ZARELLA, J., with whom VERTEFEUILLE and SULLIVAN, Js., join, concurring in part and dissenting in part. I disagree with the new interpretation of our kidnapping statutes that the majority announces in part I of its opinion and with its conclusion in part III that unlawful restraint is a specific intent crime.[1] My disagreement with the majority is premised on what I believe to be serious flaws in its construction of the plain language of the statutory scheme, its treatment of the principle of stare decisis, and its usurpation of the roles of both the legislature and the office of the state's attorney set forth in our state constitution. I agree, however, with the majority's conclusion that the defendant, Scott Salamon, is entitled to a new trial on the charge of kidnapping in the second degree, albeit for a different reason. I therefore would remand the case for a new trial on that charge and direct the trial court to instruct the jury on the crime of kidnapping consistent with my analysis that follows. Accordingly, I concur in the result.

I

The majority identifies two concerns pertaining to the crime of kidnapping. First, it is troubled by the potential for defendants to be charged with this severe crime in situations where the restraint of the victim is incidental to the commission of some underlying assault-type crime.[2] Second, the majority is unable to distinguish clearly the crime of unlawful restraint from that of kidnapping. The majority's ultimate conclusion, however, fails to address the latter issue at all and, in addressing the former, overrules this court's past precedent and overlooks the clear language of the statute defining the specific intent necessary for kidnapping. To address these concerns, the majority announces today, and for the first time, that the statutory scheme governing the crimes of unlawful restraint and kidnapping is ambiguous. This claimed ambiguity is premised on the majority's conclusion that the language of the statute fails, in light of the significant difference in the penalties for the two crimes, to distinguish adequately between an unlawful restraint and a kidnapping. Relying on this ambiguity, the majority then engages in an unnecessary investigation into extratextual evidence to ascertain the original intent of our legislature and concludes that, for more than thirty years, this court has misinterpreted the crime of kidnapping. I disagree with this reading of the statutory scheme and conclude that the plain language of General Statutes § 53a-91 defining "restrain" and "abduct" clearly distinguishes the two crimes and their different elements. Indeed, even if it is proper to look to extratextual evidence, that evidence does not support the majority's position.

As a preliminary matter, and before explaining my analysis of § 53a-91 et seq., I note my agreement with the majority's observation that our prior case law in this area has not included an in-depth discussion of the distinctions between unlawful restraint and kidnapping, specifically, of the critical difference between the mental states required to commit these crimes. That analysis is one, however, that, to the best of my knowledge, none of our prior cases required us to conduct. I agree with the majority that this case warrants further textual analysis of the statutory scheme governing these crimes. Unlike the conclusion advocated by the majority, however, the construction I advance is clearly supported by the text of the statutes and is consistent with our long line of precedent, correctly identifying that, for a defendant to be found guilty of kidnapping, the jury must find that he possessed the *necessary intent*.

Because I conclude that the crimes of kidnapping and unlawful restraint require the state to prove that the defendant possessed separate and distinct mental states, a brief discussion of criminal intent in statutory crimes is useful. At common law, it was axiomatic that criminal acts required "the coupling of the evil-meaning mind with the evil-doing hand . . . ." *State* v. *Gabriel*, 192 Conn. 405, 412, 473 A.2d 300 (1984); see also 1 W. LaFave & A. Scott, Substantive Criminal Law (1986) pp. 8–9 (criminal conduct encompasses both act and state of mind that defines crime). Notwithstanding this common-law requirement, we have recognized that the legislature may enact a statutory crime for which culpability requires either "that one [merely] do the proscribed act, that one do the act with general intent, or that one do the act with specific intent." *State* v. *Bitting*, 162 Conn. 1, 5, 291 A.2d 240 (1971). In ascertaining whether the legislature intended conduct alone to be criminal—that is, subject to strict liability—or intended that criminality also require general or specific intent, we have stated that the legislature's choice in language is "significant." Id. Furthermore, to determine what mental state is required for a particular crime, we have observed that, "[w]hen the elements of a crime consist of a description of a particular act and a mental element not specific in nature, the only issue is whether the defendant intended to do the proscribed act. If he did so intend, he has the requisite general intent for culpability. When the elements of a crime include a defendant's intent to achieve some result additional to the act, the additional language distinguishes the crime from those of general intent and makes it one requiring a specific intent." Id.

To clarify the distinction between the crimes of unlawful restraint and kidnapping, I must begin, as with all statutory analysis, with the text of the relevant statutes read in the context of the legislative scheme. See General Statutes § 1-2z. The crime of unlawful restraint

in the first degree, a class D felony, is defined by General Statutes § 53a-95 (a), which provides that "[a] person is guilty of unlawful restraint in the first degree when he *restrains* another person under circumstances which expose such other person to a substantial risk of physical injury." (Emphasis added.) The crime of kidnapping in the second degree, a class B felony, is defined in General Statutes § 53a-94 (a), which provides that "[a] person is guilty of kidnapping in the second degree when he *abducts* another person." (Emphasis added.) Thus, when one looks solely at the text defining the two crimes, the principal difference between them is plain. To understand how unlawful restraint differs from kidnapping, it is necessary to distinguish a defendant's "restraint" of a victim in one case from "abduction" in another. Section 53a-91 defines these terms and is, therefore, the proper focus for an analysis of the substantive distinction between the two crimes.

General Statutes § 53a-91 (1) provides in relevant part: " 'Restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him . . . without consent. . . ." The act necessary to commit restraint is clear. The defendant must "restrict a person's movements" by "moving him" or "confining him . . . ." General Statutes § 53a-91 (1). Additionally, the legislature has chosen to specify a mental state. Therefore, restraint is clearly not conduct subject to strict liability. Rather, the proscribed act of restricting must be done "intentionally and unlawfully," which clearly excludes reckless or negligent restriction of another's movements from the purview of criminal restraint. General Statutes § 53a-91 (1). Thus, I conclude, unlike the majority, that the statute's text requires that the defendant act with only general intent.[3] The "proscribed act," namely, the restriction of another person's movements, must be done intentionally, but the statute does not define a specific "intent to achieve some result additional to the act . . . ."[4] *State* v. *Bitting*, supra, 162 Conn. 5. The statute, however, does define the degree or extent of restriction that a defendant must perpetrate to accomplish a restraint. The criminal actor must "restrict a person's movements . . . in such a manner as to interfere substantially with [the victim's] liberty . . . ." General Statutes § 53a-91 (1). Therefore, a jury faced with determining whether a defendant has committed an unlawful restraint must decide whether the state has proven beyond a reasonable doubt that the defendant acted (1) intentionally and unlawfully (2) to restrict the victim's movement, (3) that the restriction amounted to a substantial interference with the victim's liberty, and (4) that the restriction was accomplished without the victim's consent.[5]

The term "abduct," as defined by § 53a-91 (2), builds on the definition of "restrain." The statute provides that

" '[a]bduct' means to restrain a person with intent to prevent his liberation by either (A) secreting or holding him in a place where he is not likely to be found, or (B) using or threatening to use physical force or intimidation." General Statutes § 53a-91 (2). To find a defendant guilty of kidnapping, therefore, a jury must find that the state has proven beyond a reasonable doubt all of the elements of a restraint, outlined previously, *plus* that the defendant accomplished a restraint "*with intent to prevent* [*the victim's*] *liberation by . . . using or threatening to use physical force or intimidation*." (Emphasis added.) General Statutes § 53a-91 (2); see also Commission to Revise the Criminal Statutes, Connecticut Penal Code Comments (1971) § 53a-91, p. 30, reprinted in 28A Conn. Gen. Stat. Ann. § 53a-91 (West 2007) p. 423 (noting abduction involves *restraint plus intent* to secrete victim or to threaten or use physical force); D. Borden & L. Orland, 10 Connecticut Practice Series: Connecticut Criminal Law (2d Ed. 2007) p. 181 ("an abduction requires a restraint, as defined by . . . § 53a-91 [1] *plus the requisite intent* defined by . . . § 53a-91 [2]" [emphasis added]). Unlike the definition of "restrain," which requires that the defendant merely intend to do an act, that is, to restrain the victim's movement, the definition of "abduct" requires additional proof that the defendant act with "intent to achieve some result additional to the act [of restraining] . . . ." *State* v. *Bitting*, supra, 162 Conn. 5. Specifically, the legislature has specified that the crime of kidnapping requires *additional proof* that the defendant act *with intent to prevent the victim's liberation by specific means*. See, e.g., *State* v. *Luurtsema*, 262 Conn. 179, 201, 811 A.2d 223 (2002) (including "use of physical force" in statement of requisite intent for kidnapping); *State* v. *Vass*, 191 Conn. 604, 618, 469 A.2d 767 (1983) ("use of force, threat of force or intimidation" sufficient to satisfy requisite intent for crime of kidnapping); *State* v. *Bell*, 188 Conn. 406, 415–16, 450 A.2d 356 (1982) (same); see also Commission to Revise the Criminal Statutes, supra, § 53a-91, p. 30 (noting abduction involves restraint *plus intent* to secrete victim or to threaten or use physical force). Thus, kidnapping is a specific intent crime, and this additional intent element distinguishes kidnapping not only from unlawful restraint but also from other crimes that may involve restraint of the victim.

The majority's failure to recognize this significant distinction is the product of its misreading of the intent elements of "restrain" and "abduct." The majority describes the intent necessary to restrain a victim, as "the intent to interfere substantially with that person's liberty . . . ." Footnote 28 of the majority opinion. This is not a precise reading of the statute and is not supported by the legislature's choice of language. Unlike the language used to define "abduct," the language used to define "restrain" does not require that a defendant

restrict the victim's movements with "*the intent to* interfere substantially with that person's liberty"; (emphasis added) id.; but only that the defendant act "intentionally and unlawfully . . . ." General Statutes § 53a-91 (1). The phrase "in such a manner as to interfere substantially with his liberty" in § 53a-91 (1) defines the point at which the defendant's intentional restriction of the victim becomes a criminal restraint.[6] The definition of "abduct" builds on the intentional act of restraint but additionally requires that the state prove that the defendant possessed a specific intent. In the definition of "abduct," the legislature employs the phrase "*with intent to*" to describe the requirement that the defendant must desire to achieve the additional result of preventing the victim's liberty by secreting him or using or threatening to use physical force or intimidation.[7] (Emphasis added.) General Statutes § 53a-91 (2).

Significantly, the legislature repeats this linguistic pattern of coupling "restrain" with a specific intent as indicated by the phrase "with intent to" in the statutory scheme, which further supports the conclusion that unlawful restraint is a general intent crime. General Statutes § 53a-92 (a) defines kidnapping in the first degree and provides in relevant part: "A person is guilty of kidnapping in the first degree when he abducts another person and . . . (2) he *restrains* the person abducted *with intent to* (A) inflict physical injury upon him or violate or abuse him sexually . . . ." (Emphasis added.) Thus, to be guilty of kidnapping in the first degree, the state must prove that the defendant intentionally and unlawfully restricted the victim's movements to such a degree as to interfere substantially with her liberty (i.e., restraint), *with intent* to prevent her liberation by use or threat of physical force or intimidation (i.e., abduction), *and with intent* to inflict physical injury or abuse her sexually. See General Statutes §§ 53a-91 and 53a-92 (a) (2) (A). In contrast to the language that the legislature employs to provide the specific intent that must be *added* to a restraint to constitute kidnapping, the unlawful restraint statutes employ no similar language and specify no similar additional intent. See generally General Statutes §§ 53a-95 and 53a-96. Rather, these provisions simply state that "[a] person is guilty of unlawful restraint" when he *restrains* another person. General Statutes §§ 53a-95 and 53a-96.

Identification of the different intent requirements for kidnapping and unlawful restraint is important for several reasons. First, it explains the legislature's different classification of the two crimes because kidnapping requires a greater criminal intent. Second, once kidnapping is distinguished as a specific intent crime, the potential defenses available to a defendant charged with the more serious crime of kidnapping are broader than those available to a defendant charged with unlawful restraint.[8] Finally, this construction is consistent with

our case law, which repeatedly has identified that a kidnapping conviction requires proof that the defendant possessed the necessary intent.

Not only does the preceding analysis clarify the distinction between unlawful restraint and kidnapping, it also confirms that the analysis we have always conducted when a defendant is charged with kidnapping and an underlying assault-type crime is proper. The question for the jury is not whether the restraint was incidental to the commission of some underlying crime but whether the state has proved beyond a reasonable doubt that the confinement or movement of the victim was accomplished "with the requisite intent" to constitute the crime of kidnapping. *State* v. *Luurtsema*, supra, 262 Conn. 201; accord *State* v. *Amarillo*, 198 Conn. 285, 305, 503 A.2d 146 (1986); see also *State* v. *Bell*, supra, 188 Conn. 416. Therefore, in circumstances like those in the present case, in which the defendant's conduct may warrant a kidnapping charge and an additional charge, the state must prove beyond a reasonable doubt that the defendant possessed *both* the requisite intent to commit the underlying crime *and* the specific intent necessary for kidnapping to support a conviction on both charges.

It is the proper role of the jury to make such determinations. The burden is on the state to present evidence to support its contention that the defendant possessed both intents, even if he did so simultaneously. As our long history of case law dealing with this issue illustrates, there will be factual circumstances that make it especially difficult for a jury to identify whether a defendant acted with a singular purpose or multiple criminal objectives. Nevertheless, it is the jury's function, not this court's, to meet that challenge. "It offends neither logic nor reason that a particular fact may give rise to contradictory inferences. The inference ultimately drawn by the jury need not be the only rational inference possible. Our law confides to the jury the difficult task of deciding among often conflicting inferences which logically and reasonably may flow from the same basic fact. In its consideration of the evidence the jury must rely on its common sense, experience and knowledge of human nature in drawing inferences and reaching conclusions of fact." *State* v. *Rodgers*, 198 Conn. 53, 59, 502 A.2d 360 (1985).

When a defendant's actions give rise to multiple criminal charges, it is especially important that the jury understand the requisite intent that the state must prove beyond a reasonable doubt for *each separate* crime. The majority expresses concern that our existing interpretation of the kidnapping statutes has "encouraged [prosecutors] . . . to include a kidnapping charge in any case involving a sexual assault or robbery." The majority then attempts to devise a means by which a jury must determine whether the act of restraining was

"incidental" to the commission of the other crime or whether it was "independent" and "significant enough" to constitute the separate crime of kidnapping. (Internal quotation marks omitted.) This new standard ignores the statutory language that clearly requires specific intent for the commission of a kidnapping and instead focuses on the conduct or actions of the defendant. I would address the majority's concerns differently and focus not on the defendant's *actions* but, as the statute dictates, on the defendant's *intent*.

The jury must consider all of the evidence and be instructed that it may infer intent from the conduct of the defendant.[9] The majority identifies considerations that it deems relevant to a jury's determination of whether a restraint is incidental to some other crime. I would suggest that such factors are of greater relevance to a jury's determination of whether the defendant has acted with the specific intent necessary to support a kidnapping conviction. The jury must be instructed to consider all attendant circumstances. For example, evidence of any words spoken by the defendant to the victim or victims that may indicate his mental state, the manner in which the defendant accomplished the restraint of the victim, the actions that the defendant took prior to, during and following the restraint, the nature and duration of the victim's movement or confinement, whether the restraint occurred during the commission of a separate offense, whether the restraint reduced the defendant's risk of being caught, and whether the restraint occurred under circumstances that prevented discovery of the victim all will assist a jury's determination and shed light on the inner workings of the defendant's state of mind.

Furthermore, when a defendant is charged with multiple crimes, trial courts must instruct the jury properly on both the specific intent required for kidnapping *and* the requisite intent for any other underlying crime. After instructing the jury on the elements of intent, the trial court also should specify the following: "If you find that the defendant restrained the victim, as I've previously defined that term, but do not find that this restraint amounted to an abduction because the defendant lacked the specific intent to prevent the victim's liberation by secreting or holding him in a place where he is not likely to be found, or by using or threatening to use physical force or intimidation, then you must find the defendant not guilty of the charge of kidnapping. The intent for kidnapping *is different from* the intent to commit [the separate assault-type crime]. To find the defendant guilty of both charges, you must find not only that the state has proven beyond a reasonable doubt that the defendant engaged in the *conduct* constituting each crime but also that the defendant acted with the requisite *intent* for each crime."

II

Section 53a-91, as I previously described, is clear and unambiguous on its face. The claimed ambiguity on which the majority relies to engage in its extratextual investigation is premised on the majority's flawed reading of that statute. It is, therefore, incumbent upon me to address the errors that the majority commits in this investigation, the violence that the majority's ultimate conclusions do to our principles of stare decisis and the problems created by its new rules regarding our kidnapping statutes.

A

As a result of its extratextual investigation into the "historical backdrop" surrounding the enactment of our revised penal code, the majority determines that the legislature "intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to and necessary for the commission of another crime against that victim." My primary disagreement with this determination is that it focuses improperly on the *action* of restraint in the crime of kidnapping rather than on the *intent* requirement. Additionally, the evidence on which the majority rests its ultimate determination is incomplete. First, the majority correctly observes that the commission to revise the criminal statutes (commission) intended its revisions of the kidnapping and unlawful restraint provisions to draw a distinction between restraints and abductions. The majority fails to recognize, however, that the commission accomplished this goal through its adoption of the differing mental states necessary for commission of the two crimes. The commission itself articulated the essence of this distinction: "Restraining, as defined, involves non-consensual restriction or interference with physical liberty. Abduction involves restricting *plus intent* to secrete the victim or the threat to use or the use of physical force or intimidation." (Emphasis added.) Commission to Revise the Criminal Statutes, supra, § 53a-91, p. 30.

Additionally, the majority relies on the fact that the commission noted that it "drew generally from comparable provisions of New York's Revised Penal Law and the Model Penal Code" and on the reform of kidnapping statutes starting with the New York Court of Appeals' decision in *People* v. *Levy*, 15 N.Y.2d 159, 204 N.E.2d 842, 256 N.Y.S.2d 793, cert. denied, 381 U.S. 938, 85 S. Ct. 1770, 14 L. Ed. 2d 701 (1965).[10] The majority is correct that the revised penal code adopted in Connecticut parallels the structural format of the New York Penal Law on kidnapping and unlawful imprisonment. The majority neglects to highlight, however, the three relevant and significant substantive changes that the Connecticut legislature made to the New York model before enacting our code. First, New York defines "restrain" differently. New York's definition of restraint includes

a provision that "without consent" can mean restriction accomplished by "physical force, intimidation or deception . . . ."[11] N.Y. Penal Law § 135.00 (1) (a) (McKinney 2004). In contrast, Connecticut omits from its definition of "restraint" any mention of physical force or intimidation. See generally General Statutes § 53a-91 (1). Second, New York defines "abduct" differently. New York's definition requires that the defendant "restrain a person with intent to prevent his liberation by . . . (b) using or threatening to use *deadly physical force*."[12] (Emphasis added.) N.Y. Penal Law § 135.00 (2) (McKinney 2004). Conversely, the definition of "abduct" in § 53a-91 (2) contains no "deadly force requirement" but, instead, uses more inclusive language that more closely resembles that which New York employed in defining "restrain." See General Statutes § 53a-91 (2) (" '[a]bduct means to restrain a person with intent to prevent his liberation by . . . using or threatening to use physical force or intimidation"). Finally, New York's statute defining kidnapping in the first degree includes a temporal requirement.[13] See N.Y. Penal Law § 135.25 (McKinney 2004) (person is guilty of kidnapping in first degree when, under circumstances not involving demand for ransom, he abducts another person, restrains that other person for more than twelve hours and possesses specific intent to do further harm). Connecticut's statutory scheme does not express any minimum period of confinement. See generally General Statutes § 53a-92. I suggest that these differences are vital to interpreting the statutory scheme ultimately adopted by the Connecticut legislature and demonstrate that the New York Penal Law served only as a guide. Moreover, the changes that our legislature made to the New York model support this court's existing construction of our kidnapping statutes, which rejects a time or distance requirement for restraint and relies on proof of the requisite specific intent to establish a defendant's guilt.

B

The majority's opinion is premised not only on its flawed statutory analysis but also on ignoring the important dictates of stare decisis and the legislative acquiescence doctrine. The majority correctly acknowledges that the principle of stare decisis is especially strong in circumstances, such as those in the present case, involving statutory construction. See, e.g., *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 494–95, 923 A.2d 657 (2007). With today's decision, the court strays far afield of this important principle.

Our case law identifies several indicators that support the conclusion that legislative inaction should be viewed as affirmation of our court's statutory construction. The first indicator is the length of time that has passed since the court's announcement of its interpretation and during which the legislature has remained silent. See, e.g., id., 502 (legislature's failure to act in

eighteen years since court first interpreted statute "highly significant"); *Hammond* v. *Commissioner of Correction*, 259 Conn. 855, 873–74, 792 A.2d 774 (2002) (rejecting argument regardless of its merits because court constrained by more than sixteen years of legislative silence); *Rivera* v. *Commissioner of Correction*, 254 Conn. 214, 252, 756 A.2d 1264 (2000) (six years of legislative silence indicative of legislature's affirmation). The second factor is the number of opportunities that this court has had to reconsider its initial statutory interpretation and to decide whether to abide by it. See *Hummel* v. *Marten Transport, Ltd.*, supra, 282 Conn. 491–95 (court's repeated affirmation of its initial interpretation followed by legislative silence persuasive); see also *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 665, 935 A.2d 1004 (2007) ("[i]n light of . . . long interpretive history, [party] has a heavy burden of demonstrating why we should not treat the legislative silence in response to our construction of [a statute] as legislative approval of that construction"). But cf. *Ferrigno* v. *Cromwell Development Associates*, 244 Conn. 189, 198–202, 708 A.2d 1371 (1998) (inconsistent interpretive history by court weighed in favor of overruling one case's view of statute despite legislative inaction). The third factor is that the court should consider the existence of any evidence that the issue of the statute's construction has been presented to the legislature or addressed at all by its members, that is, whether there has been an actual opportunity to affirm or correct. See *Hummel* v. *Marten Transport, Ltd.*, supra, 495 (since court's decisions, legislature enacted comprehensive reform to statutory scheme but "only [e]ffected a nonsubstantive change to [statute]"); *Hammond* v. *Commissioner of Correction*, supra, 874 (legislature's acquiescence "especially strong" in wake of prior case in which concurrence "expressly urged" legislature to reexamine statute); *Rivera* v. *Commissioner of Correction*, supra, 252 (legislature amended statutory provision since court's decision without addressing court's construction).

This court was first called on to interpret § 53a-91 et seq. in 1977. See *State* v. *Chetcuti*, 173 Conn. 165, 377 A.2d 263 (1977). In *Chetcuti*, we concluded that "[t]he language of the statutes is clear . . . ." Id., 168. Furthermore, we expressly rejected the approach that the majority takes in the present case, namely, that when "the abduction and restraint of a victim *are merely incidental* to some other underlying offense, such as sexual assault, the abduction and restraint cannot form the basis for a verdict of guilty on a charge of kidnapping." (Emphasis added.) Id., 170. We also recognized the "merger effect" that this incidental rule would create if adopted and announced that "the legislature of this state has seen fit not to merge the offense of kidnapping with sexual assault or with any other felony. Nor has the legislature imposed any time requirement for

the restraint, nor any distance requirement for the asportation to constitute the crime of kidnapping." Id. This conclusion has been consistently affirmed by this court and nearly always by a unanimous decision. See, e.g., *State* v. *Luurtsema*, supra, 262 Conn. 201–203; *State* v. *Wilcox*, 254 Conn. 441, 465–66, 758 A.2d 824 (2000); *State* v. *Amarillo*, supra, 198 Conn. 304–305; *State* v. *Vass*, supra, 191 Conn. 614–15; *State* v. *Bell*, supra, 188 Conn. 416–17. Moreover, the legislature has remained silent throughout this time despite several opportunities to alter this court's construction of the statutory scheme.[14] The presence of all of these recognized considerations indicates that this court should infer legislative affirmation from that body's inaction. The majority elects to view my position with respect to legislative acquiescence as an absolute bar to reconsideration of prior statutory interpretation. My position is not at all that extreme. When one contemplates the factors that our precedent requires us to consider in determining whether to deem legislative inaction affirmation and the history of our case law with respect to our kidnapping statutes, however, I cannot see "how [this court] reasonably could decline to follow that rule today, if it is to retain any force at all."[15] *Hummel* v. *Marten Transport, Ltd.*, supra, 282 Conn. 502.

In addition to its general observation that legislative acquiescence has not always been deemed affirmation, the majority articulates six reasons to justify its decision to overrule our long-standing precedent. The ideas that the majority expresses and cases that it cites in support of these reasons, however, are all distinguishable from the present case. Further, I do not agree that these six rationales rise to the level of substantial injustice or clear error, which our cases require to overrule an existing statutory construction.[16]

The majority acknowledges our role as the legislature's surrogate when we first construe that body's intent in enacting a statute. It fails, however, to recognize the end of that surrogacy once we have construed the legislature's intent and an appropriate time has passed without action to correct that construction. This court should honor the "significant jurisprudential limitation" imposed on us by the legislative acquiescence doctrine; (internal quotation marks omitted) *Hammond* v. *Commissioner of Correction*, supra, 259 Conn. 874; and recognize that "legislatures and not courts are responsible for defining criminal activity." *State* v. *Skakel*, 276 Conn. 633, 675, 888 A.2d 985, cert. denied, U.S. , 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).

C

The majority announces its new construction of the crime of kidnapping and explains that, going forward, "in order to establish a kidnapping, the state is not required to establish any minimum period of confinement or degree of movement. When that confinement

or movement is merely incidental to the commission of another crime, however, the confinement or movement must have exceeded that which was necessary to commit the other crime." This conclusion is not supported by the language of the statutes or by our prior construction expressly rejecting such a rule. In rejecting our existing jurisprudence, the majority not only steps into the shoes of the legislature but also effectively divests prosecutors of the charging discretion that they currently possess with respect to the crimes of kidnapping and unlawful restraint. In doing so, it accomplishes that which was best articulated by Justice Borden in his concurring opinion in *Luurtsema*: "It would be appealing to decide . . . that in a given case the degree of movement or time of forcible restraint is too de minimus to constitute kidnapping. The fact that it may be counterintuitive *to me*, however, is not sufficient . . . .

"[W]e have implicitly rejected any notion that a slight degree of asportation or detention could create a jury question regarding whether kidnapping was merely 'incidental' to the underlying crime also committed by [a] defendant. . . . *It would be contrary to the legislative scheme for us to reenter that fray . . . and would amount to micromanaging what is essentially a charging decision by the state . . . .*" (Citations omitted; emphasis added.) *State* v. *Luurtsema*, supra, 262 Conn. 204–205 (*Borden*, *J.*, concurring).

I begin with the majority's intrusion on our state's attorneys. The majority correctly acknowledges our well settled law that, "an accused may be charged with and convicted of more than one crime arising out of the same act or acts, as long as all of the elements of each crime are proven." With today's decision, the majority ignores the equally well settled principle that when "criminal statutes overlap, the state is entitled to choose from among them as long as its action does not discriminate against any class of defendants. . . . We have always held that prosecutors have broad discretion in determining what crime or crimes to charge in any particular situation. . . . Moreover, where the elements of two or more distinct offenses are combined in the same act, prosecution for one will not bar prosecution for the other." (Citations omitted.) *State* v. *Chetcuti*, supra, 173 Conn. 168–69. The majority claims, in the absence of any supporting authority, that our existing interpretation of the kidnapping statute has afforded prosecutors with "unbridled discretion" and "encouraged them . . . to include a kidnapping charge in any case involving a sexual assault or robbery." I am puzzled by this statement, which encompasses a general criticism of prosecutors' charging decisions in this realm, because footnote 23 of the majority opinion indicates that prosecutors seem to exercise this discretion often in the defendants' favor. As the majority suggests, there seem to be many prosecutions for the less serious crime of unlawful restraint arising from factual circum-

stances that could support the more serious kidnapping charge. See footnote 23 of the majority opinion. Although we have held that prosecutorial discretion is not without oversight, we also have noted that "the basis of prosecutorial charging decisions is one area not generally well suited for broad judicial oversight because it involve[s] exercises of judgment and discretion that are often difficult to articulate in a manner suitable for judicial evaluation." (Internal quotation marks omitted.) *Massameno* v. *Statewide Grievance Committee*, 234 Conn. 539, 575, 663 A.2d 317 (1995). We have authorized the exercise of such oversight in response to a claim of discrimination. See id., 576–77. This defendant raises no such claim, and I am not aware of any prior claims of discriminatory charging practices with respect to the crime of kidnapping.

The statutory scheme does not mandate that all restraints committed with the intent necessary to abduct be prosecuted as kidnappings. I recognize, as does our case law, that there is an area of overlap between the crime of unlawful restraint in the first degree, which requires restraint of the victim "under circumstances which expose [the victim] to a substantial risk of physical injury"; General Statutes § 53a-95; and of the crime of kidnapping. It may be possible to "restrain" a person under circumstances that expose such person to a substantial risk of physical injury when that risk is created by the perpetrator's intent to use physical force. See *State* v. *Jordan*, 64 Conn. App. 143, 148, 781 A.2d 310 (2001) ("jury finding of actual physical injury encompasses the statutory requirement of mere exposure to physical injury"). As this court recognized in *State* v. *Palmer*, 206 Conn. 40, 536 A.2d 936 (1988), however, this overlap does not diminish the fact that the two crimes have different elements. See id., 53–54 (rejecting claim that conviction of kidnapping and unlawful restraint in first degree violates double jeopardy principles). Specifically, kidnapping requires additional proof of the particular criminal intent necessary to establish abduction. See, e.g., *State* v. *Luurtsema*, supra, 262 Conn. 201 (including "use of physical force" in statement of requisite intent for kidnapping); *State* v. *Vass*, supra, 191 Conn. 618 ("use of force, threat of force of intimidation" sufficient to satisfy requisite intent for crime of kidnapping); *State* v. *Bell*, supra, 188 Conn. 415–16 (same); see also Commission to Revise the Criminal Statutes, supra, § 53a-91, p. 30 (noting abduction involves restraint *plus intent* to secrete victim or to threaten or use physical force).

The majority fails to recognize that merely because there are factual circumstances that *could* give rise to a prosecution for kidnapping does not mean that they *must*. Our case law has recognized that, under certain factual circumstances, unlawful restraint in the first degree may constitute a lesser included offense of the crime of kidnapping in the first or second degree. See

State v. *Vass*, supra, 191 Conn. 618; see also *State* v. *Daugaard*, 231 Conn. 195, 196 n.1, 647 A.2d 342 (1994), cert. denied, 513 U.S. 1099, 115 S. Ct. 770, 130 L. Ed. 2d 666 (1995). But see *State* v. *Palmer*, supra, 206 Conn. 53–54 (concluding, for purposes of double jeopardy analysis, that defendant could have committed crime of kidnapping in first degree without first having committed purportedly lesser included offense of unlawful restraint in first degree). Thus, a particular defendant charged with kidnapping may be entitled to a jury charge on unlawful restraint.[17]

The majority not only invades the purview of our state's attorneys, but its new construction of the statutory scheme ignores the fact that "[t]he [state] constitution assigns to the legislature the power to enact laws defining crimes and fixing the degree and method of punishment . . . ." *State* v. *Darden*, 171 Conn. 677, 679–80, 372 A.2d 99 (1976). "Prescribing punishments for crimes clearly fits into this category and is therefore a function of the legislature." *State* v. *Morrison*, 39 Conn. App. 632, 634, 665 A.2d 1372, cert. denied, 235 Conn. 939, 668 A.2d 376 (1995). Reading the majority opinion in its entirety reveals that the crux of its concern is really the severity of punishment authorized under the kidnapping statutes in light of the scope of potential conduct governed by it. The majority appears to overlook the fact that defining crimes is the responsibility of our legislature. Moreover, this concern regarding overbreadth is predicated on studying the defendant's *conduct*. As I previously noted, however, the focus should be on the defendant's *specific intent* and not on his conduct.[18] The majority's misguided focus leads to the illogical conclusion that a defendant's conviction of kidnapping is improper when the restraint was incidental to the commission of an underlying crime but that a defendant's conviction of both unlawful restraint and the same underlying crime is not improper under the same circumstances. This position only makes sense if one considers the variation in the severity of punishment that results from a kidnapping conviction. That is, the majority does not seem to be bothered by the additional punishment for the class D felony, first degree unlawful restraint, but is bothered by the additional charge for the class B felony, second degree kidnapping. Although the majority concludes that the legislature intended a graded scheme of increasing severity of punishment for the restriction of an individual's liberty, which I do not refute, it offers no basis for its inconsistent conclusion that the legislature did not intend for defendants to be convicted of kidnapping when they perpetrate a restraint incidental to an assault-type crime but did intend for defendants to be convicted of unlawful restraint under the same circumstances. In the latter situation, the restraint necessary to commit the underlying crime and the restraint necessary to commit the crime of unlawful restraint are also the

same. This conclusion divests prosecutors of their discretion to make charging decisions, ignores the clear language distinguishing the crimes of kidnapping and unlawful restraint by virtue of their respective intents, and diminishes the proper role of a jury to determine whether the state has proven all elements of the crimes charged beyond a reasonable doubt. See part I of this opinion; see also *State* v. *Cortes*, 276 Conn. 241, 247, 885 A.2d 153 (2005) (jury found defendant guilty of unlawful restraint but not guilty of kidnapping).

Another troubling aspect of the majority's decision is that it appears to result in the imposition of two separate standards for determining when a kidnapping has occurred. If a defendant has committed an assault-type crime, then the majority would have the state prove that the "confinement, movement, or detention . . . was significant enough, in and of itself, to warrant independent prosecution." (Internal quotation marks omitted.) In contrast, when a defendant abducts a victim with intent to commit an assault-type crime but cannot complete the assault-type crime, under the majority's construction, a kidnapping conviction would be justified regardless of the length of confinement or degree of movement. Under this paradigm, a defendant could be convicted of kidnapping when his victim suffered less actual physical injury than in a case in which the defendant accomplished the underlying assault and the act of kidnapping was merely incidental to that assault. I cannot see how this would in any way effectuate the statute as written or the legislature's intent to create a criminal code that is "rational, coherent, cohesive and intelligible . . . ." (Internal quotation marks omitted.)

Nevertheless, I agree with the result reached by the majority. In the present case, the trial court instructed the jury only on the general meaning of intent and omitted from its instructions on kidnapping the specific intent necessary for a conviction on that charge.[19] Furthermore, the trial court improperly defined "abduct" in its charge to the jury.[20] I agree with the defendant that these instructions were improper. Because the specific intent to prevent the victim's liberation by secreting her, or by using or threatening to use physical force or intimidation, is an essential element of the crime charged, such an omission constitutes reversible error. See, e.g., *State* v. *Tedesco*, 175 Conn. 279, 291–92, 397 A.2d 1352 (1978). Furthermore, I conclude that the trial court's definition of "abduct" had the potential to confuse the jury and did not adequately distinguish the crime of unlawful restraint in the first degree from that of kidnapping in the second degree.[21] Therefore, I concur in the result that the majority reaches, that is, that the defendant is entitled to the reversal of his conviction of kidnapping in the second degree and a new trial on that charge.

[1] I agree with the majority's conclusion in part II that the prosecutorial improprieties did not entitle the defendant, Scott Salamon, to a new trial.

[2] I use "assault-type crime" to describe the category of offenses that the majority views as requiring some restraint of the victim in order to perpetrate and, thus, as having the potential to give rise to a charge of kidnapping in addition to or in lieu of a charge for the commission of the underlying crime. For example, such crimes include, but are not limited to, assault, robbery and sexual assault.

[3] My research has not revealed extensive discussion in our case law distinguishing characteristics of strict liability, general intent and specific intent crimes. I note, however, that our case law, for example, has characterized the following crimes as general intent: (1) sexual assault in the second degree under General Statutes § 53a-71 (a) (1); e.g., *State* v. *Sorabella*, 277 Conn. 155, 169, 891 A.2d 897, cert. denied, U.S. , 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006); (2) risk of injury to a child under General Statutes § 53-21; e.g., id., 172–73; (3) manslaughter in the second degree under § 53a-56; see *State* v. *Salz*, 226 Conn. 20, 28 n.5, 627 A.2d 862 (1993) (distinguishing general intent crime of manslaughter in second degree, which requires that defendant act either "recklessly" or "intentionally," from specific intent crime of murder under § 53a-54a); (4) sexual assault in the first degree under General Statutes § 53a-70. E.g., *State* v. *Smith*, 210 Conn. 132, 136, 554 A.2d 713 (1989).

Furthermore, many of these crimes expose a defendant convicted of them to comparable or greater punishment than that prescribed by the unlawful restraint statutes. I suggest, therefore, that we cannot look to the legislature's choice of punishment as an indicator of whether the crime requires an element of specific intent or merely general intent but must look to the language of the statute, in accordance with *State* v. *Bitting*, supra, 162 Conn. 5, to ascertain the legislature's intent. See General Statutes § 53a-71 (class B or C felony); General Statutes § 53-21 (class B or C felony); General Statutes § 53a-56 (class C felony); General Statutes § 53a-70 (class A or B felony).

[4] My conclusion necessitates addressing a prior case in which this court observed, with little analysis, that the legislature's use of the word "intentionally" in a statute renders the crime a specific intent crime pursuant to General Statutes § 53a-5. *State* v. *Shaw*, 186 Conn. 45, 53, 438 A.2d 872 (1982). I disagree with this observation in *Shaw*, which is inconsistent not only with the plain language of § 53a-5 but also with our precedent recognizing both general intent and specific intent crimes.

General Statutes § 53a-5 provides in relevant part: "When the commission of an offense defined in . . . title [53a], or some element of an offense, requires a particular mental state, such mental state is ordinarily designated in the statute defining the offense by use of the terms 'intentionally', 'knowingly', 'recklessly' or 'criminal negligence', or by use of terms, such as 'with intent to defraud' and 'knowing it to be false', describing a *specific kind of intent or knowledge*. . . ." (Emphasis added.) The statute does not indicate that the use of these words defines specific intent crimes; rather, it denotes the words that the legislature is likely to use to communicate the mental state required for any particular crime. Additionally, our case law does not support the conclusion that the presence of one or more of these enumerated words or phrases indicates a specific intent crime. See, e.g., *State* v. *Shine*, 193 Conn. 632, 637–39, 479 A.2d 218 (1984) (categorizing certain statutory crimes requiring "recklessness" as general intent crimes).

[5] I note that the statute does not further define a substantial interference. Whether the restriction of movement rises to the level of a substantial interference with the victim's liberty is a factual question for the jury.

[6] The majority's reliance on the definition of "intentionally" set forth in General Statutes § 53a-3 (11) to support its conclusion that unlawful restraint is a specific intent crime is far from conclusive. That definitional provision defines both kinds of statutory intent—general and specific. *State* v. *McColl*, 74 Conn. App. 545, 575, 813 A.2d 107, cert. denied, 262 Conn. 953, 818 A.2d 782 (2003); see also *State* v. *Austin*, 244 Conn. 226, 235–37, 710 A.2d 732 (1998); *State* v. *DeBarros*, 58 Conn. App. 673, 680–84, 755 A.2d 303, cert. denied, 254 Conn. 931, 761 A.2d 756 (2000). To act with statutory "intent," a defendant must have the conscious objective to engage in proscribed conduct *or* have the conscious objective to cause a particular result. The majority contorts the plain language of § 53a-91 (1) to arrive at its conclusion that the proscribed conduct is "moving or confining the victim," and the intended result is substantial interference with the victim's liberty. Footnote 28 of the majority opinion. As previously discussed, I disagree with this reading of § 53a-91. Rather, the proscribed conduct is the restriction of the victim's movements, which must be accomplished through movement or confinement. Contrary to the majority's position, the statute does not dictate

that the defendant have the specific intent to interfere substantially with the victim's liberty; it provides only that, to be a restraint, the restriction must be severe enough to so interfere.

Furthermore, the majority's understanding of § 53a-5 and its "directive"; id.; is not consistent with our case law. We repeatedly have recognized that, "when a statute requires the state to prove that the defendant *intentionally engaged* in the statutorily proscribed *conduct*, § 53a-5 does not require us to presume that the statute requires the state to prove that the defendant *had knowledge* of a *circumstance* described in the statute." (Emphasis in original.) *State* v. *Higgins*, 265 Conn. 35, 45, 826 A.2d 1126 (2003); see *State* v. *Denby*, 235 Conn. 477, 482–83, 668 A.2d 682 (1995). The majority criticizes my reading of § 53a-91 by noting that I would not apply the intent requirement to the fact that the restraint must be accomplished without the victim's consent for it to be unlawful. The majority fails to recognize, however, that lack of consent is a *factual circumstance* that must exist in order to render the proscribed conduct unlawful. This court has rejected an argument virtually identical to that now advanced by the majority that the defendant must have knowledge of the victim's lack of consent with respect to § 53a-70, sexual assault in the first degree, which is a general intent crime. *State* v. *Smith*, 210 Conn. 132, 136–40, 554 A.2d 713 (1989). I think it also is relevant to the majority's concerns to note that a defendant charged with unlawful restraint certainly may raise the defense of consent. As we recognized in *Smith*, "[a] finding that a complainant had consented would implicitly negate a claim" of unlawful restraint. Id., 140. Furthermore, the statutory scheme defining unlawful restraint and kidnapping does not make consent an affirmative defense. Therefore, the defense of consent places the burden on "the state to prove lack of consent beyond a reasonable doubt whenever the issue is raised." Id.

My reading of the unlawful restraint statutes also is consistent with this court's interpretation of § 53-21 defining the *general intent* crime of risk of injury to a child. General Statutes § 53-21 (a) provides in relevant part that "[a]ny person who (1) *wilfully or unlawfully* causes or permits any child . . . to be placed in such a situation *that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired* . . . shall be guilty of a class C felony . . . ." (Emphasis added.) The language that the legislature employed in this statute to define the mental state required is "wilfully or unlawfully . . . ." General Statutes § 53-21 (a). Unlike "intentionally," "wilfully" is not a mental state referenced in § 53a-5 or otherwise defined by the definitional section of our criminal statutes. This court has concluded, however, that the legislature intends to require that the defendant's actions be "intentional" when it proscribes "wilful" conduct. *State* v. *Payne*, 240 Conn. 766, 774, 695 A.2d 525 (1997), overruled in part on other grounds by *State* v. *Romero*, 269 Conn. 481, 849 A.2d 760 (2004); see also *State* v. *Sorabella*, 277 Conn. 155, 173, 891 A.2d 897, cert. denied, U.S. , 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006). We have held, however, with respect to the risk of injury statute, that the requirement that the conduct be intentional does not apply to the effect of endangering the health or morals of a child. *State* v. *Sorabella*, supra, 173; see also *Allstate Ins. Co.* v. *Berube*, 84 Conn. App. 464, 470–71, 854 A.2d 53, cert. denied, 271 Conn. 929, 859 A.2d 583 (2004). To be consistent, the majority's position that § 53a-5 mandates that "intentionally," as used in § 53a-91 (1), applies to the effect "in such a manner as to interfere substantially with [the victim's] liberty"; General Statutes § 53a-91 (1); would also mandate that "wilfully," as used in § 53-21, apply to the effect "that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired . . . ." General Statutes § 53-21 (a) (1). This can only lead to the conclusion that the majority will apply this logic in the future to the risk of injury statute and thus find it to be a specific intent crime. Of course, in order to do so, the majority again will have to overrule a long of line of cases that has held otherwise and has not met with legislative disapproval.

Finally, the majority's view of § 53a-5 seems inconsistent with the Appellate Court's conclusion in *State* v. *Youngs*, 97 Conn. App. 348, 365, 904 A.2d 1240, cert. denied, 280 Conn. 930, 909 A.2d 959 (2006), that the intent requirement for unlawful restraint in the first degree does not apply to the element of that offense that requires the restraint to be perpetrated under circumstances that expose the victim to a substantial risk of physical injury.

[7] The majority also asserts that my conclusion that unlawful restraint is a general intent crime is "inconsistent" with this court's decision in *State* v. *Foster*, 202 Conn. 520, 522 A.2d 277 (1987), because, in that case, "we impliedly acknowledged that a restraint is unlawful if, and only if, a defendant's conscious objective in moving or confining the victim is to achieve that prohibited result, namely, to restrict the victim's movements in such a manner as to interfere substantially with his or her liberty." Footnote 28 of

the majority opinion. I do not agree with the majority. In *Foster*, we did not analyze the language of § 53a-91 (1) or define the intent requirement for "restrain." We did, however, reject the defendant's contention that the trial court's instructions on the definition of "restrain" improperly led the jury to believe that the state did not need to prove that the defendant intended to interfere substantially with the victim's liberty. *State* v. *Foster*, supra, 539. The court did not affirmatively adopt this analysis of the requisite statutory intent. Instead, the court cited the trial court's instructions, which simply set forth the precise statutory definition of "restrain," and noted that, "[w]hen the charge is reviewed in its entirety, it is obvious that the [trial] court had more than adequately explained the meaning of restraint . . . ." (Internal quotation marks omitted.) Id.

In support of its discussion of *Foster*, the majority cites three Appellate Court cases. See footnote 28 of the majority opinion. First, I note that these cases are not binding on this court. Furthermore, none of them engaged in a textual comparison of the intent requirements for unlawful restraint and kidnapping. In the first of these cases, *State* v. *Davis*, 13 Conn. App. 667, 539 A.2d 150 (1988), the Appellate Court stated, with no analysis at all, that unlawful restraint requires specific intent. Id., 672. In *State* v. *Phu Dinh Le*, 17 Conn. App. 339, 552 A.2d 448 (1989), the court relied on the flawed conclusion in *State* v. *Shaw*, 186 Conn. 45, 53, 438 A.2d 872 (1982); see footnote 4 of this opinion; and on the summary statement in *Davis*. See *State* v. *Phu Dinh Le*, supra, 343. Finally, in *State* v. *Youngs*, 97 Conn. App. 348, 904 A.2d 1240, cert. denied, 280 Conn. 930, 909 A.2d 959 (2006), the court also relied on *Davis* and offered no more meaningful analysis of its conclusion that unlawful restraint is a specific intent crime. See id., 363–65. Moreover, although the court in *Youngs* categorized unlawful restraint as a specific intent crime, that court stated that the specific intent required is the intent to restrain the victim, and not, as the majority suggests, the intent to interfere substantially with the victim's liberty. See id.

[8] This court has recognized that the defense of voluntary intoxication is available to negate the mental state required to commit specific intent crimes but not available to negate the mental state required for general intent crimes. E.g., *State* v. *Shine*, 193 Conn. 632, 638, 479 A.2d 218 (1984). Similarly, the defense of mistake of fact can be raised only to negate the mental state required to commit specific intent crimes. *State* v. *Smith*, 210 Conn. 132, 139, 142, 554 A.2d 713 (1989).

[9] For example, the trial court should instruct that "[a]s defined by our statute, a person acts intentionally with respect to conduct when his conscious objective is to engage in such conduct.

"What a person's purpose or intention has been usually is a matter to be determined by inference. No person is able to testify that he looked into another's mind and saw therein a certain purpose or intention. The only way in which a jury can ordinarily determine what a person's purpose or intention was at any given time, aside from that person's own statements, is by determining what that person's conduct was and what the circumstances were surrounding that conduct, and from that, infer what his purpose or intention was.

"This inference is not a necessary one; that is, that you are not required to infer intent from the accused's conduct, but it is an inference that you may draw if you find that it is reasonable and logical and in accordance with [the court's] instructions on circumstantial evidence. . . .

"[T]he burden of proving intent beyond a reasonable doubt is on the state." (Internal quotation marks omitted.) *State* v. *Respass*, 256 Conn. 164, 183–84 n.16, 770 A.2d 471, cert. denied, 534 U.S. 1002, 122 S. Ct. 478, 151 L. Ed. 2d 392 (2001).

[10] Notably, this court repeatedly and expressly has rejected arguments based on the reasoning in *Levy* as early as its initial construction of § 53a-91 et seq. See, e.g., *State* v. *Amarillo*, supra, 198 Conn. 304 & n.12; *State* v. *Chetcuti*, 173 Conn. 165, 170–71, 377 A.2d 263 (1977).

[11] New York Penal Law § 135.00 (1) provides: " 'Restrain' means to restrict a person's movements intentionally and unlawfully in such manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent and with knowledge that the restriction is unlawful. A person is so moved or confined 'without consent' when such is accomplished by (a) *physical force, intimidation or deception*, or (b) any means whatever, including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and the parent, guardian or other person or institution having

lawful control or custody of him has not acquiesced in the movement or confinement." (Emphasis added.) N.Y. Penal Law § 135.00 (1) (McKinney 2004).

[12] New York Penal Law § 135.00 (2) provides: " 'Abduct' means to restrain a person with intent to prevent his liberation by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use *deadly physical force*." (Emphasis added.) N.Y. Penal Law § 135.00 (2) (McKinney 2004).

[13] New York Penal Law § 135.25 provides in relevant part: "A person is guilty of kidnapping in the first degree when he abducts another person and when:

"1. His intent is to compel a third person to pay or deliver money or property as ransom, or to engage in other particular conduct, or to refrain from engaging in particular conduct; or

"2. He restrains the person abducted *for a period of more than twelve hours* with intent to:

"(a) Inflict physical injury upon him or violate or abuse him sexually; or

"(b) Accomplish or advance the commission of a felony; or

"(c) Terrorize him or a third person; or

"(d) Interfere with the performance of a governmental or political function . . . . " (Emphasis added.) N.Y. Penal Law § 135.25 (McKinney 2004).

[14] There is evidence that the legislature is aware of this court's long-standing statutory construction and has declined opportunities to amend the relevant portions of the statutes since 1977. For example, although the majority quickly dismisses a 1993 amendment to § 53a-94, our case law suggests that the legislature's action with respect to this provision and the failure to alter the court's previous construction is significant evidence of affirmation. See *Hummel* v. *Marten Transport, Ltd.*, supra, 282 Conn. 495; *Rivera* v. *Commissioner of Correction*, supra, 254 Conn. 252. Additionally, following our decision in *Luurtsema*, the judiciary committee considered three bills addressing the elements of the charge of kidnapping. An Act Concerning Asportation in Kidnapping Cases, Raised Bill No. 1284, 2005 Sess.; An Act Concerning Asportation in Kidnapping Cases, Senate Bill No. 530, 2005 Sess.; An Act Concerning Asportation in Kidnapping Cases, Raised Bill No. 1159, 2003 Sess. None received favorable committee action.

[15] In spite of these substantial persuasions, the majority observes, with respect to the legislative acquiescence doctrine, that this court also has "recognized that legislative inaction [following our interpretation of a statute] is not necessarily legislative affirmation . . . ." (Internal quotation marks omitted.) I note, however, that none of the cases on which the majority relies supports deviation, *in this case*, from the weight of our case law, which accepts the legislature's silence as assent. "Time and again, we have characterized the failure of the legislature to take corrective action as manifesting the legislature's acquiescence in our construction of a statute." (Internal quotation marks omitted.) *Rivera* v. *Commissioner of Correction*, supra, 254 Conn. 252; accord *Mahon* v. *B.V. Unitron Mfg., Inc.*, supra, 284 Conn. 665; *Hummel* v. *Marten Transport, Ltd.*, supra, 282 Conn. 494; *Conway* v. *Wilton*, 238 Conn. 653, 682, 680 A.2d 242 (1996).

For example, the majority relies on *State* v. *Colon*, 257 Conn. 587, 778 A.2d 875 (2001), for the proposition that "legislative inaction is not always the best of guides to legislative intent." (Internal quotation marks omitted.) The court in *Colon* cited a single case in support of this observation, namely, *Streitweiser* v. *Middlesex Mutual Assurance Co.*, 219 Conn. 371, 379, 593 A.2d 498 (1991). See *State* v. *Colon*, supra, 598 n.14. *Streitweiser* is far from a classic example, however, of this court's consideration of whether legislative inaction amounts to affirmation. In *Streitweiser*, the court was faced with two inconsistent lines of cases, in response to which the court observed that, "[b]ecause these diverse holdings look in different directions, the legislature cannot logically have acquiesced in them all." *Streitweiser* v. *Middlesex Mutual Assurance Co.*, supra, 379. No such inconsistency exists in the present case. Notwithstanding this important distinction in *Streitweiser*, *Colon* itself is distinguishable. In that case, we did not announce a reconstruction of § 53a-48 or overrule the case in which it was first construed, namely, *State* v. *Grullon*, 212 Conn. 195, 562 A.2d 481 (1989). See *State* v. *Colon*, supra, 598–600. Rather, the court overruled a subsequent case, *State* v. *Robinson*, 213 Conn. 243, 567 A.2d 1173 (1989), not because its interpretation of § 53a-48 as a bilateral conspiracy statute was clearly erroneous or resulted in injustice but because it concluded that its reliance on *Grullon* in *Robinson* was improper. See *State* v. *Colon*, supra, 598–601.

The other cases on which the majority relies for its observation that legislative silence is not always affirmation are likewise distinguishable from the reconsideration of the statutory scheme at issue in the present case. See, e.g., *State* v. *Skakel*, 276 Conn. 633, 692, 888 A.2d 985 (broad pronouncement of common-law rule beyond mere statutory construction "tempers

. . . traditional reluctance to upset the settled interpretation of a particular statute''), cert. denied, U.S. , 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006); *State* v. *Miranda*, 274 Conn. 727, 734, 878 A.2d 1118 (2005) (court corrected ''clearly wrong'' statutory interpretation only three years old); *Waterbury* v. *Washington*, 260 Conn. 506, 539–45, 800 A.2d 1102 (2002) (*first* interpretation of specific statutory provision and reexamination of earlier constructions due to court's failure to have considered entirety of statutory scheme); *Ferrigno* v. *Cromwell Development Associates*, supra, 244 Conn. 198–202 (correction of court's inconsistent interpretations of same statute over time).

[16] First, the majority asserts that ''[t]he arguments for adherence to precedent are least compelling . . . when the rule to be discarded may not be reasonably supposed to have determined the conduct of the litigants . . . .'' (Internal quotation marks omitted.) Majority opinion, p. 523, quoting *Craig* v. *Driscoll*, 262 Conn. 312, 330, 813 A.2d 1003 (2003). None of our prior cases that cite this quote by former United States Supreme Court Justice Benjamin N. Cardozo; see B. Cardozo, The Nature of the Judicial Process (1921) p. 151; discussed overruling the existing construction of a criminal statute. See *Craig* v. *Driscoll*, supra, 330 (deciding whether to recognize common-law action against purveyor that negligently served alcohol to adult patron who, because of intoxication, injured third person, and noting fact that parties were unlikely to consider question of what law would govern their conduct if it were to result in injury); *George* v. *Ericson*, 250 Conn. 312, 317–18, 736 A.2d 889 (1999) (overruling common-law rule of evidence excluding testimony of nontreating physicians and replacing it with standard governing testimony of expert witnesses in general); *Conway* v. *Wilton*, 238 Conn. 653, 661, 680 A.2d 242 (1996) (reinterpretation of statute governing tort liability); *O'Connor* v. *O'Connor*, 201 Conn. 632, 644, 648, 519 A.2d 13 (1986) (rejection of lex loci doctrine in tort actions).

Furthermore, when Justice Cardozo's statement is viewed in the larger context of his chapter entitled, ''Adherence to Precedent,'' it does not support the majority's suggestion that criminal actors are like those who engage in tortious conduct and rarely give thought to what law will govern their criminal behavior. Instead, Justice Cardozo was observing the possibility that, over time, ''the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly . . . .'' B. Cardozo, supra, p. 151. I fail to see the relevance of this observation to the majority's decision.

Second, the majority suggests that ''the issue presented by the defendant's claim is not one that is likely to have reached the top of the legislative agenda . . . .'' I note that the majority cites no authority in support of its claims that the legislature is unlikely to act ''because the issue directly implicates only a relatively narrow category of criminal cases . . . it is uncertain whether the position that the defendant advocates would attract interested sponsors with access to the legislature . . . [and] it . . . is unclear whether the issue is sufficiently important to gain their full support.'' I can only garner from these observations that the majority has apparently concluded that the legislature would require the influence of lobbyists and the potential for political advantage in order to rectify an erroneous statutory construction by this court. Additionally, I am puzzled by the majority's assumption that the application of our kidnapping statutes is of little interest to the legislature in light of the committee activity addressing it in the past few years. See footnote 14 of this opinion.

Third, the majority concludes that ''this court never has undertaken an extensive analysis of whether our kidnapping statutes warrant the broad construction that we have given them.'' As I stated previously in this opinion, I agree with the majority that in-depth textual analysis is lacking in our prior written decisions.

Fourth, the majority claims that a ''reason to reconsider our prior holdings construing the kidnapping statutes to encompass virtually all sexual assaults and robberies is that all of our prior cases have relied on a literal application of the language of our kidnapping statutes.'' Although the majority concedes that this court ''frequently adhere[s] to the literal language of a statute,'' it proceeds to rely on four cases to exemplify situations in which we eschewed the literal language of a statute because it led to bizarre or unworkable results. I note that none of the four cases to which the majority refers implicated stare decisis or our legislative acquiescence doctrine. Moreover, the cases involved circumstances that are distinguishable from the application of our kidnapping statutes in the present case. See *Clark* v. *Commissioner of Correction*, 281 Conn. 380, 390–91, 401, 917 A.2d 1 (2007) (rejecting literal construction because statutory scheme conflicted on its face); *Connelly* v. *Commissioner of Correction*, 258 Conn. 394, 404–405, 780 A.2d 903 (2001) (in construing statute for first time, court rejected literal reading that would impliedly overrule existing case law that legislature did not express intent to overrule); *Levey Miller Maretz* v. *595 Corporate Circle*, 258 Conn. 121, 132–33, 780 A.2d 43 (2001) (rejecting literal construction of statute when legislature expressly communicated that it did not intend provision to be narrowly construed); *State* v. *Brown*, 242 Conn. 389, 402–406, 699 A.2d 943 (1997) (literal construction of statute would have been practically

unworkable as it would have required trial to commence regardless of whether defendant's attorney was available).

Fifth, the majority suggests that "the legislative acquiescence doctrine requires actual acquiescence on the part of the legislature"; (internal quotation marks omitted); and cites to a footnote in *Berkley* v. *Gavin*, 253 Conn. 761, 756 A.2d 248 (2000), for this proposition. See id., 776–77 n.11. I note, however, the lack of any authority for this general proposition announced in *Berkley*. Nevertheless, as I already have discussed, with respect to the kidnapping statutes, there has been *actual* acquiescence. In 1993, subsection (b) of the same statute under which the defendant in the present case was charged was amended and, yet, no change was made with respect to a minimum requirement for the length of confinement or asportation. See Public Acts 1993, No. 93-148, § 1. It is significant that the legislature amended the statute sixteen years after our interpretation was first announced and after consistent rulings by this court, and chose not to amend the pertinent definitional sections. See footnote 14 of this opinion. If this is not evidence of acquiescence, I am hard pressed to know where else to look. The majority appears to suggest that, because the legislature did not correct our construction of the kidnapping statutes, there was no acquiescence.

Sixth, the majority observes that, "since 1977, when this court first rejected a claim that a kidnapping conviction could not be based on conduct involving a restraint that is merely incidental to the commission of another crime, the courts of many other states have reached a contrary conclusion in interpreting their kidnapping statutes." The majority later characterizes these courts' actions as "follow[ing] the lead of New York and California . . . ." Significantly, one commentator has suggested of New York's highest court: "The *Levy* majority usurped the power of the New York legislature. In effect, the court by judicial interpretation wrote a new kidnapping statute for New York." F. Parker, "Aspects of Merger in the Law of Kidnapping," 55 Cornell L. Rev. 527, 537 (1970). I agree that evidence of a trend in other jurisdictions may indicate that a change in our kidnapping laws would be prudent or advisable, but the adoption of such changes is for the legislature, not this court.

[17] To be so entitled, the defendant would have to satisfy the four-pronged test laid out by this court in *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980). "A defendant is entitled to an instruction on a lesser offense if, and only if . . . (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser." (Internal quotation marks omitted.) *State* v. *Vass*, supra, 191 Conn. 616–17.

"The [defendant in *Vass* could not prevail on his claim] that he was entitled to a charge of unlawful restraint . . . . Although its definition, restraint of another person, does fall within the ambit of the crime of kidnapping, the defendant . . . failed to satisfy the fourth prong of the *Whistnant* test. He . . . failed to demonstrate that the crucial element of intent, which differentiates kidnapping from unlawful restraint in the second degree, was sufficiently in dispute to justify an instruction on the lesser charge. The defendant offered no evidence . . . that would tend to suggest that whoever perpetrated the crime restrained the victim without the requisite intent to prevent her liberation by the use of force, threat of force or intimidation." (Citation omitted.) Id., 618.

[18] The majority describes our prior construction of the kidnapping statutes as "overly broad" and proposes that juries now must determine whether a defendant's restraint of the victim is incidental to the commission of a separate crime. I fail to see how this will provide a jury with clear guidance on how to make such a discerning judgment. Moreover, as noted in part I of this opinion, the factors that the majority suggests that a jury should consider are more properly indicators of whether the defendant possessed the mental state necessary to kidnap the victim rather than whether the defendant perpetrated a restraint of independent significance.

[19] The trial court instructed the jury in relevant part: "Intent relates to the condition of mind [of one] who commits an act, his purpose in doing the act. As defined by statute, a person acts intentionally with respect to [a] result or conduct when the conscious objective is to engage in such conduct. . . .

"Nobody is able to look into another's mind and see a specific intent. The only way a jury can ordinarily determine what a person's purpose was or intent was other than from that person's own statements and testimony is by determining what the conduct was and what the circumstances were surrounding the conduct. . . ."

[20] The trial court instructed the jury in relevant part: "Abduct means to restrain a person by the use of physical force or the threatened use of physical force or by intimidation."

[21] Under the definitions set forth in § 53a-91, one may accomplish a restraint through many means, including the use of force. See General Statutes § 53a-91 (1). For example, a defendant may commit an unlawful restraint without ever possessing an intent to prevent the victim's liberation by using or threatening to use physical force. Such restraint could occur by confining the victim in a room using locks or other barriers, refusing to provide information on the location of an exit or, as the statute notes, by deception. A person may accomplish an abduction, however, only if he restrains the victim with the specific intent to prevent his liberation "by either (A) secreting or holding him in a place where he is not likely to be found, or (B) using or threatening to use physical force or intimidation." General Statutes § 53a-91 (2).