SCHALLER, J., with whom VERTEFEUILLE, J., joins, concurring in part and dissenting in part. This case presents the question of what steps our law permits a court to take in an effort to reconcile criminal statutes that are in conflict to the extent that the statutory scheme is rendered unworkable. General Statutes § 1-2z[1] authorizes the judiciary to determine the meaning of a statute or of a statutory scheme in a manner that does not yield "unworkable" results. If, however, after resort to traditional methods of statutory construction, two criminal statutes cannot be reconciled, that is, the plain language of both statutes cannot be given effect, does the court have authority to create a workable interpretation of one of the statutes, when that interpretation is at odds with the statute's plain meaning? Because I conclude that the majority, in its admirable effort to resolve the conundrum before us, has exceeded its authority in the method that it has applied to escape the statutory morass, I respectfully dissent.[2] In part I of this dissent, I will address how the majority, in effect, overrules sub silentio our decision in *State* v. *Tabone*, 279 Conn. 527, 902 A.2d 1058 (2006), and, as a result, creates a precedent that is likely to bring uncertainty to the future interpretation of our criminal statutes in addition to placing a burden on the defendant in this case. In part II, I will demonstrate that, although there is no optimal remedy for the present statutory predicament, the only suitable remedy under the circumstances is to rescind the original plea bargain and to permit the defendant, John Tabone, to plead anew.

I

It is beyond dispute that the statutory scheme regarding special parole was in a state of irreconcilable conflict at the time of the defendant's alleged criminal conduct.[3] General Statutes (Rev. to 1999) § 54-125e (c) provides in relevant part that: "The period of special parole shall be not less than one year nor more than ten years except that such period shall be not less than ten years nor more than thirty-five years for a person convicted of a violation of subdivision (2) of section 53-21 . . . 53a-71 . . . [or] 53a-72a . . . ."[4] At the same time, General Statutes § 54-128 (c) provides that "[t]he total length of the term of incarceration and term of special parole combined shall not exceed the maximum sentence of incarceration authorized for the offense for which the person was convicted." In *Tabone*, we recognized that "the trial court was required to sentence the defendant to a minimum of one year of imprisonment under [General Statutes] § 53a-35a (6), and to a minimum of ten years of special parole under § 54-125e (c). The total length of the minimum term of imprisonment and the minimum period of special parole

combined amounts to eleven years. As such, the trial court was required to impose a combined term of imprisonment and period of special parole that exceeds the maximum sentence of imprisonment for sexual assault in the second degree. At the same time, pursuant to § 54-128 (c), the trial court was prohibited from imposing a combined term of imprisonment and period of special parole that exceeds the maximum sentence of imprisonment for sexual assault in the second degree. Accordingly, under the circumstances of the present case, an *irreconcilable conflict* exists between the sentencing requirements of §§ 54-125e (c) and 54-128 (c)." (Emphasis added.) *State* v. *Tabone*, supra, 279 Conn. 543. In resolving the irreconcilable conflict we concluded that "when the sentencing provisions of §§ 54-125e (c) and 54-128 (c) conflict, the legislature intended the maximum statutory limit in § 54-128 (c) to control." Id., 544.

In contrast to our well reasoned conclusion in *State* v. *Tabone*, supra, 279 Conn. 543–44, that an irreconcilable conflict exists between §§ 54-125e (c) and 54-128 (c), and that, as a result, § 54-125e (c) must yield to § 54-128 (c), the majority now concludes, in effect, that no such irreconcilable conflict actually existed because a "necessary corollary" to our earlier decision in *Tabone*, was that "the defendant may be sentenced to a period of special parole unfettered by a mandatory minimum period, provided that the combination of the defendant's term of incarceration and term of special parole does not exceed the statutory maximum set forth by § 54-128 (c)." I respectfully submit that such an interpretation is not supported either by our decision in *Tabone* or by our broader jurisprudence.[5]

First, we did not mention in *Tabone* that the trial court was free to sentence the defendant to fewer than ten years special parole irrespective of the plain and unambiguous language of § 54-125e to the contrary. Equally important is that the analysis in *Tabone* suggests precisely the opposite. In our statutory interpretation, we determined that "pursuant to the *plain language* of § 54-125e (c), the trial court was *required* to sentence the defendant to a minimum of ten years of special parole. Accordingly, *the defendant's sentence of ten years of special parole is authorized by, and, indeed, required by, § 54-125e (c)*."[6] (Emphasis added.) *State* v. *Tabone*, supra, 279 Conn. 537.

Second, it appears that the majority has now settled on the necessary corollary theory for interpreting *Tabone* because of what it perceives as the lack of other suitable remedies. This position overlooks the existence of several remedies, however imperfect they may be, that would be available to the trial court upon remand. See part II of this dissenting opinion. More importantly, however, I submit that the majority's suggestion of a necessary corollary to our decision in

Tabone should not be given effect in the absence of legal authority that would permit us to give § 54-125e (c) a meaning contrary to its plain and unambiguous meaning.[7]

Third, in reaching its conclusion, the majority relies on our presumption that the legislature did not intend to enact conflicting legislation, and the court's authority to "harmonize" statutes where possible. These tools, however, do not justify the majority's result. At the outset, I note that the presumption that the legislature has not enacted conflicting legislation, although an important principle, is just that—*a presumption*. It does not in itself direct a particular result. Like all presumptions, it is capable of being refuted. *Kinney* v. *State*, 285 Conn. 700, 710, 716, 941 A.2d 907 (2008) (despite " 'strong presumption of constitutionality' " statute held unconstitutional). Accordingly, whether the presumption against conflicting statutes can be given controlling effect depends on whether an independent legal basis can be offered to support it. Although the majority correctly points out that we have in the past reconciled statutes so as not to frustrate the legislative intent, the majority is unable to cite to a case in which we have done so by giving one statute an interpretation that directly contravenes its plain and unambiguous meaning. See *Rivera* v. *Commissioner of Correction*, 254 Conn. 214, 242, 756 A.2d 1264 (2000) (court can reconcile and give concurrent effect to two statutes, but only by "fair interpretation").

In addition, the majority refers to a *future* legislative act, wherein the legislature has since amended § 54-125e (c) to remove the ten year mandatory minimum,[8] presumably to validate its conclusion that the trial court, in this case, is free from the mandatory minimum that was in effect at the time of the defendant's crime. Although the majority purports not to rely on this future legislative act to support its statutory interpretation, it nonetheless simultaneously argues that the fair notice concerns that militate against reliance on such acts in criminal cases are not present in this case. Because that argument is relevant only when the court, in fact, seeks to rely on a future legislative act,[9] I will briefly address why reference to that future legislative act is not proper as a general matter in criminal cases and, in this case, specifically.[10] Retroactive application of a subsequent legislative act has been employed sparingly and only within the civil context. See *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, 256 Conn. 674, 722, 780 A.2d 1 (2001), quoting *Dept. of Social Services* v. *Saunders*, 247 Conn. 686, 701–702, 724 A.2d 1093 (1999). Moreover, even if such reliance were appropriate in the criminal context, our law permits such analysis only when the legislature has *clarified*—as opposed to *changed*—the law. *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, supra, 722 ("whether the legislature intended to change or merely

clarify existing law is critical to our decision [whether to look to future legislative amendments]" [internal quotation marks omitted]). The outright elimination of a statutory minimum sentence, I submit, is undeniably a *change* in the law, and not a clarification. Of course, we could nonetheless give effect to the future amendment irrespective of the change in law if the legislature had evinced an intent to do so. In the present case, there is nothing in the language or legislative history that evinces an intent of the legislature to apply the amendment retroactively.[11]

Ordinarily, when faced with a similar statutory conundrum, we would look to various tools of statutory interpretation to give meaning to statutes that, on their surface, are in conflict. In *Rivers* v. *New Britain*, 288 Conn. 1, 950 A.2d 1247 (2008), for example, we relied on § 1-2z, which permits the court to look to legislative history when the plain meaning of a statute yields "unworkable results . . . ." In the present case, however, the scant legislative history on the special parole scheme yields no insight that would permit the court to give § 54-125e an interpretation in direct conflict with its plain meaning. In the absence of helpful legislative history, I note that § 1-2z does not further authorize the court, in effect, to recast a statute in order to overcome an irreconcilable conflict. Moreover, on occasion, we have looked to see whether the use of the phrase "shall" is mandatory or directory. In doing so we have stated that "the use of the word 'shall,' though significant, does not invariably create a mandatory duty." *Hall Manor Owner's Assn.* v. *West Haven*, 212 Conn. 147, 152, 561 A.2d 1373 (1989). When negative terminology accompanies the phrase, however, as is the case here, the term connotes a mandatory action. *Stewart* v. *Tunxis Service Center*, 237 Conn. 71, 78, 676 A.2d 819 (1996). Thus, by asserting in § 54-125e (c) that "such period shall be *not less* than ten years" the legislature unmistakably evinced a mandatory requirement. (Emphasis added.)

In short, because our tools of statutory construction cannot resolve the conflict, and reference to future legislative history bears no relevance to the question before us, there is no legal authority to support the *presumption* against conflicting statutes. As a result, we cannot give effect to those provisions of § 54-125e (c) that require a ten year sentence of special parole for a conviction in violation of General Statutes (Rev. to 1999) §§ 53-21 (2), 53a-71 and 53a-72a.[12] Accordingly, because we have no authority to rewrite § 54-125e (c), the solution to this statutory morass lies exclusively in the hands of the legislature, which, in fact, has acted to remedy the conflict since this issue came to light.

In addition to my concerns about the majority's analysis in reaching its conclusion, I am concerned about the potential effects of this decision on the defendant. In short, we cannot give retroactive effect to an unques-

tionably novel construction of § 54-125e (c) without running afoul of due process. In *Bouie* v. *Columbia*, 378 U.S. 347, 352, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964), the United States Supreme Court stated that "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." In determining whether this right has been violated, we have stated that "[i]f a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." (Internal quotation marks omitted.) *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 806, 950 A.2d 1220 (2008), quoting *Bouie* v. *Columbia*, supra, 354. Not only is the majority's construction novel, in that it is contrary to the plain meaning of the statute, but it also, in my opinion, operates to the defendant's disadvantage, thereby depriving him of his right to due process. "To fall within the ex post facto prohibition, a law must be retrospective—that is, it must apply to events occurring before its enactment—*and it must disadvantage the offender affected by it* . . . by altering the definition of criminal conduct *or increasing the punishment for the crime* . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *Lynce* v. *Mathis*, 519 U.S. 433, 441, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997); *State* v. *Parra*, supra, 251 Conn. 626 n.7.

The dispositive issue in determining whether the majority's novel interpretation operates to the defendant's disadvantage is whether the starting point for the due process analysis is ten years incarceration or ten years incarceration with an additional ten years special parole. That is, if we begin our analysis as to whether the new sentence increases the punishment for the crime from the original sentence of ten years imprisonment, with ten years special parole, then a sentence of ten years imprisonment, with nine years special parole clearly does not increase the punishment and would not operate to the defendant's disadvantage. That starting point, however, does not adequately recognize the fact that the original sentence of ten years imprisonment, with ten years special parole was an illegal sentence. Accordingly, I believe it is improper to analyze a due process inquiry starting from the basis of an illegal sentence. Rather, I contend that the appropriate starting point is the maximum legal sentence, in light of the irreconcilable conflict between §§ 54-125e (c) and 54-128 (c), namely, a sentence of ten years imprisonment. In that event, a sentence that includes nine years of special parole *not otherwise authorized by statute* clearly increases the punishment for the crime and violates the defendant's right to due process of law.

The discussion in footnote 23 of the majority opinion reflects a misunderstanding of the due process question. As I recognize in this dissenting opinion, I agree that under *State* v. *Raucci*, 21 Conn. App. 557, 575 A.2d 234, cert. denied, 215 Conn. 817, 576 A.2d 546 (1990), and *State* v. *Miranda*, 260 Conn. 93, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002), the trial court is bound only by the original sentencing intent of a period of ten years of incarceration followed by a period of ten years postrelease supervision. That sentencing limit, however, does not speak to the specific question before us, namely, whether the *ten year period of postrelease supervision* can be fulfilled by a period of *special parole*, as opposed to other forms of postrelease supervision. As noted previously, the periods of special parole urged by the majority are not authorized by statute and, therefore, the majority's proposed sentence results in an increase to the defendant's punishment in light of a *legal* sentence inclusive of special parole which, because of the irreconcilable conflict, is simply ten years incarceration. In addition, because the majority has reached its remedy sua sponte, the parties did not have the opportunity to brief the issue of whether the proposed sentence violates the defendant's right to due process.[13]

In sum, because the majority does not offer an independent legal basis to support the presumption against the enactment of conflicting statutes and, therefore, has not justified adequately its interpretation of § 54-125e (c), which contravenes the plain meaning of that statute, I respectfully dissent.

II

Because I agree with the majority that the defendant's current sentence is illegal, I next set forth what I believe is the appropriate remedy in light of the unique circumstances of this case. In *State* v. *Tabone*, supra, 279 Conn. 544, we remanded the matter back to the trial court for resentencing in accordance with *Raucci* and *Miranda*. Embodied in that order was the concept that when a sentence imposed as a result of a plea bargain is illegal, the best remedy is to resentence the defendant to a new legal sentence that approximates, as closely as possible, but does not exceed, the original sentencing intent. See *State* v. *Raucci*, supra, 21 Conn. App. 563; see also *United States* v. *VanDam*, 493 F.3d 1194, 1206 (10th Cir. 2007) ("[w]hen . . . the defendant does not seek to withdraw his guilty plea, the less drastic remedy of resentencing appears to be most apt"). It is clear to me, however, that under the sentencing scheme at the time of the defendant's crimes, there is no legal sentence that approximates the original sentencing intent, namely, a period of ten years of incarceration followed by a period of ten years postrelease supervision. Accordingly, in these unusual circumstances, I conclude that the proper remedy is to rescind the defen-

dant's original plea and permit the defendant to plead anew.

In *Santobello* v. *New York*, 404 U.S. 257, 263, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the United States Supreme Court listed two potential remedies—specific performance or withdrawal of the plea—when a prosecutor has breached a promise that induced the defendant to make a plea agreement. See also *State* v. *Littlejohn*, 199 Conn. 631, 644, 508 A.2d 1376 (1986) ("fairness ordinarily impels the court, in its discretion, either to accord specific performance of the agreement or to permit the opportunity to withdraw the guilty plea"). In his concurring opinion, Justice Douglas stated that "[i]n choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the [s]tate." *Santobello* v. *New York*, supra, 267; see also *State* v. *Rivers*, 283 Conn. 713, 732, 931 A.2d 185 (2007). The present case, however, is distinguishable from *Santobello* and its progeny in two respects. First, we are not presented with the breach of a prosecutor's promise. As in *Santobello*, the typical case involves a prosecutor who, for example, has promised to recommend a particular sentence, but later reneges and recommends a harsher sentence. See, e.g., *Santobello* v. *New York*, supra, 258–59. In the present case, neither party has breached the agreement. Rather, after two separate appeals, the defendant's sentences have been held to be illegal as a matter of statutory and constitutional law. Second, unlike the typical defendant faced with an illegal sentence, the defendant in this case does not explicitly request the opportunity to withdraw his plea.[14] Nor does the defendant seek specific performance. Rather, the defendant makes the extraordinary request that this court strike all periods of supervision from the plea agreement, resulting in a total effective sentence of ten years imprisonment.

I first address the defendant's request to have this court strike the periods of supervision from the plea agreement, which would result in a total effective sentence of ten years imprisonment. I agree with the decisions from other jurisdictions that have declined to entertain a similar request because no law or public policy supports such a remedy, and doing so would deprive the state of the benefit of its bargain. In *State ex rel. Gessler* v. *Mazzone*, 212 W. Va. 368, 374, 572 S.E.2d 891 (2002), the West Virginia Supreme Court stated that when a " 'bargain' [becomes] impossible, through mutual mistake regarding statutory realities . . . this [c]ourt cannot condone a resolution, as requested by the [p]etitioner, which would permit him to retain the benefit of his bargain by having six counts dismissed while serving no sentence for the crimes to which he desired to plead guilty. . . . The [p]etitioner

cannot choose which portions are advantageous to him and implore this [c]ourt to apply only those certain portions. There is no equity in that result, no semblance of a bargain, and certainly no public policy which would support such a result." See also *State* v. *Parker*, 334 Md. 576, 603, 640 A.2d 1104 (1994) (remedy involving unconditional release from custody deprives state of benefit of its bargain, i.e., certain period of confinement). In the present case, the defendant has pleaded guilty to crimes constituting sexual offenses against a child. Strong public policy considerations militate against directing a sentence that does not contain a period of postincarceration supervision. See *State* v. *Waterman*, 264 Conn. 484, 490, 825 A.2d 63 (2003) (sex offenders' actions cause serious harm to society and some data indicates that such offenders have greater probability of recidivism than other offenders); see also *Doe* v. *Pataki*, 120 F.3d 1263, 1266 (2d Cir. 1997). In sum, although I recognize that a court should accord the defendant's choice of remedy preference, as Justice Cardozo stated in *Snyder* v. *Massachusetts*, 291 U.S. 97, 122, 54 S. Ct. 330, 78 L. Ed. 674 (1934), "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." I would, therefore, decline to grant the defendant's request for a remedy that would require this court to strike all postrelease supervision from the plea bargain.[15]

I turn next to my conclusion that the only appropriate remedy under these unique circumstances is to order a rescission of the original plea agreement, thereby placing the parties in their original positions.[16] *State* v. *Garvin*, 242 Conn. 296, 314, 699 A.2d 921 (1997) ("[t]he validity of plea bargains depends on contract principles"); *Rojas* v. *State*, 52 Md. App. 440, 447, 450 A.2d 490 (1982) ("rescission is a desirable remedy when either party to a plea agreement cannot compel the other party to perform its material promise"). My conclusion to rescind the legally inoperative plea agreement finds support from other jurisdictions faced with similar circumstances. See *State ex rel. Gessler* v. *Mazzone*, supra, 212 W. Va. 374 ("[w]here a plea agreement cannot be discharged due to legal impossibility, the entire agreement must be set aside"); *People* v. *Caban*, 318 Ill. App. 3d 1082, 1087–89, 743 N.E.2d 600 (2001) (proper remedy for legally unfulfillable sentence was rescission because illegal contract is void ab initio); *Chae* v. *People*, 780 P.2d 481, 486 (Colo. 1989) (illegal sentence recommendation renders agreement invalid and requires guilty plea be vacated).

Although I recognize that rescission of a plea agreement may result in a manifest injustice if the defendant already has testified or provided evidence to the police that would place him at a severe disadvantage in subsequent plea renegotiations; see *State* v. *Rivers*,

supra, 283 Conn. 733–34; the defendant in the present case entered an *Alford*[17] plea to the charges, and, as far as the record reveals, has not provided the police with information that may serve to his later disadvantage. Additionally, I concur with the other jurisdictions that have concluded that there is no double jeopardy bar to retrying the defendant on all of the original charges. "The principle that [the fifth amendment] does not preclude the [g]overnment's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence." *United States* v. *Tateo*, 377 U.S. 463, 465, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964); see also *United States* v. *Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002) (having found plea agreement void, court held that because illegal sentence prevents both defendant and government from being bound by plea agreement, government may reinstate dropped charges); *Lewis* v. *Warner*, 166 Ariz. 354, 357, 802 P.2d 1053, 1056 (App. 1990) (recognizing that "dismissal of charges prior to trial, as part of a plea agreement or otherwise, does not operate as an acquittal so as to preclude later prosecution" on double jeopardy grounds); *Chae* v. *People*, supra, 780 P.2d 488 (district attorney may reinstate charges against defendant that were previously dismissed under plea agreement); *People* v. *Caban*, supra, 318 Ill. App. 3d 1089–90 (no double jeopardy violation when plea vacated due to legal impossibility); *Dixon* v. *State*, 981 S.W.2d 698, 699 (Tex. App. 1998) (where state, as part of plea bargain agreement, reduces charges against defendant in exchange for guilty plea, and defendant successfully challenges conviction, both parties resume their original positions, and no double jeopardy bar to retrying defendant for greater offense).

Under this remedy, of course, the defendant ultimately could receive a sentence harsher than the original sentence contemplated by the plea agreement. *United States* v. *Greatwalker*, supra, 285 F.3d 730 ("[The defendant's] success in this appeal may be costly. Because the illegal sentence prevents both [the defendant] and the [g]overnment from being bound by the plea agreement, the [g]overnment may reinstate the dropped charges and proceed to reprosecute the first-degree murder charge."); *United States* v. *Palladino*, 347 F.3d 29, 35 (2d Cir. 2003) ("what appears to be a 'victory' for [the] defendant in this case could ultimately result in a conviction on remand that carries a longer sentence than that initially imposed").[18] Nonetheless, because there is no basis in law or policy to either strike the postincarceration supervision or to order the defendant to serve a sentence greater than that permitted by law, I conclude that rescission is the only appropriate remedy.

Accordingly, I respectfully dissent, and would reverse the judgment and remand the case with instructions

that the trial court vacate the plea bargain and permit the defendant to plead anew.[19]

[1] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

[2] I join in parts IA and II of the majority opinion.

[3] We generally have applied the law in existence on the date of the offense. *In re Daniel H.*, 237 Conn. 364, 377, 678 A.2d 462 (1996).

[4] We recognized in *State* v. *Tabone*, supra, 279 Conn. 532 n.9, that General Statutes (Rev. to 1999) § 54-125e (c) was the applicable revision of the statute. We determined that although the statute had been amended in 1999; see Public Acts, Spec. Sess., June, 1999, No. 99-2, § 52; that amendment did not apply because the defendant was convicted of conduct that allegedly occurred before October 1, 1999, when the amendment took effect. Subsequent references to § 54-125e are to the 1999 revision, unless noted otherwise.

[5] Neither the state nor the defendant sought the remedy set forth by the majority.

[6] So clear was our decision that § 54-125e (c) *required* a minimum ten year sentence of special parole, that subsequent to publication of *Tabone* in the Connecticut Law Journal, the defendant filed a motion to correct an illegal sentence on the ground that his sentence of five years special parole with respect to his violation of subdivision (2) of General Statutes (Rev. to 1999) § 53-21 was illegal in light of *Tabone*, because it did not conform with the ten year minimum.

[7] To the extent that the majority relies on our decision in *Tabone* to justify its current interpretation of § 54-125e (c), such reliance, in effect, amounts to a *bootstrapping* approach. It is improper to rely on *Tabone*, which merely identified the conflict, to conclude that *Tabone* acts as a legal basis for authorizing the current interpretation. Had the majority's current interpretation of § 54-125e (c) been addressed in *Tabone*, that opinion likewise would have had to proffer a legal basis to justify that interpretation.

[8] General Statutes (Rev. to 1999) § 54-125e (c), as amended by Public Acts, Spec. Sess., June, 1999, No. 99-2, § 52, provides that "such period may be for more than ten years for a person convicted of a violation of . . . 53a-71 . . . ."

[9] Respectfully, I dispute the majority's contention that fair notice is not at issue here. As the majority itself recognizes, but does not adhere to, "such a practice [is] inappropriate when construing a penal statute wherein the construction proposed by the [majority] raises concerns of fair notice." *State* v. *Cote*, 286 Conn. 603, 624 n.14, 945 A.2d 412 (2008). The majority, however, provides only cursory analysis as to why such reliance does not raise the concerns of fair notice alluded to in *Cote*. That the trial court is bound by the limits of the defendant's plea does not speak to the issue of whether the novel interpretation of a criminal statute contrary to its plain meaning raises issues of fair notice, a point that I will address subsequently.

State v. *Kozlowski*, 199 Conn. 667, 682, 509 A.2d 20 (1986), on which the majority relies, is inapposite. In that case, the public act at issue "clearly spelled out [the] increased penalties . . . ." Id. In the present case, the majority supplies § 54-125e (c) with an interpretation that is in direct contrast to its "clearly spelled out" penalties, thus implicating the issue of fair notice.

[10] The subsequent amendment underscores the fact that the statute, at the time of the defendant's conviction, *required* a ten year minimum sentence of special parole.

[11] In *State* v. *Quinet*, 253 Conn. 392, 752 A.2d 490 (2000), we addressed a claim regarding a term of probation and the application of General Statutes (Rev. to 1995) § 53a-29 (e), which, prior to the legislature's amendment of § 54-125e (c), was an almost verbatim equivalent of, and undoubtedly the model for, § 54-125e (c) prior to its creation. In *Quinet*, the defendant claimed that No. 95-142, § 2 of the 1995 Public Acts, which amended General Statutes (Rev. to 1995) § 53a-29 (e) after the defendant's crime to create the imposition of a mandatory minimum sentence of probation for various crimes, could be applied retroactively in the hopes that the trial court could sentence him to a shorter prison term and longer probationary period. Id., 412–13. In reviewing the text and legislative history of the statute, we concluded that there was nothing to suggest that the legislature intended for the amendment to be applied retroactively. Id., 414. Thus, we asserted

that "[w]e will not give retrospective effect to a criminal statute absent a clear legislative expression of such intent. See, e.g., *State* v. *Parra*, 251 Conn. 617, 625–26, 741 A.2d 902 (1999); *In re Daniel H.*, 237 Conn. 364, 376, 678 A.2d 462 (1996); *State* v. *Crowell*, 228 Conn. 393, 401, 636 A.2d 804 (1994)." *State* v. *Quinet*, supra, 414.

Presumably, the majority relies on the fact that the legislature amended the statute in the subsequent legislative session. Reliance on the amount of intervening time, however, is a subjective consideration and improperly elevates that heretofore unannounced consideration above our well established requirement that the legislature has to evince a clear intent before we apply a change in the law retroactively. *Mead* v. *Commissioner of Correction*, 282 Conn. 317, 325, 920 A.2d 301 (2007) ("[t]he presumption that [a criminal statute] has only prospective effect can be overcome only by a clear and unequivocal expression of legislative intent that the statute shall apply retrospectively"). Silence in the text and silence in the legislative history do not evince a clear and unequivocal expression of legislative intent.

[12] There also exists an irreconcilable conflict for a violation of General Statutes (Rev. to 1999) § 53a-72b, which, at the time, carried a maximum period of incarceration of five years. See General Statutes (Rev. to 1999) § 53a-35a. On the other hand, there is no conflict with respect to violations of General Statutes (Rev. to 1999) §§ 53a-70, 53a-70a, 53a-70b and 53a-40, all of which then carried a maximum sentence of twenty years or greater. See General Statutes (Rev. to 1999) § 53a-35a.

[13] Although my research ultimately leads me to conclude that the majority's remedy violates the defendant's right to due process, I would have permitted the parties to file supplemental briefs on the issue.

[14] The record reveals, however, that the defendant previously requested to withdraw his plea and that he had expressed interest in doing so again at the first resentencing hearing after *Tabone*.

[15] I recognize, however, that a total effective sentence of ten years incarceration with no postrelease supervision is one of several possible results if the parties were to choose to enter into a second plea bargain or if the parties proceeded to trial.

[16] In its brief, the state argues, in the alternate, that vacating the defendant's plea is the proper remedy if the court finds that the state's agreement is invalid.

[17] *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[18] If the defendant either renegotiates a new plea bargain or goes to trial and is convicted, he must receive credit for time served. If, on the other hand, the defendant proceeds to trial and is acquitted, he may be able to pursue a civil remedy.

[19] I recognize that rescission of the plea agreement may require the state to marshal stale evidence and, more importantly, may require the testimony of a traumatized victim long after the crime. *Arevalo* v. *Farwell*, United States District Court, Docket No. 3:04-cv-00568-ECR-VPC (D. Nev. March 24, 2008) (court shied away from withdrawing plea, in part, because state would have to marshal previously traumatized victim of sexual offense years after attack). Although the state principally has argued that we should enforce the agreement, in taking the alternate position that a rescission is proper, I assume the state has taken into account the possibility that the victim may be called on to testify.