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Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984)

Peter G. Carroll

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RECENT DECISIONS

COMMONWEALTH v. CASS

I. INTRODUCTION

In *Commonwealth v. Cass*,¹ the Supreme Judicial Court of Massachusetts held that a viable fetus is a "person" within the meaning of the vehicular homicide statute.² Relying heavily on a 1975 decision in which it interpreted "person" to include the viable unborn for the purposes of civil wrongful death actions,³ the court in *Cass* saw no reason to apply a different definition to the term in this criminal action.⁴ The court was satisfied, furthermore, that the primary goal of the doctrine of strict construction of criminal statutes, fair warning as to the scope of criminal liability,⁵ was adequately served by a prospective application of the new rule.⁶

The victim in *Cass*, an eight and one-half month old fetus, died as the result of internal injuries after the defendant's vehicle struck the victim's mother.⁷ The defendant was charged in district court with vehicular homicide.⁸ Both parties subsequently requested that the dis-

1. 392 Mass. 799, 467 N.E.2d 1324 (1984).

2. *Id.* at 808, 467 N.E.2d at 1330. MASS. GEN. LAWS ANN. ch. 90, § 24G (West 1984).

3. *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975).

4. 392 Mass. at 801, 467 N.E.2d at 1326.

5. *See infra* notes 55 and 60 and accompanying text.

6. 392 Mass. at 804, 467 N.E.2d at 1327. *See infra* note 56 and accompanying text.

7. *Id.* at 799-80, 467 N.E.2d at 1325.

8. That statute provides:

Whoever, upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle while under the influence of intoxicating liquor, or of marihuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue, or whoever operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered and by any such operation causes the death of another person, shall be guilty of homicide by a motor vehicle and shall be punished by imprisonment in a jail or house of correction for not less than thirty days nor more than two and one-half years, or by a fine of not less than three hundred nor more than three thousand dollars, or both.

MASS. GEN. LAWS ANN. ch. 90, § 24G(b) (West 1984).

strict court report the case to the appeals court on a statement of agreed facts. The supreme judicial court transferred the case for review upon its own motion.⁹

Section 24G(b) is concerned with the death of a "person" caused by the operation of a motor vehicle. Nowhere in the section is "person" defined.¹⁰ Other state courts have uniformly held that such statutes were not intended to include the killing of the unborn, but rather are merely codifications of the common law definition of homicide which requires that the "person" be born alive.¹¹

II. BACKGROUND

At common law, the requirement of live birth extended to civil wrongful death actions.¹² Indeed, the requirement persisted as an interpretation of the Massachusetts wrongful death statute¹³ until quite recently. In *Leccese v. McDonough*,¹⁴ the supreme judicial court refused to allow recovery for the wrongful death of a fetus that, while born, was not born alive.¹⁵ The court supported its decision with a long line of precedent, emphasized that speculation as to the viability of the fetus would be avoided with such a rule, and pointed to the legislature as the appropriate source of any future change in the law.¹⁶

In *Mone v. Greyhound Lines, Inc.*,¹⁷ *Leccese* was explicitly overruled and the born alive requirement was abolished for civil actions under the wrongful death statute.¹⁸ In rejecting the born alive rule, the court in *Mone* acknowledged the extensive precedent for the rule

9. 392 Mass. at 799, 467 N.E.2d at 1324-25.

10. *See supra*, note 8.

11. *See, e.g.*, *People v. Guthrie*, 97 Mich. App. 226, 293 N.W.2d 775 (1980) for interpretation that "death of another" does not include death of the unborn for purposes of vehicular homicide statute; *State v. Dickenson*, 28 Ohio St.2d 65, 275 N.E.2d 599 (1971); *State v. Larsen*, 578 P.2d 1280 (Utah 1978). *See State v. Willis*, 98 N.M. 771, 652 P.2d 1222 (1982) for interpretation that a fetus is not a "human being" for purposes of vehicular homicide statute; *State ex rel. A.W.S.*, 182 N.J. Super. 278, 440 A.2d 1144 (1981). *See State v. Amaro*, 448 A.2d 1257 (R.I. 1982) for interpretation that a fetus is not a "person" within the meaning of the vehicular homicide statute. *See also* Annot., 40 ALR 3d 444, at 447 (1971). Most recently, the Supreme Court of South Carolina has indicated that fetuses are included within the meaning of "person" in a manslaughter statute. *See State v. Horne*, No. 22157, slip op. (Aug. 17, 1984).

12. *See Winfield, The Unborn Child*, 8 CAMB. L.J. 76, 84-85 (1942). *See also* Annot., 15 A.L.R. 3d 993 (1967).

13. MASS. GEN. LAWS ANN. ch. 229, § 2 (Michie/Law. Co-op. 1974).

14. *Leccese v. McDonough*, 361 Mass. 64, 279 N.E.2d 339 (1972).

15. *Id.* at 67, 279 N.E.2d at 341.

16. *Id.*

17. 368 Mass. 354, 331 N.E.2d 916 (1975).

18. *Id.* at 360, 331 N.E.2d at 919.

but pointed out that the majority of American jurisdictions have replaced the rule with the requirement that the fetus simply be viable.¹⁹ The court was satisfied that a simple viability requirement would introduce no more speculation than the typical tort claims involving medical determinations.²⁰ Finally, the court in *Mone* pointed to decisions subsequent to *Leccese* that recognized the common law origins of the right to recovery for wrongful death.²¹ Consequently, the court in *Mone* took the view that courts have the power to "make changes in the common law, rather than to wait for the Legislature, where such changes . . . would not seriously impair an existing interest, disappoint an expectation, or defeat a reliance."²²

One year after the *Mone* decision, the supreme judicial court in *Commonwealth v. Edelin*²³ faced the question as to whether a fetus was a "person" within the meaning of a criminal statute. The court in *Edelin* reversed a lower court conviction of a physician for manslaughter when it held that the abortion of a six month old fetus in the normal course of the physician's practice at Boston City Hospital was not an action causing the death of a "person."²⁴ The Commonwealth theorized that "upon the detachment of the placenta, the fetus became a 'person' within the manslaughter statute."²⁵ The court insisted that "(o)nly when a fetus had been born alive outside its mother could it become a 'person' within the meaning of the statute."²⁶ The court summarily distinguished *Mone* as a civil case and, therefore, not controlling.²⁷

In addition to the concerns of judicial precedent, speculation as to fetus viability, and difficulty in administering a rule other than the born alive rule, the *Edelin* decision reflects the overriding consideration of the court as to the appropriateness of changing the widespread understanding of words in a criminal statute.²⁸ Criminal laws, as con-

19. *Id.* at 357 & n.5, 331 N.E.2d at 918 & n.5.

20. *Id.* at 360, 331 N.E.2d at 919.

21. *Id.* at 358-59, 331 N.E.2d at 918.

22. *Id.* at 359, 331 N.E.2d at 918-919.

23. 371 Mass. 497, 359 N.E.2d 4 (1976).

24. *Id.* at 509, 359 N.E.2d at 10. The normal procedure of abortion by saline injection into the amniotic sac had failed and the physician was forced to remove the fetus by manually detaching the placenta from the uterine wall. *Id.* at 502-03, 359 N.E.2d at 7.

25. *Id.* at 509, 359 N.E.2d at 10. While affirming the born alive rule, three Justices thought that the evidence was sufficient to go to the jury on the question of whether the fetus was born alive. *Id.* at 517, 359 N.E.2d at 15.

26. *Id.* at 509, 359 N.E.2d at 10.

27. *Id.* at 513 n.23, 359 N.E.2d at 12 n.23.

28. Considerable criticism exists because while tort and property law recognize the legal rights of the unborn, criminal law does not. See, e.g., Note, *The Law and the Unborn*

trusted with civil laws, impose sanctions that characteristically involve loss of liberty or life; statutes that impose restrictions on these constitutionally protected rights are construed strictly.²⁹ Strict construction of criminal statutes was propounded as a doctrine in 1820 by the United States Supreme Court as an acknowledgement of exclusive power vested in the legislature to create criminal laws.³⁰ The doctrine has been followed in Massachusetts since 1850.³¹ Against this background, the meaning of "person" in a criminal statute was again questioned in *Cass*.

III. THE CASS DECISION

In *Cass*, the supreme judicial court justified its decision to abolish the born alive requirement for the purposes of the vehicular homicide statute on two grounds. The first arises from the fact that the Legislature enacted the vehicular homicide statute after the *Mone* decision.³² The court pointed to no legislative history to support an assumption that the legislature considered the impact of *Mone*, a civil case, on the meaning of "person" in the vehicular homicide statute, but stated "we

Child, 46 NOTRE DAME LAW. 349 (1971). Critics acknowledge nonetheless that within criminal law the born alive rule is applied consistently everywhere in the United States. See Comment, *The Role of the Law of Homicide in Fetal Destruction*, 56 IOWA L. REV. 658, 659 (1971).

29. See generally J.P. BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES (1873).

The law delights in the life, liberty, and happiness of the subject; and deems statutes which deprive him of these, or of his property, however necessary they may be, in a sense odious. Therefore, and for kindred reasons, as well as for the reason that every man should be able to show certainly when he is guilty of a crime, statutes which subject one to a punishment . . . are to be construed strictly.

Id. at 127-28.

30. See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820). Chief Justice Marshall stated for the court that:

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

Id. at 95.

31. See *Cleaveland v. Norton*, 60 U.S. (6 Cush.) 380 (1850).

There are two or three general rules of construction. . . . The first is, that all penal acts are to be construed strictly, and not extended by equity, or by the probable or supposed intention of the legislature as derived from doubtful words; but that in order to charge a party with a penalty, he must be brought within its operation, as manifested by express words or necessary implication.

Id. at 383.

32. *Cass*, 391 Mass. at 800, 467 N.E.2d at 1325. *Moné* was decided July 16, 1975, and section 24G(b) was approved July 2, 1976.

can reasonably infer that, in enacting section 24G, the Legislature contemplated that the term "person" would be construed to include viable fetuses."³³

The dissenters saw no substance in the majority's assumption in view of the well understood meaning of "person" in criminal law.³⁴ Indeed, the supreme judicial court had itself distinguished *Mone* as a civil case and as not controlling in *Edelin*, a criminal case decided the year of the enactment of the vehicular homicide statute.³⁵ Thus, rather than providing support for the court's decision in *Cass*, *Mone* has been characterized by the court in *Edelin* as irrelevant with respect to criminal law. If the court did not regard *Mone* as applicable to criminal law, why should the legislature be presumed to have done so?³⁶ Furthermore, the legislature could not look to any example from another jurisdiction in which the decision to include the unborn within the meaning of "person" for the purposes of civil actions was precedent to include the unborn within the meaning of "person" for criminal actions.³⁷

33. *Id.* at 801, 467 N.E.2d at 1326.

34. *Id.* at 809, 467 N.E.2d at 1330 (Wilkins, J., dissenting).

35. *Edelin*, 371 Mass. at 513 n.23, 359 N.E.2d at 12 n.13. *Edelin* was decided December 17, 1976—four months after section 24 was approved.

36. Again, no support exists for this assumption in any subsequent acts by the Legislature. In particular, chapter 272, § 22, amended and approved December 23, 1977, appears to retain a born alive requirement for the determination of both illegitimacy and homicide of an illegitimate child. MASS. GEN. LAWS ANN. ch. 272, § 22 (Michie/Law. Co-op. 1980). Section 22 reads in part: "A parent who conceals the death of the issue of such parent, which if born alive would be illegitimate, so that it cannot be ascertained whether it was born alive or, if born alive, whether it was murdered . . ." *Id.* It would appear that the statute is subjecting parents to punishment for denying to the Commonwealth the necessary evidence for a murder prosecution should there be foul play. That evidence is live birth of the child.

37. In the first case to decide whether "person" in a vehicular homicide statute includes unborn children, the Ohio Supreme Court in *State v. Dickinson*, while recognizing "person" to include fetuses for the purpose of recovery in civil wrongful death actions, refused to apply this broad definition of "person" to a criminal statute; "It must be noted . . . that the definition of a word in a civil statute does not necessarily import the same meaning to the same word in interpreting a criminal statute. The result may be desirable, but criminal statutes, unlike civil statutes, must be construed strictly against the state." *State v. Dickinson*, 28 Ohio St.2d 65, 70, 275 N.E.2d 599, 602 (1971). When faced with the identical issue, the Michigan Supreme Court in *People v. Guthrie*, while noting that Michigan's wrongful death statute had been interpreted to include the unborn, refused to change the definition of "person" in a vehicular homicide statute; "It is one thing to mold, change and even reverse established principles of common law in civil matters. It is quite another thing to do so in regard to criminal statutes." *People v. Guthrie*, 97 Mich. App. 226, 232, 293 N.W.2d 775, 778 (1980). Thus, other jurisdictions, while noting the change in the meaning of "person" in tort claims, have preserved the more restricted meaning in criminal law and have refused to use civil cases as precedent for changes in criminal statutory interpretation. *See, supra* note 11 and accompanying text.

The second ground for the court's decision in *Cass* was a simple assertion by the court that the judiciary has the power to redefine words in criminal statutes.³⁸ As evidence of this power, the court pointed to occasions "[w]here the Legislature uses nonspecific terms in criminal statutes [and where] this court frequently provides necessary construction and definition from the common law."³⁹ The majority conceded that "[s]ince at least the fourteenth century the common law has been that the destruction of a fetus in utero is not a homicide."⁴⁰ While it appeared, therefore, that the issue could only be resolved by excluding the unborn as a class of victims under the statute, the court concluded instead that "[w]e look to the common law as to whether a viable fetus can be the victim of a homicide and conclude that it can."⁴¹ In so doing, the court in *Cass* distinguished "preexisting" common law⁴² from that which the court has "developed and redefined."⁴³ The court felt that considering only preexisting common law in the course of defining a term in a criminal statute would only "freeze its meaning."⁴⁴

The court's self-described role is to provide "definitive common law rulings required by general language used by the Legislature."⁴⁵ The court, however, subdivided common law into old and new; the court characterized hundreds of years of case law and legal thinking as "preexisting" common law and characterized a handful of recent cases⁴⁶ as examples "developed and redefined" common law.⁴⁷ By refusing to apply "preexisting" common law, the court avoided the obvious implications of Massachusetts common law as restated in

38. *Cass*, 392 Mass. at 801, 467 N.E.2d at 1326.

39. *Id.*

40. *Id.* at 805, 467 N.E.2d at 1328.

41. *Id.* at 801, 467 N.E.2d at 1326.

42. *Id.* at 804, 467 N.E.2d at 1327.

43. *Id.*

44. *Id.*

45. *Id.* at 803, 467 N.E.2d at 1327.

46. The court cites three cases where the court has "developed and redefined the meaning of the common law applicable to other criminal statutes." *Cass*, 392 Mass. at 804, 467 N.E.2d at 1327. These cases are: *Commonwealth v. Lewis*, 381 Mass. 411, 409 N.E.2d 771 (1980), *cert. denied*, 450 U.S. 929 (1981); *Commonwealth v. Gould*, 380 Mass. 672, 405 N.E.2d 927 (1980); *Commonwealth v. Golston*, 373 Mass. 249, 366 N.E.2d 744 (1977), *cert. denied*, 434 U.S. 1039 (1978).

47. "As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs. . . ."

BLACK'S LAW DICTIONARY 250-51 (5th ed. 1979).

Edelin.⁴⁸ In a single stroke, the court “developed and redefined” common law so as to allow the legal meaning of “person” to include the unborn.

The court in *Cass* argued that, since Massachusetts has no criminal code,⁴⁹ the judiciary is able to “develop common law rules of criminal law.”⁵⁰ The primary purpose of a criminal code is to provide “an integrated body of law”⁵¹ in which all crimes are clearly defined by statute. The lack of codification of criminal law in no way, however, diminishes the need for strict statutory interpretation. In this regard, the court’s argument appears to evince more than a desire to create “common law rules”; rather, a desire for new common law crimes. The court’s statement that “we would not want the death of the fetus to go unpunished”⁵² clearly manifests this intent.

The power of the court to change the meaning of words in laws created by the Legislature is the most troubling aspect of the *Cass* decision. By ignoring the common law rule, established in criminal cases, that “person” includes only those who are born alive, the court has made an end run around the rule of strict construction of criminal statutes. The court stated flatly: “. . . we are not persuaded that the rule of strict construction of criminal statutes prevents us from construing the word “person” to include viable fetuses.”⁵³ The court, however, was not unmindful that strict statutory construction “avoid[s] unconstitutional application of statutes to defendants who did not have the benefit of the warning provided by our construc-

48. See *supra* notes 25 & 26 and accompanying text.

49. There was a Proposed Criminal Code of Massachusetts that was never adopted. PROPOSED CRIMINAL CODE OF MASSACHUSETTS (Michie/Law. Co-op. 1972). The Supreme Judicial Court has often noted the Code in its decisions and its provisions for particular issues of law have been used as guidance. See *Commonwealth v. Jones*, 362 Mass. 83, 86 n.3, 283 N.E.2d 840, 843 n.3 (1972) (“the revision commission maintains this fundamental distinction between robbery and theft.”); *Commonwealth v. Tarrant*, 367 Mass. 411, 417 n.6, 326 N.E.2d 710, 715 n.6 (1975) (“the definition of a dangerous weapon adopted in the Proposed Criminal Code of Massachusetts . . . is well stated . . .”). The Proposed Code is explicit as to whether a fetus is a person: “‘human being’ means a person who has been born and is alive.” PROPOSED CRIMINAL CODE OF MASSACHUSETTS, ch. 265, § 1(c) (Michie/Law. Coop. 1972). The court in *Cass* did not mention the definition of “human being” in the Proposed Code.

50. *Cass*, 392 Mass. at 803, 467 N.E.2d at 1327.

51. PROPOSED CRIMINAL CODE OF MASSACHUSETTS, ch. 263, § 2(a) (Michie/Law. Co-op. 1972). Common law crimes are abolished by the Code. See PROPOSED CRIMINAL CODE OF MASSACHUSETTS ch. 263, § 6 (Michie/Law. Co-op. 1972). Only offenses defined by statute are crimes. *Id.*

52. *Cass*, 392 Mass. at 807, 467 N.E.2d at 1329 (footnote omitted).

53. *Id.* at 804, 467 N.E.2d at 1327.

tion.”⁵⁴ In order to avoid such constitutional issues in *Cass*, the court elected to apply its decision prospectively.⁵⁵

Using prospectivity to avoid an unconstitutional application of the criminal statute fails, however, to address the concern as to the appropriateness of the judiciary acting so as to expand the class of victims of a criminal statute.⁵⁶ The doctrine of strict construction, while serving to ensure fair warning and certainty, has the additional function of preserving the distinct roles of the legislative and judicial branches of government.⁵⁷ By restricting judicial interpretation of criminal statutory language to the common law understanding, legislative intent is preserved. The court’s conclusion that prospective application “satisfies the rationale of the rule of strict construction” is thus not completely correct.⁵⁸ By refusing to apply the doctrine, the court has obscured the role of the judiciary.

IV. IMPLICATIONS OF THE *CASS* DECISION

In *Cass*, the court does not comment on the effect of its decision on other criminal statutes. The Massachusetts homicide statute defines murder as the “killing of a human being, with malice aforethought.”⁵⁹ Because “human being” is left undefined, it is not clear how the court, in view of the *Cass* decision, would define “human being.” In particular, it is not clear whether “human being” includes viable fetuses for the purposes of the homicide statute.⁶⁰

The California Supreme Court was the first court faced with the question of whether the killing of an unborn child constituted the killing of a “human being” within the meaning of a homicide statute.⁶¹ In *Keeler v. Superior Court*,⁶² a husband beat his estranged wife so as

54. *Id.*

55. *Id.* at 805, 467 N.E.2d at 1328. Recognition by the court in *Cass* of a notice and fair warning issue is, itself, an admission that the court is changing the law and not merely determining the intent of the legislature. *Id.* at 789-99, 467 N.E.2d at 1325.

56. The Massachusetts Constitution expressly provides for the distinct roles of the legislative and judicial branches of government; “the judicial shall never exercise the legislative and executive powers or either of them: to the end it may be a government of laws and not of men.” MASS CONST. Pt. 1, art. XXX.

57. *See supra* note 30.

58. *Cass*, 392 Mass. at 805, 467 N.E.2d at 1328.

59. MASS. GEN. LAWS ANN. ch. 277 § 39 (Michie/Law. Co-op. 1972).

60. The abortion statutes do not resolve this question; “unborn child” is defined as “the individual human life in existence and developing from fertilization until birth.” MASS. GEN. LAWS ANN. ch 112 § 12K (Michie/Law. Co-op. 1972).

61. The California Penal Code had provided that “[m]urder is the unlawful killing of a human being, with malice aforethought.” CAL. PENAL CODE § 187 (Deering 1959).

62. 2 Cal.3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

to cause deliberately the death of an eight month old fetus fathered by another man.⁶³ The California Supreme Court, in granting a writ to prevent the superior court from proceeding with the murder prosecution, upheld the common law born alive requirement and refused to include the unborn within the meaning of "human being" for the purposes of the homicide statute.⁶⁴

Absent a clear statute to the contrary, every state that has considered whether the killing of an unborn child constitutes a homicide has followed the ruling of the California Supreme Court.⁶⁵ If a case with facts similar to *Keeler* were to confront the Massachusetts Supreme Judicial Court, the implications of the *Cass* decision may force a different outcome. The first independent ground for the *Cass* decision rested on the fact that the vehicular homicide statute followed on the heels of the *Mone* decision.⁶⁶ The Massachusetts homicide statute was enacted much earlier.⁶⁷ Thus, the supreme judicial court would be faced with the possibility of holding that, while "person" includes the unborn in vehicular homicide actions, "human being" does not include the unborn in a murder prosecution because the legislature enacted the homicide statute prior to the *Mone* decision. Such a holding is unlikely in the face of such a serious inconsistency in the criminal law.⁶⁸

The second independent ground for the *Cass* holding rested on the court's inherent power to "develop and redefine" the common law.⁶⁹ From this perspective, it is hard to see any principle that would prevent the court from expanding the meaning of "human being" in

63. *Id.* at 623-24, 470 P.2d at 618-19, 87 Cal. Rptr. at 483 (1970).

64. *Id.* at 649, 470 P.2d at 630, 87 Cal. Rptr. at 483 (1970). The California Supreme Court stated "it is clear the court cannot go so far as to create an offense by enlarging a statute . . . by giving the terms used false or unusual meanings." *Id.* at 632, 470 P.2d at 625-26, 87 Cal. Rptr. at 489-90. The court reasoned that "[f]or a court to simply declare, by judicial fiat, that the time has now come to prosecute . . . one who kills an unborn, but viable fetus would indeed be to rewrite the statute under the guise of construing it." *Id.*

65. *See State v. Brown*, 378 So.2d 916 (La. 1979) ("person" does not include fetuses for the purpose of the homicide statute); *People v. Greer*, 79 Ill.2d 103, 402 N.E.2d 203 (1980) ("individual" does not include the unborn for the purposes of the homicide statute); *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983) ("death of another person" does not include the death of the unborn for purposes of the homicide statute). *See also* Annot., 40 A.L.R.3d 444 (1971).

66. *See supra* note 32 and accompanying text.

67. The original language of the Massachusetts homicide statute was adopted in 1899.

68. This potential inconsistency illuminates the danger of assuming, absent an explicit indication otherwise, that a statute is merely the product of court action that chronologically precedes it.

69. *See supra* note 39 and accompanying text.

all criminal homicide statutes so as to include the unborn.⁷⁰ This is particularly true in the light of the broad language of the court that “our criminal law should extend its protection to viable fetuses.”⁷¹

V. CONCLUSION

The majority’s characterization in *Cass* of their authority to abolish the born alive rule for the purposes of a criminal statute is misleading. On the one hand, the conclusion that the legislature, in using the word “person” in section 24G(b), applied the *Mone* definition appears contraindicated by the court’s own decision in *Edelin* to affirm the born alive requirement. On the other hand, the court’s independent conclusion that it is appropriate to redefine terms that are well understood in criminal statutes simply because they may be outmoded runs afoul of the doctrine of strict construction of criminal statutory language.

It may indeed be desirable to do away with the born alive requirement and thereby bring the unborn under the protection of the homicide statutes. Such a major change in the law, however, should come from the legislature. By avoiding the doctrine of strict construction, the court in *Cass* has made the line between judicial interpretation of statutes and judicial lawmaking a thin one at best.

Peter G. Carroll

70. The doctrine of strict construction might be side-stepped as in *Cass*. See *supra* note 56 and accompanying text.

71. *Cass*, 392 Mass. at 807, 467 N.E.2d at 1330.