brain functions as criteria for death following this medical trend." (Citation omitted; internal quotation marks omitted.) Id., 776. Because it is axiomatic that "life is the obverse of death"; *People* v. *Flores*, 3 Cal. App. 4th 200, 210, 4 Cal. Rptr. 2d 120 (1992); it already was clear that, to disprove that Antonia was not dead at the time of birth, and, therefore, to prove that she was a person under the born alive rule, the state had to establish both that she did not suffer an irreversible cessation of circulatory and respiratory systems and did not suffer an irreversible cessation of brain function.[44]

In a case in which the defendant has been sentenced to death, it is simply too much to bear to expect the defendant to be familiar with the eighteenth century works of Zephaniah Swift, extrajurisdictional precedent and the unexpressed intent of our legislature to adopt a common-law definition, yet, at the same time, to excuse the state's ignorance or disregard of a pertinent and contemporaneous state Supreme Court decision

from this jurisdiction.

I disagree emphatically with the majority's characterization of my argument as advocating for unwarranted penalizing of the state, apparently aimed at evening some unexplained score. What the majority cursorily dismisses as seeking "a sort of rough justice" is nothing less than advancing the values of fundamental fairness. The majority purports to adhere to these values despite holding the defendant to a standard of, in essence, legal clairvoyance as to this court's recognition of the born alive rule some twelve years after the criminal conduct at issue, resulting in the upholding of a death penalty charge, while simultaneously excusing the state's failure to predict the direction of the law that clearly was signaled by *Guess*. If advocating for constitutionally required fundamental fairness in both instances amounts to rough justice, then I am in favor of it.[45]

In short, in a criminal prosecution, the burden is upon the state to present its case-in-chief and prove all the elements of the charged crimes. It is not incumbent upon the defendant, or upon the trial court, to instruct the state on how to try its case. By failing to prove definitively that Antonia had not suffered an irreversible cessation of brain function at the time of her "birth," the state ran the risk that its evidence would be insufficient to show that Antonia was a person for purposes of the born alive rule. The remedy for the failure to present sufficient evidence at trial is a judgment of acquittal on all related charges. *Burks* v. *United States*, supra, 437 U.S. 11, 18. In remanding the case for a new trial, the majority improperly provides the state with a second opportunity to prove its case, ostensibly to protect the defendant's rights. Instead, I would order a judgment of acquittal with respect to the charges arising from the "death" of Antonia.

In sum, the majority's newfound recognition of the born alive rule, which is not clearly embodied in our murder statutes, and its application of the doctrine of transferred intent to the present circumstances are unexpected and indefensible by reference to Connecticut law as it existed at the time of the defendant's offenses. Accordingly, retroactive application of the majority's legal conclusions to uphold the defendant's convictions is a violation of due process. Furthermore, because the state failed to present sufficient evidence to prove that Antonia was born "alive" pursuant to the definition of that term established by *State* v. *Guess*, supra, 244 Conn. 764, the defendant's right to be free from double jeopardy also has been violated. On the basis of the foregoing, I respectfully dissent.

[1] The act against a fetus is to be distinguished from the underlying assault on its mother that results in the termination of a pregnancy. In 2003, five years after the underlying events in the present case, the legislature enacted General Statutes § 53a-59c, which criminalized as a class A felony the assault of a pregnant woman when the "assault results in the termination of pregnancy that does not result in a live birth." General Statutes § 53a-59c (a) (2). To date, the legislature has yet to adopt a statute recognizing a fetus

itself as a potential "victim" of assault.

[2] Pursuant to General Statutes (Rev. to 1997) § 53a-54b, "[a] person is guilty of a capital felony who is convicted of any of the following . . . (8) murder of two or more persons at the same time or in the course of a single transaction; or (9) murder of a person under sixteen years of age." Pursuant to General Statutes § 53a-54a (a), "[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 . . . ."

[3] I recognize that medical intervention generally may be expected to follow an assault and that, in certain instances, such intervention can affect the degree of criminality of particular conduct. For example, a defendant may be charged with attempted murder instead of murder only because of the fortuity of timely and successful medical intervention. In the present case, however, successful medical intervention resulted in the defendant being subject to *harsher*, rather than lesser, criminal penalties. Such a result is, in my opinion, thoroughly bizarre and, accordingly, could not reasonably have been expected by the defendant or any other resident of Connecticut.

[4] Because, in light of the resolution of this appeal, the issue of whether Antonia ever was "alive" remains open, I place the terms "birth" and "death" in quotation marks.

[5] Simply put, the combined effect of unforeseeable events and a novel interpretation of our murder statutes as applied to those events has transformed the death of a fetus in utero, which at the time of the defendant's assault of Rodgers was a noncriminal act, into an offense eligible for the death penalty. Compare *Chapman* v. *United States*, 500 U.S. 453, 467–68, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (noting, in rejecting due process claim, that "whatever debate there is [over meaning of statute] would center around the appropriate sentence, and not the criminality of the conduct"), reh. denied, 501 U.S. 1270, 112 S. Ct. 17, 115 L. Ed. 2d 1101 (1991), superseded by statute on other grounds as stated in *United States* v. *Clark*, 110 F.3d 15 (6th Cir. 1997); *Knutson* v. *Brewer*, 619 F.2d 747, 750 (8th Cir. 1980) (rejecting argument that defendant had due process right to expect to be convicted of lesser crime only, finding it "significant that the issue of construction involved here is not the drawing of a line between legal conduct and illegal conduct"); *State* v. *Payne*, 240 Conn. 766, 779, 695 A.2d 525 (1997) (rejecting due process claim when "defendant has made no plausible argument, nor can we conceive of one, that he acted in reliance on the belief that his conduct was lawful, or that a person of ordinary intelligence would have no reason to know that he was engaging in prohibited conduct"), overruled in part on other grounds by *State* v. *Romero*, 269 Conn. 481, 490, 849 A.2d 760 (2004); J. Jeffries, "Legality, Vagueness, and the Construction of Penal Statutes," 71 Va. L. Rev. 189, 196 (1985) (among "factors considered in the vagueness inquiry . . . [is] whether the uncertainty affects the fact or merely the grade of criminal liability").

In rejecting the defendant's due process claim, the majority, employing inflammatory language designed to evoke sympathy, twice confuses the analysis by conflating the question of whether the defendant knew that killing Rodgers was a criminal act with the question of whether he had notice that the death of her fetus would result in an additional charge of murder. Obviously, those issues are entirely distinct, and the defendant raises no claim that prosecuting him for the murder of Rodgers offends due process.

[6] Because the evidence was insufficient to convict and, therefore, the proper remedy is a judgment of acquittal, the majority's remand of the case for a new trial violates the defendant's rights against double jeopardy. "The [d]ouble [j]eopardy [c]lause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). "The [c]lause does not allow the [s]tate . . . to make repeated attempts to convict an individual for an alleged offense, since [t]he constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." (Internal quotation marks omitted.) Id. Because "the [d]ouble [j]eopardy [c]lause precludes a second trial once [a] reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal." Id., 18.

[7] If the "death" of Antonia qualifies as the "murder of a person under sixteen years of age" pursuant to subdivision (9) of General Statutes (Rev. to 1997) § 53a-54b, it necessarily follows that it also qualifies as a second

murder pursuant to subdivision (8). I review the law, therefore, with an eye toward determining whether the defendant's conviction for the alleged murder of Antonia could stand on its own pursuant to subdivision (9).

[8] Although I acknowledge that some degree of reliance on secondary legal resources as interpretive aids may be appropriate when determining whether a statute is unconstitutionally vague, I disagree with *the extent* of the majority's use of such materials in this death penalty case, particularly in light of the complete dearth of support for the majority's conclusion in the most relevant places, i.e., the statutory language, legislative history, other Connecticut statutes or authoritative Connecticut jurisprudence existing in 1998. It is not so much the majority's methodology of using the ordinary tools of statutory construction with which I take issue, but the fact that the most powerful of those tools either reveal nothing as to what our legislature intended or, worse, suggest a conclusion contrary to the majority's conclusion.

[9] Indeed, the rule of strict construction of criminal statutes originated within the context of capital punishment, in recognition of the severity of that punishment. See 1 W. LaFave, Substantive Criminal Law (2d Ed. 2003) § 2.2 (d), pp. 123–24.

[10] "No doubt some criminal statutes deserve a stricter construction than others. Other things being equal, felony statutes should be construed more strictly than misdemeanor statutes; those with severe punishments more than those with lighter penalties; those involving morally bad conduct more than those involving conduct not so bad; those involving conduct with drastic public consequences more than those whose consequences to the public are less terrible; those carelessly drafted more than those done carefully." 1 W. LaFave, Substantive Criminal Law (2d Ed. 2003) § 2.2 (d), p. 126. This case presents most, if not all, of the foregoing hallmarks counseling stricter construction in favor of the defendant.

[11] This is because "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as [a]rt. I, § 10, of the [c]onstitution forbids. An ex post facto law has been defined by [the United States Supreme Court] as one that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action, or that aggravates a crime, or makes it greater than it was, when committed. . . . If a state legislature is barred by the [e]x [p]ost [f]acto [c]lause from passing such a law, it must follow that a [s]tate Supreme Court is barred by the [d]ue [p]rocess [c]lause from achieving precisely the same result by judicial construction." (Citation omitted; internal quotation marks omitted.) *Bouie* v. *Columbia*, supra, 378 U.S. 353–54.

[12] In analyzing the claim, the trial court cited to state and federal vagueness jurisprudence.

[13] The trial court also rejected the defendant's retroactivity claim. Specifically, the court disagreed that prosecution of the defendant for the murder of Antonia in reliance on the born alive rule was an impermissible retroactive application of a *novel* judicial construction because "the rule [that] applies to establish the defendant's liability was not created after he acted. That rule existed before the murder and capital felony statutes were enacted and continues to be in effect after their enactment." *State* v. *Courchesne*, supra, 46 Conn. Sup. 72.

On appeal, although the defendant continues to press both vagueness and retroactivity claims, the majority opinion, while at times reciting vagueness principles, does not address the vagueness claim directly but, instead, characterizes the defendant's due process argument as invoking only the retroactivity doctrine. The majority proceeds to rely heavily on cases that involved that doctrine, i.e., cases in which the court openly acknowledged that the decision involved *a change* in the law. It is, therefore, unclear whether the majority: (1) agrees with the trial court that the statutes, as previously construed in *Anonymous*, are not vague and that they clearly incorporate the born alive rule, but that this court nevertheless is changing the law by adopting a novel construction of the statutory language for the first time today; (2) concludes, contrary to the trial court, that the statutes are vague as to whether the born alive rule was incorporated, but that any vagueness may be cured by retroactive judicial construction that is neither unexpected or indefensible with reference to the same preexisting law that was insufficient to defeat the vagueness claim; or (3) concludes, contrary to the trial court, that the statutes are not vague and do *not* incorporate the born alive rule, but that this court retroactively may enlarge the scope of the statutory definition of "person" to include the rule because such construction is not

unexpected or indefensible with reference to previously stated law. In light of the fundamental confusion that confounds the majority's position, evidenced by the amalgamation of vagueness and retroactivity principles that permeates its due process analysis, it is ironic that the majority criticizes my understanding of well established due process jurisprudence.

The majority's approach is problematic, regardless of which of the foregoing paths it has chosen. As to the first option, if, as the trial court found, the statutes are unambiguous and clearly incorporated the born alive rule, there simply is no occasion for this court to decide whether it improperly is applying retroactively a novel construction of those statutes. See *Ortiz* v. *N.Y.S. Parole in Bronx, N.Y.*, supra, 586 F.3d 158 (because "case does not involve any expansion in the scope of criminal liability beyond that indicated by previous decisional law," federal court "need not consider whether the New York courts have worked an impermissible retroactive *change* in the law, violating due process by adopting a new judicial interpretation that was 'unexpected and indefensible' by reference to what courts had said before," but need only determine whether, as state court held, statute itself provided fair warning [emphasis in original]); *Dale* v. *Haeberlin*, 878 F.2d 930, 932 (6th Cir. 1989) ("[b]efore determining whether the Kentucky Supreme Court violated the [c]onstitution by retroactively applying an unanticipated change in state law, we must be certain that the opinion . . . actually changed existing Kentucky law"), cert. denied, 494 U.S. 1058, 110 S. Ct. 1528, 108 L. Ed. 2d 767 (1990); compare *Rogers* v. *Tennessee*, supra, 532 U.S. 455 (acknowledging that Tennessee Supreme Court's abolition of year and a day rule represented change from previously articulated law before concluding that change was neither unexpected nor indefensible); *Marks* v. *United States*, 430 U.S. 188, 194, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (noting that United States Supreme Court had announced new standards that significantly extended reach of federal obscenity statutes before deciding whether standards could be applied retroactively); *Bouie* v. *Columbia*, supra, 378 U.S. 351–52 (concluding that statute was narrow, precise and clearly did not encompass conduct at issue before deciding whether judicial enlargement of statute could be applied retroactively); *State* v. *Miranda*, 260 Conn. 93, 106–10, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002) (this court's determination that assault statute had been violated based on failure to act, when all previous case law had been based on affirmative conduct, was reasonably foreseeable change).

As to the second option, I question whether a statute, once having been found unconstitutionally vague after reference to appropriate interpretative aids, may then be rehabilitated by a retroactive judicial construction that purports to be expected and defensible by reference to those same interpretative aids. "[W]here vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot be cured in a given case by a construction in that very case placing valid limits on the statute, for the objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. *The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss*." (Emphasis added; internal quotation marks omitted.) *Bouie* v. *Columbia*, supra, 378 U.S. 352–53.

As to the third option, I disagree that this court, if it were to conclude that the murder statutes were unambiguous and did not incorporate the born alive rule, nevertheless could read the rule into the statutes and then apply that construction retroactively. Connecticut is a "code" state that has relegated the defining of crimes exclusively to the legislature. See Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. § 53a-4 (West 2007), commission comment; see also *Vo* v. *Superior Court*, 172 Ariz. 195, 204, 836 P.2d 408 (App. 1992) (noting "[critical] distinction between 'code states,' which have abolished common law crimes and provide that no crime can be defined other than by the legislature, and 'common law states,' which recognize common law crimes and allow judicial decisions to fashion expanded definitions of crimes"). Although this court may consider the common law for purposes of discerning legislative intent; see *Vo* v. *Superior Court*, supra, 204; see also *State* v. *Soto*, 378 N.W.2d 625, 627 (Minn. 1985); its authority *to adopt or to recognize itself common-law doctrine* is limited by the plain language of the code's savings clause, which is included at the outset of chapter 951 of the General Statutes and 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.) General Statutes

§ 53a-4. Clearly, in light of the savings clause, we are limited to recognizing basic common-law principles of and defenses to criminal liability not inconsistent with those set out in chapter 951 of the Penal Code. Contrary to the majority's suggestion, we are not authorized to adopt *any* common-law principles, so long as they are not inconsistent with *any other* part of the Penal Code. Chapter 951 comprises General Statutes §§ 53a-4 through 53a-23, which "set out the basic principles of and defenses to criminal liability." Commission to Revise the Criminal Statutes, Penal Code Comments, supra, commission comment, p. 323. Section 53a-3, which includes the definition of " '[p]erson,' " falls within chapter 950, enumerating "general provisions" of the Penal Code, and § 53a-54a, which proscribes murder, falls within chapter 952, enumerating substantive offenses of the Penal Code. See *State* v. *Miranda*, 245 Conn. 209, 220, 715 A.2d 680 (1988) ("[t]he definition of proscribed results constitutes the substantive crime" [internal quotation marks omitted]). The savings clause simply does not permit this court to supplement provisions of chapters 950 and 952 with common-law doctrine, and, therefore, we cannot supplement §§ 53a-3 and 53a-54a with common-law rules unexpressed by the legislature. As explained by the accompanying commission comment, the inclusion of the savings clause "does not mean . . . that the court is free to fashion additional substantive offenses, for the [Penal] Code precludes, by repealing section 54-117, the notion of common law crimes." Commission to Revise the Criminal Statutes, Penal Code Comments, supra, commission comment, p. 323. If this court today, as a matter of common-law adjudication, were to adopt the born alive rule, it effectively would be defining an element of a substantive offense in direct contravention to the foregoing stricture. See *Keeler* v. *Superior Court*, 2 Cal. 3d 619, 631–32, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) (declining to change statutory definition of human being because "the power to define crimes and fix penalties is vested exclusively in the legislative branch" and explaining that "we would undoubtedly act in excess of the judicial power if we were to adopt the . . . proposed construction"), superseded by statute as stated in *Wilson* v. *Kaiser Foundation Hospitals*, 141 Cal. App. 3d 891, 190 Cal. Rptr. 649 (1983); compare *Commonwealth* v. *Cass*, 392 Mass. 799, 803, 467 N.E.2d 1324 (1984) (disagreeing that changing statutory definition of person required legislative action because, "[*w*]*hile this may be true in code jurisdictions*, it is not true in [Massachusetts], where our criminal law is largely common law" [emphasis added]).

In sum, I analyze the defendant's due process claim within the void for vagueness rubric because the trial court disposed of the claim on that basis, the defendant continues to press a vagueness claim on appeal that cannot simply be bypassed, and the issue presented, at root, is whether *the legislature*, when promulgating the criminal code, intended to incorporate the born alive rule into the definition of person and made that clearly known, and *not*, as the majority's choice of analytical frameworks suggests, whether *this court* may newly recognize that rule today and apply it retroactively without offending due process. Accordingly, I disagree with the majority that the present case is a "conventional and foreseeable example of common-law adjudication" to which the holdings of *Rogers* v. *Tennessee*, supra, 532 U.S. 451, and *State* v. *Miranda*, supra, 260 Conn. 93, are directly applicable. I nevertheless will address those holdings hereinafter because of the majority's extensive reliance on them and, furthermore, because I believe the majority's characterization of them and the results they purportedly dictate are inaccurate.

[14] Although the murder section of our Penal Code was based in part on the New York Revised Penal Law and the Model Penal Code; see Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. § 53a-54a (West 1971), commission comment; we do not inevitably rely upon provisions of those codes to construe related Connecticut provisions identically. In *State* v. *Ross*, 230 Conn. 183, 197–99, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995), for example, this court declined to adopt wholesale the Model Penal Code's principles of extraterritorial jurisdiction where those principles had not been incorporated explicitly into Connecticut's code. Moreover, "[a]s this court has noted, [even where there is] similarity of language existing between the New York and Connecticut Penal Codes, [such] does not compel a like construction." *State* v. *Mastropetre*, 175 Conn. 512, 522, 400 A.2d 276 (1978). Here, however, despite the varying approaches, the defendant was effectively charged with predicting that, as to defining who may be the victim of a homicide, the trial court would conclude that the legislature, although it declined to adopt the Model Penal Code approach explicitly, nevertheless

intended to adopt it.

[15] Following this language is a citation to a footnote in a criminal law treatise "and the authorities cited therein." 2 Model Penal Code, supra, § 210.1, comment 4 (c), p. 11 n.22. That treatise, in turn, cites to the portion of Blackstone's Commentaries discussing the born alive rule. See R. Perkins, Criminal Law (2d Ed. 1969) p. 29 n.10.

[16] The majority recites often quoted language from decisions of the United States Supreme Court explaining that the vagueness doctrine "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited," that "[d]ue process does not require statutes to provide a laundry list of prohibited conduct . . . [and that laws] may be general in nature so as to include a wide range of prohibited conduct." (Internal quotation marks omitted.) I acknowledge that, in many instances, "[u]ncertain statutory language has been upheld when the subject matter would not allow more exactness and when greater specificity in language would interfere with practical administration." 1 W. LaFave, supra, § 2.3 (c), p. 151. The inability to be precise and the desire to avoid extensive, limiting descriptions that may reduce flexibility in the application of a statute, however, simply are not real concerns in the drafting of a provision that defines who will be considered a person for purposes of the law of homicide. In short, if the legislature had intended to incorporate the born alive rule into Connecticut's statutory definition of person, it *easily* could have done so, like the drafters of the Modal Penal Code and the New York Revised Penal Law, by the addition of a mere seven words: "who has been born and is alive." The only murder prosecutions that possibly could be precluded by the addition of those words are the prosecutions that the majority has determined the legislature unequivocally intended to foreclose, that is, prosecutions for the deaths of unborn fetuses. Because our code was modeled after the Model Penal Code and the New York Revised Penal Law, our legislators most certainly were aware of the option of using the more precise language. The majority offers no persuasive reason why the legislature would decline to do so while simultaneously intending to incorporate the rule that the omitted language so clearly would have conveyed.

[17] The majority's answer to this point is weak, almost to the point of warranting no response. Essentially, the majority asserts that, although the Model Penal Code definition mirrors the born alive rule and the accompanying commentary, which cites to material discussing the born alive rule, explains that "[t]he effect of this language is to continue the common-law rule limiting criminal homicide to the killing of one who has been born alive," it nevertheless is not clear whether the drafters of the Model Penal Code intended to incorporate the born alive rule, although a number of courts, including the trial court, have concluded precisely the opposite. In any event, according to the majority, the differences between the relevant provisions are unimportant because our legislature's intent is clearly evidenced by the opinion of the Model Penal Code drafters that our statute, although silent on the point, "may be expected to carry forward the common-law approach"; 2 Model Penal Code, supra, § 210.1, comment 4 (c), p. 11; or, alternatively, by a treatise author's general musings as to what "courts" usually do. See 1 W. LaFave, supra, § 14.1 (c), pp. 419–20 n.13. Thus, the majority argues, instead of simply saying what it meant, our legislature expected the general public to discern and infer its hidden intent from its failure to repudiate expressly speculative commentary appearing in the code of other jurisdictions, or in footnoted treatise predictions. I cannot agree with this strained reasoning.

[18] In fact, this court's holding in *Valeriano* v. *Bronson*, 209 Conn. 75, 546 A.2d 1380 (1988), strongly suggests the opposite conclusion. In that case, we rejected a habeas petitioner's claim that his counsel had been ineffective for failing to raise, as a bar to prosecution, the common law "year and a day" rule because it was "very doubtful if the rule ever existed in Connecticut." Id., 90. We noted that the rule had been mentioned in Connecticut case law only twice, in dicta, in 1877 and 1984; id., 90–91; and that "the adoption of the comprehensive Penal Code in 1969 abrogated the common law and set out substantive crimes and defenses in great detail." Id., 92. We then rejected the petitioner's argument that the savings clause of § 53a-4 had resulted in an incorporation of the "year and a day" rule into the Penal Code because "[g]enerally speaking, [a] 'savings clause' . . . saves something . . . that would otherwise have been lost. . . . The usual function of a saving clause is to preserve something from immediate interference . . . ." (Citations

omitted; internal quotation marks omitted.) Id. The flaw in the defendant's argument, we reasoned, was that it assumed "that [the 'year and a day'] rule had been adopted in Connecticut and remained legally viable at the time the Penal Code was enacted into law in 1969," an argument that, in light of the absence of pre-1969 case law adopting the rule, already had been resolved against the petitioner. Id. The same circumstances are present here: Indisputably, prior to the adoption of the criminal code in 1969, no Connecticut case had adopted the born alive rule. Accordingly, the legislature could not have intended, sub silentio, to retain it.

[19] In contrast, in Connecticut, the defendant has been prosecuted for capital murder for killing a pregnant woman and, consequently, her full term fetus, while another individual who accomplished precisely the same result a few years later was charged with only one count of murder, simply because the fetus in that case was not delivered prior to expiring. See *State* v. *Latour*, 276 Conn. 399, 401, 886 A.2d 404 (2005). I am hard pressed to suggest a better example of arbitrariness. Such disparity in treatment is a prime demonstration of how "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *Rockford*, 408 U.S. 104, 108–109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). The United States Supreme Court has cautioned that "[l]egislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Smith* v. *Goguen*, 415 U.S. 566, 575, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974).

[20] I recognize that, pursuant to United States Supreme Court precedent, courts should not apply the rule of lenity unless a statute remains ambiguous after consulting its language, structure and legislative history and the policies motivating its passage. See, e.g., *Moskal* v. *United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990). That approach has been criticized heavily, however, by members of both that court and this one, in light of *the rule's* motivating concerns, namely, the provision of notice and fair warning to criminal defendants as to what conduct is prohibited. See *State* v. *Lutters*, 270 Conn. 198, 222–23, 853 A.2d 434 (2004) (*Zarella, J.*, concurring); see also *United States* v. *Hayes*, 555 U.S.   , 129 S. Ct. 1079, 1093, 172 L. Ed. 2d 816 (2009) (Roberts, C. J., dissenting) ("[i]f the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a [fifty state] survey or comb through obscure legislative history"). In light of those concerns, I am hard pressed to conclude that the United States Supreme Court's sanction of the use of legislative history in this context extends to the use of legislative history underlying *different* statutory provisions enacted *after* the criminal conduct in question, as the majority has done in this case. Moreover, for reasons discussed hereinafter, I believe the majority's complete reliance on extrajurisdictional precedent and secondary sources to uphold *this defendant's* conviction, rather than for future application of our murder statutes in similar circumstances, also offends due process. Without this disproportionate level of assistance from secondary interpretory aids, Connecticut's statutory definition remains ambiguous such that the rule of lenity properly is applicable.

[21] In *In re Valerie D.*, 25 Conn. App. 586, 591–92, 595 A.2d 922 (1991), rev'd, 223 Conn. 492, 499, 613 A.2d 748 (1992), the Appellate Court alluded vaguely to the born alive rule in recounting the holding of *Anonymous*, when determining that, pursuant to governing statutes, a mother's prenatal conduct toward her fetus could be taken into account during proceedings for neglect and termination of parental rights brought subsequent to the child's birth. The Appellate Court then rejected the applicability of the rule's underlying rationale in that context in favor of the reasoning of cases allowing tort claims for injuries inflicted in utero. Id. In reversing the Appellate Court's ultimate determination, this court did not mention either *Anonymous* or the born alive rule. See *In re Valerie D.*, supra, 223 Conn. 492.

[22] There were additional indications, at the time of the defendant's acts, that Connecticut was not inclined to afford much legal protection to fetuses. As I mentioned previously in this opinion, there was no statute, as there is now; see General Statutes § 53a-59c; imposing additional penalties for an assault of a pregnant woman that results in the death of her fetus in utero. Furthermore, this court had held that a mother's detrimental actions toward her child, occurring prior to the child's birth, could not form the basis of a petition to terminate the mother's parental rights. *In re Valerie D.*, 223 Conn. 492, 505, 613 A.2d 748 (1992). Finally, consistent with the United States Supreme Court's decision in *Roe* v. *Wade*, 410 U.S. 113, 157–59, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), which rejected the notion that a fetus

is a person within the meaning of the fourteenth amendment, the right to an abortion was, and remains, statutorily protected with minimal restrictions. See General Statutes § 19a-602.

[23] Like Justice Zarella, I disagree with the majority's conclusion that it is appropriate to look to decisions of the Superior Court in civil cases that discuss a child's right to bring a tort action for injuries sustained in utero. See, e.g., *Simon* v. *Mullin*, 34 Conn. Sup. 139, 380 A.2d 1353 (1977); *Tursi* v. *New England Windsor Co.*, 19 Conn. Sup. 242, 111 A.2d 14 (1955). I acknowledge that judicial opinions, to provide the requisite notice and fair warning to a defendant that his conduct is criminal, need not involve precisely the same factual scenario as the defendant's case. See *Rose* v. *Locke*, 423 U.S. 48, 51, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975). Entirely different considerations apply, however, in the civil context than in the criminal context. See *State* v. *Amaro*, 448 A.2d 1257, 1259 (R.I. 1982) (wrongful death statutes are "remedial in nature, and . . . thus properly subject to a liberal application" while a "statute that is clearly penal in nature . . . must . . . be narrowly construed"); see also *Vo* v. *Superior Court*, 172 Ariz. 195, 205, 836 P.2d 408 (App. 1992) (same). Moreover, the United States Supreme Court has rejected the notion that civil case law suffices to provide notice to citizens as to the meaning of analogous criminal provisions. See *Bouie* v. *Columbia*, supra, 378 U.S. 357–58 (holding that South Carolina Supreme Court, in reaching novel construction of criminal trespass statute that deprived defendants of due process, improperly relied on "irrelevant" cases concerning law of civil trespass; because "[b]oth cases . . . turned wholly upon tort principles . . . they had no relevance whatever . . . to criminal trespass").

[24] The majority's lengthy description of the content of the trial court's opinion in *Anonymous* is notable for what it does *not* include, namely, a clear statement explaining the operation of the born alive rule or an overt acknowledgment that it is controlling law in Connecticut. Contrary to the majority's initial characterization of *Anonymous*, the trial court in no way "relied *expressly* on the born alive rule in concluding that a fetus killed in utero is not a person for purposes of our murder statute"; (emphasis added) *State* v. *Anonymous (1986-1)*, supra, 40 Conn. Sup. 505; nor was it necessary for the court to do so. As I noted previously in this opinion, the trial court in *Anonymous* explored many sources of legislative intent, none of which indicated that the legislature intended for the protections of the criminal code to apply to unborn, viable fetuses. Because the purported victim in *Anonymous* had not been born alive, then expired from injuries inflicted in utero, the court simply had no occasion to decide what rule the legislature intended to control in that circumstance and, accordingly, the opinion does not discuss it. Even if it had, "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." *Valeriano* v. *Bronson*, supra, 209 Conn. 91.

Moreover, even if the trial court's imprecise and indirect statements in *Anonymous*, as recited by the majority in the present case, can be said to be an implicit acknowledgment of the born alive rule, such an acknowledgment resembles an instance in which a court assumes, without actually deciding, that a particular rule is in force, then disposes of the case by determining that, given the facts of the case, the claim at issue nevertheless fails. Oftentimes, the court later will have occasion to decide squarely whether it ought to adopt the rule and, when it so decides, it is not to be bound by its earlier assumption because the propriety of that assumption, having not been directly at issue, was purely dictum. See, e.g., *Stuart* v. *Commissioner of Correction*, 266 Conn. 596, 603 n.11, 834 A.2d 52 (2003) (concluding that persons arrested and confined in other states are not similarly situated to those arrested and confined in Connecticut, despite previous case assuming that opposite was true, but disposing of case on rationale that no fundamental right was at stake); *Ford* v. *Ford*, 68 Conn. App. 173, 177 and n.2, 789 A.2d 1104 (concluding that certain factors need not be considered in initial custody determination despite previous case assuming that opposite was true, but disposing of case on rationale that trial court did consider factors), cert. denied, 260 Conn. 910, 796 A.2d 556 (2002).

The majority's desperation is evident from its suggestion that, consistent with due process jurisprudence, the defendant should be constructively charged not only with having read between the lines of a Superior Court decision to discern what rule would apply in a related, but distinct situation that was not before the court and that the decision never discussed, but also with the underlying rationale of the holdings of several extrajurisdictional cases cited within that Superior Court decision. It is hardly surprising

that the majority cites no authority for this incredible proposition.

[25] Although the majority proceeds as if the born alive rule had been universally adopted in every state, it is unclear whether that, in fact, is the case. In any event, whatever historical foothold the rule had acquired largely has been abandoned, for the most part legislatively, in favor of less arbitrary rules affording greater protection to fetuses and treating equally culpable defendants with greater parity. See D. Curran, note, "Abandonment and Reconciliation: Addressing Political and Common Law Objections to Fetal Homicide Laws," 58 Duke L.J. 1107, 1109 (2009) (beginning in 1970s, American jurisdictions began moving away from born alive rule and, by 2009, thirty-six states had abandoned it).

[26] I use the word "typically" in acknowledgment of the point made earlier, that there are no hard and fast rules or set methodology for evaluating due process arguments. Due to the vast body of due process jurisprudence, I cannot say with certainty that there is no case in which a court's exclusive reliance on extrajurisdictional precedent and secondary sources to reject a vagueness claim has been upheld. I submit, however, that such a case would be more the exception than the norm, and that in a matter involving the penalty of death, this court should refrain from heavy reliance on questionable techniques when analyzing a due process claim.

[27] The United States Supreme Court has explained: "It would be a rare situation in which the meaning of a statute of another [s]tate [as interpreted by that state's courts] sufficed to afford a person 'fair warning' that his own [s]tate's statute meant something quite different from what its words said." *Bouie* v. *Columbia*, supra, 378 U.S. 359–60 (rejecting South Carolina's reliance on North Carolina decisions in evaluating due process challenge). This court previously has acknowledged this restriction. See *State* v. *DeFrancesco*, 235 Conn. 426, 444, 668 A.2d 348 (1995) ("[i]n determining whether a statute is unconstitutionally vague, we take into account any prior interpretations that this court, our Appellate Court and the Appellate Session of the Superior Court have placed on the statute" [internal quotation marks omitted]); *State* v. *Indrisano*, 228 Conn. 795, 805 n.6, 640 A.2d 986 (1994) ("[t]he rule of federal vagueness jurisprudence is that prior judicial decisions interpreting a state statute are authoritative if they are decisions of a court of statewide jurisdiction, the decisions of which are binding upon all trial courts in the absence of a conflicting decision of the [state] Supreme Court" [internal quotation marks omitted]). Clearly, the Superior Court's decision in *Anonymous* does not fall within the foregoing parameters.

Although additional language from *DeFrancesco* on its face suggests, contrary to *Bouie*, *Indrisano* and the several United States Supreme Court decisions cited in the main text of this concurring and dissenting opinion, that our sister states' jurisprudence concerning their statutes is an appropriate source of fair warning as to the meaning of a Connecticut statute, closer examination of the source of that language clarifies that it should not be read so broadly. Citing to *State* v. *Proto*, 203 Conn. 682, 699–700, 526 A.2d 1297 (1987), we stated that, in determining whether a statute is unconstitutionally vague, "we can use as a guide judicial opinions that, while not binding on this court, refer to the statute in question or to a statute that uses similar language." *State* v. *DeFrancesco*, supra, 235 Conn. 444. In *Proto*, we concluded that the United States Supreme Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), was "a *uniquely applicable* guide to the [Connecticut] statutes at issue" because those statutes were "similar in significant respects" to the federal statutes at issue in *Buckley* and, more importantly, "the legislative history of [the Connecticut statutes] clearly show[ed] that the General Assembly intended [Connecticut's statutory definitions] to incorporate the distinctions enumerated in *Buckley*." (Emphasis added.) *State* v. *Proto*, supra, 699–700. We reasoned that, "[s]ince our goal is to clarify statutory ambiguities in a manner consistent with legislative intent . . . we may appropriately refer to *Buckley* as a guide to resolving [the ambiguity at issue]." (Citations omitted.) Id., 700.

Needless to say, the "unique" circumstances of *Proto* are not present here. As the majority acknowledges, the legislative history of §§ 53a-3 (1) and 53a-54a (a) "offers no guidance with respect to the issue raised by the present case," let alone does it indicate that in promulgating those statutes, the General Assembly intended to incorporate doctrine enshrined in other jurisdictions' statutes or common-law jurisprudence, particularly where those jurisdictions' statutes are worded differently or where they have different common-law traditions or constitutional provisions adopting English common law. If that was the legislature's intent, it easily could have indicated that by including the words, "who has been born and is alive," to the

definition of person, rather than expecting this court to discover it serendipitously in the course of a winding, extrajurisdictional journey, indeed, in the decisions of tribunals as distant as New South Wales, Australia.

As the foregoing explanation demonstrates, the quoted language in *DeFrancesco*, traced to its source, cannot reasonably be read to sanction heavy reliance on dicta from a single trial court opinion that post dated the legislature's enactment of the Penal Code by seventeen years and, consequently, could not have been intended by the legislature to be incorporated into the Penal Code. This is particularly so in light of the extensive federal authority counseling otherwise and which, in the event of a conflict with state jurisprudence on a federal due process question, obviously is controlling. See, e.g., *Hagan* v. *Caspari*, 50 F.3d 542, 544–45 (8th Cir. 1995); *Moore* v. *Wyrick*, 766 F.2d 1253, 1255 (8th Cir. 1985), cert. denied sub nom. *Armontrout* v. *Moore*, 475 U.S. 1032, 106 S. Ct. 1242, 89 L. Ed. 2d 350 (1986).

[28] See, e.g., *People* v. *Hall*, 158 App. Div. 2d 69, 557 N.Y.S.2d 879 (1990) (applying statutory definition that explicitly incorporated born alive rule); *Cuellar* v. *State*, 957 S.W.2d 134 (Tex. App. 1997) (same); *State* v. *Cornelius*, 152 Wis. 2d 272, 448 N.W.2d 434 (App. 1989) (same). It should go without saying that, when the language of a Connecticut statute differs significantly from statutes of other states governing the same subject matter, judicial precedents from those states are of little utility for purposes of interpreting the Connecticut provision. See *Nickel Mine Brook Associates* v. *Joseph E. Sakal, P.C.*, 217 Conn. 361, 365, 585 A.2d 1210 (1991).

[29] The majority, in one instance of looking to extrajurisdictional jurisprudence for guidance, observes that "numerous other appellate courts have recognized the born alive rule and deemed it applicable to the then pending case solely on the basis of English common-law authority, other state cases, the writings of legal commentators or a combination thereof." What the majority declines to state, however, is that in three of the five cases cited, the rule was applied to *absolve* a defendant of criminal liability for the death of an *unborn* fetus by rejecting the state's contention that a viability standard ought to apply instead. See *People* v. *Greer*, 79 Ill. 2d 103, 402 N.E.2d 203 (1980); *People* v. *Guthrie*, 97 Mich. App. 226, 293 N.W.2d 775 (1980), cert. denied, 417 Mich. 1006, 334 N.W.2d 616 (1983); *State* v. *Beale*, 324 N.C. 87, 376 S.E.2d 1 (1989). Consequently, in the foregoing cases, no due process concerns were implicated by the courts' adoption of the rule. Another of the cited cases is from Maryland, a jurisdiction that recognizes common-law crimes and has a constitutional provision directing the court to look to the common law of England as of July 4, 1776, to define the state's common law. See *Williams* v. *State*, 316 Md. 677, 679 n.1, 561 A.2d 216 (1989). Given that context, the defendant could not possibly claim a lack of fair warning as to the court's adoption of the rule.

Notably, several of the other contemporary cases relied upon by the majority in support of the notion that the born alive rule is firmly established by the common law, similar to *Greer*, *Guthrie* and *Beale*, cite the rule in the context of considering whether a charge of homicide may lie for the killing of an unborn fetus, and not to apply the rule directly to uphold a criminal conviction. See *Commonwealth* v. *Cass*, 392 Mass. 799, 467 N.W.2d 1324 (1984); *State* v. *Amaro*, 448 A.2d 1257, 1258 (R.I. 1982); *Keeler* v. *Superior Court*, 2 Cal. 3d 619, 624, 470 P.2d 617, 87 Cal. Rptr. 481 (1970). This is because direct application of the rule was widespread only much further back in the historical record.

The majority is dismissive of this serious constitutional claim, reasoning, in part, that I have not identified any instance of a court holding application of the born alive rule to be unconstitutional. This circumstance likely is a function of both the rule's antiquity and its now widespread abandonment. In jurisdictions where the rule received early legislative or judicial recognition, predating robust due process jurisprudence, such recognition would preclude later vagueness challenges. Moreover, in the thirty-six states that have abandoned the rule during the last five decades or so, there clearly no longer is any occasion for a constitutional challenge.

[30] The majority's assertion that it has not relied on this material in resolving the defendant's due process argument, but only to determine that "it evinces the intent of the legislature to recognize the born alive rule," is difficult to comprehend. Simply put, the defendant's due process argument is inextricably intertwined with the questions of what the legislature intended and whether that intent was made clear, either by the statutory language, or other interpretative aids, at the time of the defendant's conduct.

[31] Because the reports of the office of legislative research, also relied upon by the majority, were drafted in 2003, they similarly are irrelevant to the

question of whether the defendant received notice and fair warning.

[32] Putting aside the temporal difficulties with this argument, I fail to understand why the result imagined by the majority is any more or less "irrational and bizarre" than the necessary implication of the majority's conclusion today. Specifically, underlying that conclusion is a presumption that the legislature, in purportedly adopting the born alive rule when it promulgated the Penal Code in 1969, intended for identical conduct to be considered either murder, rendering the defendant potentially eligible for the death penalty, or a noncriminal act carrying no penalty, with the outcome of a particular case dependent not upon the precise character of the defendant's conduct and his relative culpability, but on such external factors as the availability, skill and timeliness of intervening medical professionals and the random circumstance of when the death of the fetus ultimately occurred. Compare *State* v. *Latour*, supra, 276 Conn. 399, with the present case.

[33] I disagree with the majority's reliance on Zephaniah Swift and William Blackstone for the proposition that, because the born alive rule was firmly entrenched in the common law generally, it automatically became part of the common law of Connecticut without any explicit adoption by the legislature or the courts of this state. "[A]s Blackstone wrote, the common law was a law for England, and did not automatically transfer to the American [c]olonies; rather, it had to be adopted. See 1 [W.] Blackstone [Commentaries on the Laws of England (1769)] *107–*108 (observing that the common law of England, as such, has no allowance or authority in [o]ur American plantations); see also 1 [Z.] Swift [A System of the Laws of the State of Connecticut (1795) p. 45] ([t]he English common law is not in itself binding in this state); id., [44–45] ([t]he English common law has never been considered to be more obligatory here, than the Roman law has been in England). In short, the colonial courts felt themselves perfectly free to pick and choose which parts of the English common law they would adopt." (Internal quotation marks omitted.) *Rogers* v. *Tennessee*, supra, 532 U.S. 475 (Scalia, J., dissenting).

Although the majority cites several cases in which this court has relied on the writings of Swift, it is worth emphasizing that we do not inevitably do so. We have declined to take that approach, for example, where the statute at issue "has been drastically changed since Swift's time"; *State* v. *Van Allen*, 140 Conn. 586, 589, 102 A.2d 526 (1954); see also *State* v. *Nixon*, 32 Conn. App. 224, 246, 630 A.2d 74 (1993) (refusing to engraft common-law definition of rioting requiring participation of at least three participants, as described in writings of Swift, onto modern rioting statute that, by express terms, was not so limited), aff'd, 231 Conn. 545, 651 A.2d 1264 (1995); or where Swift's writing reflected a view of the common law that had not been applied in any case and later was rejected. *State* v. *James*, 237 Conn. 390, 417–18, 678 A.2d 1338 (1996); see also *Valeriano* v. *Bronson*, supra, 209 Conn. 91 n.10 (concluding that year and a day rule, having never been applied in any Connecticut decision, never had been adopted as part of common law in Connecticut, although Swift indicated that it had been part of common law generally). Here, the Swift treatise relied upon by the majority to prove the born alive rule is part of the common law of Connecticut; see 2 Z. Swift, A System of the Laws of the State of Connecticut (1796), pp. 298–99; indicates that the murder statute in force at that time differed vastly from today's statute and did not even purport to define either "murder" or "person." Id.. Moreover, in the more than two hundred years since that treatise was published, the born alive rule never before has been adopted as authoritative Connecticut precedent and, elsewhere, has met with widespread rejection. Accordingly, I disagree with the majority that the rule's presence in the writings of Swift gave the defendant constructive notice that the rule would be applied to him and result in the penalty of death.

[34] My conclusion that there was insufficient notice of the born alive rule to apply that doctrine to *this defendant* would not impede future prosecutions under that doctrine as a result of the majority's conclusion and, therefore, would not create a gap in the legislative scheme in the future. As to future defendants, the majority opinion clearly provides an authoritative judicial gloss.

[35] As earlier explained, I disagree with this approach. See footnote 13 of this concurring and dissenting opinion.

[36] According to the majority, this court's holding in *State* v. *Miranda*, supra, 260 Conn. 93 (*Miranda II*), which relied on *Rogers*, provides additional support for its conclusion that adoption of the born alive rule is not unexpected and indefensible with reference to previously stated law. At the outset, I disagree that the reliability of the holding of *Miranda II*, namely,

that the retroactive application of *State* v. *Miranda*, 245 Conn. 209, 715 A.2d 680 (1998) (*Miranda I*), did not offend due process, was not seriously undermined when this court subsequently reversed *Miranda I*. In *State* v. *Miranda*, supra, 274 Conn. 727 (*Miranda III)*, three justices of this court opined that *Miranda I*, as a policy matter, was "clearly wrong"; id., 734; "unwise" and went "too far"; id., 749 (*Borden*, *J.*, concurring); and three other justices concluded that *Miranda I*, as a matter of law, had been wrongly decided, in part because the opinion had failed to consider the plain language and legislative history of the statute at issue, contrary to what had been stated in *Miranda II*, and instead had relied on local and extrajurisdictional precedent that largely was inapposite. Id., 758 n.4, 762–64 (*Vertefeuille*, *J.*, concurring). According to the majority, however, our conclusion in *Miranda II* that this deeply flawed decision was "reasonably foreseeable"; *Miranda II*, supra, 110; nevertheless remains inviolate.

Additionally, I disagree with this court's conclusion in *Miranda II* that retroactive application of *Miranda I* clearly was sanctioned by the then recent holding of *Rogers*. Specifically, the conclusion in *Miranda I* had no support in the relevant statutory language or legislative history, and the extrajurisdictional precedent relied upon, even if it was analogous, hardly represented an overwhelming trend. In short, I disagree with the conclusion in *Miranda II*, purportedly reached in reliance on *Rogers*, that retroactive application of any decision arrived at by "employ[ing] the ordinary tools of statutory construction"; id., 106; including reference to inapposite extrajurisdictional precedent at odds with the language of the statute at issue, necessarily comports with due process. I have searched *Rogers* in vain, and have found no language sanctioning such an unrestrained approach. As noted previously in this concurring and dissenting opinion, when state and federal jurisprudence on federal due process conflict, the federal jurisprudence controls.

[37] The majority applies the holding of *Rogers* expansively and mechanically, and at a highly general level. In short, according to the majority, because the United States Supreme Court in *Rogers* concluded that a retroactive overruling of precedent did not offend due process, any retroactive change in the law that falls short of a direct overruling of prior case law necessarily is constitutional. Moreover, the majority reasons, because the United States Supreme Court sanctioned consideration of extrajurisdictional precedent as a factor in certain circumstances, complete reliance on extrajurisdictional precedent, in the absence of any authoritative pronouncement from Connecticut's courts or legislature, is entirely appropriate.

I reject this approach as overly cynical and inconsistent with the individualized, case specific consideration that should be given to claims of inadequate notice. Furthermore, novel judicial interpretations of statutes that did not involve outright reversal of previous precedent have been held to be unexpected and indefensible with reference to the law as previously stated and, therefore, violative of due process. Typically, these cases involve the expansion of statutory language to cover conduct not obviously within a statute's reach or not previously held to be within its coverage. See, e.g., *Bouie* v. *Columbia*, supra, 378 U.S. 347 (finding due process violation where state court expanded reach of trespassing statute beyond plain language or scope previously indicated); 1 W. LaFave, supra, § 2-4 (c), p. 163 n.62 ("[a]n examination of the prior state decisions [in *Bouie*] shows that none were actually overruled by the case which held that the trespass statute also covered instances in which a person refuses to leave the land of another after being ordered to do so"); see also *Rabe* v. *Washington*, 405 U.S. 313, 315, 92 S. Ct. 993, 31 L. Ed. 2d 258 (holding due process violation where state court broadened reach of obscenity statute by finding dispositive manner in which movie was displayed rather than its content), reh. denied, 406 U.S. 911, 92 S. Ct. 1604, 31 L. Ed. 2d 822 (1972). Each of these cases, like the present case, necessarily involved a matter of first impression.

[38] As the court explained in *Rogers*, the year and a day rule, prior to the conduct in question, had been mentioned in one decision of the Tennessee Supreme Court and one decision of the Tennessee Court of Appeals, both times in dicta.

[39] Apparently, the majority considers historic trends more compelling than contemporary ones. Astoundingly, according to the majority, "the reasons for recognizing the rule are compelling and . . . there is no persuasive reason for not doing so."

[40] Indeed, for very similar reasons, this court concluded that the year and a day rule never existed in Connecticut. See *Valeriano* v. *Bronson*, supra, 209 Conn. 90–95 (rejecting argument that rule was part of Connecticut

common law where it had been mentioned rarely and only in dicta, did not appear in our Penal Code and had been abolished in numerous other jurisdictions in light of its dubious underpinnings and advent of modern medical technology). Today, however, the majority concludes that its employment of precisely the opposite reasoning is not unexpected and indefensible with reference to previously stated law.

[41] In *Higgins*, the defendant had been sentenced to life imprisonment. *State* v. *Higgins*, supra, 265 Conn. 42.

[42] Furthermore, for the reasons expressed more fully by Justice Zarella, I agree that our murder statutes require that there must be a temporal nexus between a defendant's criminal conduct and the status of the victim when the fatal injury is inflicted.

[43] The difference is that first degree murder requires premeditation. Compare Minn. Stat. § 609.2661 (1988) with Minn. Stat. § 609.2662 (1988).

[44] Indeed, as the majority itself acknowledges, the expanded two-prong definition of life, and conversely, death, already had been applied *in the born alive rule context* six years prior to the defendant's trial. See *People* v. *Flores*, supra, 3 Cal. App. 4th 210–11.

[45] The majority's attempt to explain the due process violation by mischaracterizing my argument concerning the need for clairvoyance is unavailing under the circumstances of this case. My point, simply put, is that the majority has denied the defendant fundamental fairness in two separate respects—first, by charging him with knowledge that a wholly unarticulated and, therefore, novel interpretation of our murder statutes would apply to make his conduct as to Antonia criminal, and, second, by failing to require the state to appreciate that a general standard for determining death, intended to apply in a variety of contexts, would be pertinent to the life or death issue at the heart of this case. The majority, rather than refuting this argument, attempts to distract from it through mischaracterization.