KATZ, J., concurring in part and dissenting in part. I strongly disagree with the majority's reversal of course on an issue that was squarely presented in *State* v. *Sanseverino*, 287 Conn. 608, 650, 949 A.2d 1156 (2008) (*Zarella*, *J.*, dissenting), the majority now concluding that the defendant, Paolino Sanseverino, is not entitled to a judgment of acquittal on the charge of kidnapping in the first degree with respect to one of his victims, G. In addition, although I agree with the majority's decision to grant the state's motion for reconsideration on the issue of whether the defendant's conviction on that charge should be reduced to the lesser included offense of unlawful restraint in the second degree, I disagree that such a decision is warranted because of the "unique circumstances of this case."

On the first point, the basis of my disagreement, namely, that we properly applied a sufficiency of the evidence analysis in *Sanseverino*, is set forth in detail in my dissenting opinion in *State* v. *DeJesus*, 288 Conn. 418, 528–47, 953 A.2d 45 (2008) (*Katz*, *J.*, dissenting). It bears repeating, however, that, in *Sanseverino*, we applied the same analytical framework as in *State* v. *Salamon*, 287 Conn. 509, 548–50, 949 A.2d 1092 (2008), wherein we had examined the sufficiency of the evidence to determine whether the defendant was entitled to a judgment of acquittal of kidnapping in the second degree. See *State* v. *Sanseverino*, supra, 287 Conn. 624–26. In *Salamon*, only after we had examined the evidence at length did we conclude that a retrial was warranted because the evidence *actually adduced* could be a sufficient basis for a reasonable jury to find a kidnapping upon a proper instruction under the revised rule. *State* v. *Salamon*, supra, 514 n.7, 548–50. Although we could have reversed the defendant's conviction in *Salamon* on the basis of instructional error—i.e., he did not have the benefit of an instruction under the rule that we set forth in that case—the court relied exclusively on insufficiency of the evidence. See id., 548–50. *Sanseverino* simply was an application of the *Salamon* rubric that yielded a different outcome. Therefore, I renew my objection to the majority's inconsistent approach in the present case to the *Salamon* framework.

Turning to my second point, the majority grants the state's motion for reconsideration with respect to whether the defendant's conviction of kidnapping in the first degree should be reduced to that of the true lesser included offense of unlawful restraint in the second degree should the state decide not to retry the defendant on the greater offense. I also would grant the state's motion for reconsideration in order to modify the judgment to reflect a conviction of the lesser

included offense. Because the majority limits its decision allowing the modification of the judgment in the present case to its "unique circumstances," however, I feel compelled to question the reluctance of my colleagues to embrace a universal rule consistent with well established lesser included offense jurisprudence.

In the present case, the jury necessarily found the defendant guilty of unlawful restraint in the second degree in violation of General Statutes § 53a-96. By instructing the jury on the elements of kidnapping in the first degree, the trial court required, and the jury a fortiori found, that there was an unlawful restraint.[1] 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 either in the place where the restriction commences or in a place to which he has been moved, without consent." General Statutes § 53a-91 (1). In the present case, there is no question that the defendant restricted the victim's movement by nonconsensual force when he sexually assaulted her. Thus, the jury could—and did—reasonably find the elements of the natural lesser included offense of unlawful restraint in the second degree, which merely requires that the state prove that the defendant restrained the victim. See General Statutes § 53a-96 (a) ("[a] person is guilty of unlawful restraint in the second degree when he restrains another person"); see also *State* v. *Vass*, 191 Conn. 604, 618, 469 A.2d 767 (1983) ("definition [of unlawful restraint in the second degree] . . . fall[s] within the ambit of the crime of kidnapping [in the second degree]"); *State* v. *Faria*, 47 Conn. App. 159, 178–79 n.13, 703 A.2d 1149 (1997) (citing *Vass*, and stating that "[f]or the same reason, we hold that unlawful restraint in the second degree falls within the definition of the crime of kidnapping in the first degree"), cert. denied, 243 Conn. 965, 707 A.2d 1266 (1998).

In *State* v. *Grant*, 177 Conn. 140, 147, 411 A.2d 917 (1979), this court first adopted the rule that it "may order the modification of an erroneous judgment where the evidence is insufficient to support an element of the offense stated in the verdict but where the evidence presented is sufficient to sustain a conviction for a lesser included offense." Although the court recognized that "[t]his power should be exercised only when it is clear that no undue prejudice will result to the accused"; (internal quotation marks omitted) id., 148; it determined that no such prejudice occurs if "[t]he defendant has had a fair adjudication of guilt on all the elements of the crime . . . ." Id. A defendant is deemed to have received such a fair adjudication when the crime "is a lesser included offense of the crime charged, and the [fact finder], under the circumstances of the case, could have explicitly returned such a verdict [and] the defendant was aware of his potential liability for this crime." Id., 148–49; accord *State* v. *Saracino*, 178 Conn. 416,

421, 423 A.2d 102 (1979) ("[s]ince the jury could have explicitly returned . . . a verdict [of guilty of the lesser included offense of fourth degree larceny], the defendant was aware of her potential liability for this crime and would not now be prejudiced by modification of the judgment"). This court has explained that, "[i]n *State* v. *Grant*, supra, [147], and *State* v. *Saracino*, supra, [421], we held that even though the trial evidence did not support the defendant's conviction of the offense charged, we were free to modify the judgment to reflect a conviction of a lesser crime. We came to this conclusion because the evidence was sufficient to support a conviction of a lesser included offense on which the jury properly had been charged and the jury's verdict necessarily included a finding that the defendant was guilty of that lesser offense. See also *State* v. *Carpenter*, 214 Conn. 77, 85, 570 A.2d 203 (1990), on appeal after remand, 220 Conn. 169, 595 A.2d 881 (1991), cert. denied, 502 U.S. 1034, 112 S. Ct. 877, 116 L. Ed. 2d 781 (1992); *State* v. *Scielzo*, 190 Conn. 191, 204–205, 460 A.2d 951 (1983); *State* v. *Coston*, 182 Conn. 430, 437, 438 A.2d 701 (1980)." *State* v. *Desimone*, 241 Conn. 439, 460 n.28, 696 A.2d 1235 (1997).

I recognize that most of the cases in which this court has ordered the modification of a judgment to reflect a conviction of a lesser included offense have involved circumstances wherein the jury had been instructed on that lesser included offense. We never have stated, however, that the absence of a jury instruction is an absolute bar to this court's ability to modify a judgment.[2] Indeed, our modification of the judgment of conviction in *State* v. *Greene*, 274 Conn. 134, 874 A.2d 750 (2005), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006), undermines any such claim.

In *Greene*, a case in which the defendant had been charged with, inter alia, murder as an accessory, the trial court had granted the state's request to instruct the jury on what it had considered to be the lesser included offense of manslaughter in the first degree with a firearm as an accessory. Id., 154. On appeal, we concluded that the instruction was improper because manslaughter in the first degree with a firearm was not a lesser included offense of murder, as charged in the information. Id., 158–60. In rejecting the defendant's contention that the appropriate remedy for this constitutional instructional error was a judgment of acquittal, we determined that it would be proper to modify the judgment of conviction to manslaughter in the first degree. Id., 160–62. In doing so, we recognized that "[t]his court [previously] has modified a judgment of conviction after reversal, if the record establishes that the jury necessarily found, beyond a reasonable doubt, all of the essential elements required to convict the defendant of a lesser included offense." Id., 160. We reasoned in *Greene* that, in that particular case, "[b]efore the jury could find the defendant guilty of

manslaughter in the first degree with a firearm, the jury necessarily must have found the defendant guilty of manslaughter in the first degree. . . . Therefore, the trial court's improper instruction could not have affected the jury's finding that the defendant was guilty, beyond a reasonable doubt, of the essential elements of manslaughter in the first degree . . . ." (Citations omitted.) Id., 161. Significantly, although the trial court had instructed the jury on manslaughter in the first degree with a firearm, it had not instructed the jury that it could find the defendant guilty of first degree manslaughter. See id., 155. Nevertheless, we did not conclude that the jury's inability to return *explicitly* a verdict of guilty of manslaughter in the first degree precluded us from modifying the judgment by directing the trial court to enter a judgment of conviction on that crime. Accord *State* v. *Coston*, supra, 182 Conn. 437 (reversing for insufficient evidence conviction for attempted robbery in first degree and remanding with direction to modify judgment to reflect conviction of lesser included offense of attempted larceny in fourth degree); see also *State* v. *Ortiz*, 71 Conn. App. 865, 878, 804 A.2d 937 ("even in the absence of a request at trial for a jury instruction on a lesser included offense, an appellate court may invoke the [doctrine enunciated in *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980)][3] where the trial court record justifies its application and order that the judgment be modified to reflect a conviction on the lesser offense and that the defendant be sentenced thereon" [internal quotation marks omitted]), cert. denied, 261 Conn. 942, 808 A.2d 1136 (2002).

Embodied in *Greene* is a recognition that "whe[n] one or more offenses are lesser than and included within the crime charged, notice of the crime charged includes notice of all lesser included offenses. . . . This notice permits each party to prepare a case properly, each cognizant of its burden of proof." (Internal quotation marks omitted.) *State* v. *Tomlin*, 266 Conn. 608, 617, 835 A.2d 12 (2003).[4] In addition to this guarantee of notice, the jury's verdict of guilty on the greater offense guarantees that it found the defendant guilty of all of the elements of the lesser included offense. See *State* v. *Carpenter*, supra, 214 Conn. 85 ("[b]ecause the jury's verdict necessarily includes a determination that, absent a specific intent, all the elements of [General Statutes] § 53a-55 [a] [3] have been proven beyond a reasonable doubt, the defendant would not be prejudiced by a modification of the judgment to reflect a conviction of that charge"). As long as such notice and jury findings exist, there is no constitutional impediment to the exercise of our power to reverse a conviction while at the same time ordering the entry of judgment on a lesser included offense. See *State* v. *Edwards*, 201 Conn. 125, 134 n.6, 513 A.2d 669 (1986) ("[t]he constitutionality of the practice [of reversing a conviction while at the same time ordering the entry

of judgment on a lesser included offense] has never seriously been questioned" [internal quotation marks omitted]); see also *Rutledge* v. *United States*, 517 U.S. 292, 305 n.15, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996) (citing with approval four-pronged test announced by Court of Appeals for District of Columbia, which does not require jury to be instructed on lesser included offense, but, rather, provides that judgment can be modified if it can be shown "[1] that the evidence adduced at trial fails to support one or more elements of the crime of which [the accused] was convicted, [2] that such evidence sufficiently sustains all the elements of another offense, [3] that the latter is a lesser included offense of the former, and [4] that no undue prejudice will result to the accused" [internal quotation marks omitted]).

Such modifications are not limited to jury trials. In *State* v. *McGann*, 199 Conn. 163, 506 A.2d 109 (1986), a case tried to the court, as in the present case, this court modified a judgment of conviction from murder for hire, a capital felony, to murder; id., 179; because the latter crime was a lesser included offense and "the defendant could not have committed murder for hire without also committing intentional murder . . . ." (Internal quotation marks omitted.) Id., 178. The court modified the judgment of conviction because it concluded that "[t]he failure of the state to prove the additional element of a hiring to commit the murder leaves standing the finding . . . that the defendant did murder [the victim]." Id., 178–79. Because *McGann* involved a trial to the court, there were no jury instructions that might have given the defendant *express* notice of his criminal liability on the lesser included offense. There is also no indication in this court's decision in *McGann* that the state had requested this court to modify the judgment. Nevertheless, we noted that "[o]ur conclusion that the judgment of the trial court was erroneous in convicting the defendant of a capital felony [did] not require a remand for a new trial." Id., 178.

Indeed, it is well settled that, even in the absence of a request from either party, the trial court may, sua sponte, submit a lesser included offense to the jury if the evidence supports such a charge. *State* v. *Rodriguez*, 180 Conn. 382, 408, 429 A.2d 919 (1980); *State* v. *Horne*, 19 Conn. App. 111, 145, 562 A.2d 43 (1989), rev'd on other grounds, 215 Conn. 538, 577 A.2d 694 (1990); see also *State* v. *Jacobowitz*, 194 Conn. 408, 412–13, 480 A.2d 557 (1984) (implicitly recognizing court's discretion in concluding that trial court properly could have declined to instruct jury on lesser included offense in absence of request); *State* v. *Whistnant*, supra, 179 Conn. 581–82 (noting that question of whether due process clause of fourteenth amendment *requires* trial court to instruct the jury, sua sponte, on lesser included offense has not been resolved by federal courts). Thus, it is clear that the parties' conduct vis–vis jury instruc-

tions does not control exclusively whether a conviction may lie for a lesser included offense. The trial court's authority in this regard is rooted in the interests of justice, so that "the jury should not be . . . forced by its verdict to choose only between the offense with the [greater culpability] and acquittal." *State* v. *Asherman*, 193 Conn. 695, 731–32, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985). Similarly, the interests of justice would not be served by precluding an appellate court from ordering modification of the judgment to a conviction of a lesser offense simply because the parties did not request the trial court to provide such an instruction. Indeed, to conclude otherwise would require the state to request an instruction on every possible lesser included offense to the crime charged to avoid retrial should an appellate court find an element of that crime not to have been supported by the evidence.

It is also significant that we have held that a jury cannot consider an instruction on a lesser included offense unless it first has determined that the defendant is not guilty of the greater offense. See *State* v. *Sawyer*, 227 Conn. 566, 579, 630 A.2d 1064 (1993) ("to ensure that the charged offense has been determined by unanimous agreement, the court must direct the jury to reach a unanimous decision on the issue of guilt or innocence of the charged offense before going on to consider the lesser included offenses"); id., 585–87 (same, citing "acquittal first" rule). Therefore, in the present case, even if the jury had been charged on the lesser included offense, once it found the defendant guilty of the greater offense, it would not have reached the lesser offense. Accordingly, it makes no sense to conclude that, in a case in which the evidence would have rendered it proper to provide an instruction on the lesser offense; see footnote 3 of this concurring and dissenting opinion; the absence of such a request precludes modification of the judgment.

With respect to any concern that the state did not charge the defendant with unlawful restraint in the second degree in violation of § 53a-96, it is well settled that the state's failure to charge a lesser included offense does not preclude the submission of that charge to the jury. See *State* v. *Smith*, 185 Conn. 63, 77, 441 A.2d 84 (1981); *State* v. *Maselli*, 182 Conn. 66, 72, 437 A.2d 836 (1980), cert. denied, 449 U.S. 1083, 101 S. Ct. 868, 66 L. Ed. 2d 807 (1981); *State* v. *Rodriguez*, supra, 180 Conn. 405; see also *United States* v. *Dhinsa*, 243 F.3d 635, 676 (2d Cir.), cert. denied, 534 U.S. 897, 122 S. Ct. 219, 151 L. Ed. 2d 156 (2001); *United States* v. *Martel*, 792 F.2d 630, 638 (7th Cir. 1986). This court has relied on this rationale to conclude that, even when a defendant has not been charged with the lesser included offense, and the jury has not rendered a finding on the lesser included offense because of its finding of guilty on the greater offense, this court may order a modifica-

tion of a defective judgment on the greater to the lesser. See *State* v. *Carpenter*, supra, 214 Conn. 85. Therefore, the state's failure to charge the defendant with the lesser included offense should not bar modification of the judgment of conviction.

The only "unique circumstances"[5] that we have identified as essential to the question of whether to reduce a conviction, determined to be improper because of insufficient evidence of an element, to a lesser included offense supported by the evidence is whether there is undue prejudice to the defendant. See *State* v. *Grant*, supra, 177 Conn. 148 ("[t]his power should be exercised only when it is clear that no undue prejudice will result to the accused" [internal quotation marks omitted]). Because there is no question in the present case that the defendant had a fair trial and that the jury properly was instructed on the element of restraint, there is no undue prejudice to the defendant if we reduce his conviction to the lesser offense.[6] See *State* v. *Saracino*, supra, 178 Conn. 421 ("[s]ince the jury could have explicitly returned . . . a verdict [of guilty of the lesser included offense of fourth degree larceny], the defendant was aware of her potential liability for this crime and would not now be prejudiced by modification of the judgment"). The defendant has not claimed any prejudice in the present case, and the majority acknowledges that no such prejudice exists. Therefore, this case falls squarely within the *usual* circumstance in which it is proper for this court to modify the conviction as the state reasonably requests. Therefore, in response to the state's motion for reconsideration, I would reduce the defendant's conviction to unlawful restraint in the second degree. I would deny the motion in all other respects.

Accordingly, I respectfully concur in part and dissent in part.

[1] The trial court instructed the jury that "[f]or you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt: (1) that the defendant abducted the victim; and (2) that the defendant *restrained* the person he abducted with the intent to abuse the person sexually." (Emphasis added.)

[2] In this regard, I note that one of the decisions in which this court has concluded that it would not prejudice the defendant to reduce his conviction to a lesser included offense does not state whether the jury, through express instructions by the court, had been given the opportunity to consider the lesser included offense. See *State* v. *Edwards*, 201 Conn. 125, 133–34 n.6, 513 A.2d 669 (1986) ("While the evidence was insufficient to sustain the conviction on the second count of the substitute information charging the crime of accessory to robbery in the second degree, it did suffice to sustain a conviction for the lesser included offense of accessory to robbery in the third degree. The jury's verdict on the second count necessarily determined that the state had proven all the elements of accessory to robbery in the third degree beyond a reasonable doubt upon which the trial court instructed the jury. Under the circumstances of this case, the reduction of the defendant's conviction on the second count to the lesser included offense cannot prejudice the defendant."). A careful review of the record and briefs in *Edwards* does disclose a statement in the defendant's brief to this court suggesting that the jury did receive an instruction on the lesser offense. Presumably, however, if a jury instruction on the lesser included offense is a necessary predicate to modifying a judgment from the greater offense to a lesser offense, this court's opinion would have reflected that fact expressly.

Therefore, in the absence of any such reference, I would conclude the opposite.

[3] In *State* v. *Whistnant*, supra, 179 Conn. 588, this court held that a jury properly may be instructed on a lesser included offense when, inter alia, the evidence could justify the conviction of the lesser offense and the proof on elements that differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant not guilty of the greater offense but guilty of the lesser offense.

[4] In fact, we have relied on the same notice considerations to conclude that a defendant's waiver of his constitutional rights to a jury trial and his court trial election as to the greater offense were valid as to any lesser included offenses. See *State* v. *Williams*, 205 Conn. 456, 466, 534 A.2d 230 (1987) (defendant's waiver of right to jury trial for burglary in first degree constituted waiver for burglary in second degree as charged in substitute information "because a defendant is deemed to be on notice that a charge of the more serious offense encompasses the lesser offenses").

[5] In *State* v. *Edwards*, supra, 201 Conn. 133–36 n.6, this court noted a long history of state and federal appellate courts exercising their power to reverse a conviction while at the same time ordering the entry of judgment on a lesser included offense. See id., citing *United States* v. *Cobb*, 558 F.2d 486, 489 (8th Cir. 1977); *Austin* v. *United States*, 382 F.2d 129, 140–42 (D.C. Cir. 1967); *Luitze* v. *State*, 204 Wis. 78, 84, 234 N.W. 382 (1931). I am aware, however, that there is not a consensus among the various jurisdictions to have considered the issue as to whether modification of a judgment to a conviction of a lesser included offense is proper in the absence of a jury instruction on that lesser offense. Compare *United States* v. *Hunt*, 129 F.3d 739, 745–46 (5th Cir. 1997) (instruction not required but should be considered in determining whether modification of judgment unduly prejudicial to defendant), *United States* v. *Smith*, 13 F.3d 380, 383 (10th Cir. 1993) (no undue prejudice due to modification of judgment because possibility of instruction on lesser included offense existed throughout trial, and all elements were proven beyond reasonable doubt), *United States* v. *Lamartina*, 584 F.2d 764, 766–67 (6th Cir. 1978) (holding that, although District Court erred in refusing to instruct on lesser included offense, sentence should be vacated and case remanded for sentencing on lesser included offense, as there was sufficient evidence to support lesser but not greater offense), cert. denied, 440 U.S. 928, 99 S. Ct. 1263, 59 L. Ed. 2d 483 (1979), *Shields* v. *State*, 722 So. 2d 584, 587 (Miss. 1998) ("lesser included offense need not be before the jury in order to apply the direct remand rule"), *State* v. *Farrad*, 164 N.J. 247, 266, 753 A.2d 648 (2000) (reversing case for new trial but noting that "guilty verdict may be molded to convict on a lesser-included offense even if the jury was not instructed on that offense if [1] [the] defendant has been given his day in court, [2] all the elements of the lesser included offense are contained in the more serious offense and [3] [the] defendant's guilt of the lesser included offense is implicit in, and part of, the jury verdict" [internal quotation marks omitted]), *State* v. *Briggs*, 787 A.2d 479, 486–87 (R.I. 2001) (approving sentencing remand when, although jury was not instructed on lesser offense, defendant's trial testimony constituted evidence meeting all elements of lesser included offense of larceny) and *State* v. *Garcia*, 146 Wash. App. 821, 829–30, 193 P.3d 181 (2008) (order to modify judgment to lesser included offense proper, even though state did not charge or request trial court, sitting as finder of fact, to consider lesser offense because lesser degree necessarily proved at trial and charge on greater offense gave defendant sufficient notice) with *United States* v. *Dhinsa*, supra, 243 F.3d 676 (because there was no jury instruction on lesser offense, court could not grant government's request to modify judgment of conviction), *United States* v. *Dinkane*, 17 F.3d 1192, 1198 (9th Cir. 1994) (jury instruction on lesser included offense required to modify judgment), *Ex parte Roberts*, 662 So. 2d 229, 232 (Ala. 1995) ("[i]t is well established that if an appellate court holds the evidence insufficient to support a jury's guilty verdict on a greater offense, but finds the evidence sufficient to support a conviction on a lesser included offense, it may enter a judgment on that lesser included offense, provided that the jury was charged on the lesser included offense"), *State* v. *Villa*, 136 N.M. 367, 368, 98 P.3d 1017 (2004) ("conviction of an offense not presented to the jury would deprive the defendant of notice and an opportunity to defend against that charge and would be inconsistent with New Mexico law regarding jury instructions and preservation of error"), *State* v. *Brown*, 360 S.C. 581, 594, 602 S.E.2d 392 (2004) (jury must be instructed on lesser included offense in order to remand for sentencing on that crime) and *Collier* v. *State*, 999 S.W.2d 779, 782 (Tex.

Crim. App. 1999) (appellate court may reform judgment to conviction of lesser included offense only if [1] court finds evidence is insufficient to support conviction of charged offense but sufficient to support conviction on lesser included offense and [2] either jury was instructed on lesser included offense or one of parties asked for but was denied such instruction).

In my view, the rationale provided in those jurisdictions holding that modification of a judgment is improper in the absence of an instruction on the lesser offense is unpersuasive. See *United States* v. *Dhinsa*, supra, 243 F.3d 674, 676 (reasoning that rule of criminal procedure providing that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense . . . applies to the jury's—rather than a reviewing court's—finding of guilt on a lesser-included offense" [internal quotation marks omitted]); see also *United States* v. *Vasquez-Chan*, 978 F.2d 546, 554 n.5 (9th Cir. 1992) (citing cases in which other courts have modified judgment under facts wherein instruction on lesser offense had been given and relying on proposition that acquittal of greater offense necessarily means acquittal of lesser offense to conclude that "[i]f no such lesser-included offense instruction is given, the acquittal [whether at trial or on appeal] on the greater offense precludes a conviction on a lesser offense"); *State* v. *Brown*, supra, 360 S.C. 594–97 (citing as reasons for considering sentence remand only when lesser included offense has been properly charged to jury: [1] "appellate court does not sit as a [fact finder] in a criminal case and should avoid resolving cases in a manner which appears to place the appellate court in the jury box"; [2] "this view preserves the important distinction between an appellate determination [that] the record contains sufficient evidence to support a guilty verdict and a jury determination [that] the [s]tate proved its case beyond a reasonable doubt"; [3] "[w]hen a lesser included offense is submitted to the jury, [and the jury] . . . returns a verdict of guilty on the greater offense necessarily [having] weighed evidence relating to the lesser offense . . . it can be said with some degree of certainty that a [sentencing remand] is but effecting the will of the fact finder within the limitations imposed by law; and, that the appellate court is simply passing on the sufficiency of the implied verdict . . . [but when] no instruction at all has been offered on the lesser offense, second guessing the jury becomes far more speculative"; [4] "when the jury could have explicitly returned a verdict on the lesser offense, the defendant is well aware of his potential liability for the lesser offense and usually will not be prejudiced by the modification of the judgment from the greater to the lesser offense"; [5] "adopting a practice of remanding for sentencing on a lesser included offense when that offense has not been submitted to the jury may prompt the [s]tate to avoid requesting or agreeing to submit a lesser included offense to the jury"; [6] "the [s]tate would obtain an unfair and improper strategic advantage if it successfully prevents the jury from considering a lesser included offense by adopting an all or nothing approach at trial, but then on appeal, perhaps recognizing the evidence will not support a conviction on the greater offense, is allowed to abandon its trial position and essentially concede the lesser included offense should have been submitted to the jury"; and [7] "[t]he defendant may well have foregone a particular defense or strategy due to the trial court's rejection of a lesser included offense" [internal quotation marks omitted]).

[6] Although the jury was not charged as to this lesser included offense in the present case, the defendant was on notice from the presence of the greater offense of kidnapping in the first degree in the information that he was being charged with conduct that included an element of restraint. See *State* v. *Tomlin*, supra, 266 Conn. 617 ("[When] one or more offenses are lesser than and included within the crime charged, notice of the crime charged includes notice of all lesser included offenses. . . . This notice permits each party to prepare a case properly, each cognizant of its burden of proof." [Internal quotation marks omitted.]); *State* v. *Rodriguez*, supra, 180 Conn. 405 ("Permitting the jury to find the defendant guilty of a lesser charge of homicide than that charged, where the evidence supports such a finding, does not violate the defendant's sixth amendment right to notice. By the charge on the greater offense of murder, the defendant is put on notice that he will be put on trial for [the actions that form the basis for both crimes]. Thus, having been given notice of the most serious degree of culpable intent by the murder indictment, he is implicitly given notice of those lesser included homicides that require a less serious degree of culpable intent.").