KATZ, J., dissenting. On appeal to the Appellate Court, the defendant claimed that the trial court improperly had failed to instruct the jury on the essential element of penetration with respect to the charge of attempted sexual assault in the first degree by fellatio in violation of General Statutes §§ 53a-70 (a) (1) and 53a-49 (a) (2). *State* v. *Scott*, 55 Conn. App. 660, 667, 740 A.2d 441 (1999). The state acknowledged that the trial court did not expressly instruct the jury regarding the penetration element of that offense, but claimed that, under the circumstances of this case, the trial court's definition of the term ''fellatio'' as '' 'the act of obtaining sexual gratification by oral stimulation of the penis' ''; id., 668; coupled with the defendant's testimony that he had sought to have the victim lick his penis, rendered any instructional impropriety harmless.

The Appellate Court rejected the defendant's claim of instructional impropriety. Id. The court concluded that the trial court's charge was adequate because it had apprised the jury that the instruction on the other charge against the defendant, aggravated sexual assault in the first degree in violation of General Statutes § 53a-70a (a) (1), informed the jury that penetration is necessary to establish vaginal sexual intercourse, and that

that charge also was applicable to attempted first degree sexual assault by fellatio, the only difference being the type of intercourse charged. Id., 667–68.

In this certified appeal, the defendant reasserts his claim of instructional impropriety with respect to the charge of attempted sexual assault in the first degree by fellatio. The majority of this court concludes, contrary to the determination of the Appellate Court, that the trial court improperly failed to instruct the jury that penetration is an essential element of the crime of sexual assault in the first degree by fellatio. The majority also concludes that that impropriety was not harmless beyond a reasonable doubt. Although I agree with the majority that the trial court's reference to its prior instructions on the aggravated sexual assault charge was inadequate to inform the jury of the penetration requirement under the attempted sexual assault charge, I respectfully disagree with its determination as to harmlessness.

The state acknowledges that the trial court did not instruct the jury that penetration is a requirement of the crime of sexual assault in the first degree by fellatio. It claims, however, that, in the circumstances of this case, that failure did not deprive the defendant of a fair trial. Specifically, the state claims that any instructional impropriety was harmless in light of the defendant's testimony that he sought to have the victim lick his penis. I agree with the state.

The standard by which harmless error in omitted jury instructions should be measured is well settled. ''A jury instruction that improperly omits an essential element from the charge constitutes harmless error if a reviewing court concludes beyond a reasonable doubt that the omitted element was *uncontested and supported by overwhelming evidence*, such that the jury verdict would have been the same absent error . . . . *Neder* v. *United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).'' (Emphasis in original; internal quotation marks omitted.) *State* v. *Davis*, 255 Conn. 782, 794, A.2d (2001). Therefore, I agree with the majority that, ''if the defendant's attempt to compel the victim to lick his penis satisfies the penetration requirement of the offense of first degree sexual assault by fellatio . . . the trial court's failure to instruct the jury regarding that requirement [was] harmless beyond a reasonable doubt in light of the defendant's own testimony that he told the victim to lick his penis.''[1]

Resolution of this issue is guided by well established principles. ''We have long held that criminal statutes are not to be read more broadly than their language plainly requires . . . .'' (Internal quotation marks omitted.) *State* v. *Crowell*, 228 Conn. 393, 400, 636 A.2d 804 (1994). ''[A]lthough we recognize the fundamental principle that [penal] statutes are to be construed strictly, it is equally fundamental that the rule of strict

construction does not require an interpretation which frustrates an evident legislative intent. . . . *State* v. *Burns*, 236 Conn. 18, 26–27, 670 A.2d 851 (1996).'' (Internal quotation marks omitted.) *State* v. *Ledbetter*, 240 Conn. 317, 330, 692 A.2d 713 (1997). ''[C]onstruction should not exclude common sense so that absurdity results and the evident design of the legislature is frustrated. *State* v. *Pastet*, 169 Conn. 13, 21–22, 363 A.2d 41, cert. denied, 423 U.S. 937, 96 S. Ct. 297, 46 L. Ed. 2d 270 (1975). If two constructions of a statute are possible, we will adopt the one that makes the statute effective and workable, not the one leading to difficult and bizarre results. *Muller* v. *Town Plan & Zoning Commission*, 145 Conn. 325, 331, 142 A.2d 524 (1958).'' *State* v. *McFarland*, 36 Conn. App. 440, 446, 651 A.2d 285 (1994), cert. denied, 232 Conn. 916, 655 A.2d 259 (1995).

Moreover, even where a criminal statute is at issue, this court has shown a ''disinclination to interpret statutes in a vacuum. . . . Where a court possesses clues to the meaning of a statute, there certainly can be no rule of law which forbids [their] use, however clear the words may appear on superficial examination.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Golino*, 201 Conn. 435, 442, 518 A.2d 57 (1986). No rule of construction demands that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope. ''It is sufficient if the words are given their fair meaning in accord with the evident intent of [the legislature].'' (Internal quotation marks omitted.) *Singh* v. *Singh*, 213 Conn. 637, 646, 569 A.2d 1112 (1990).

Against this background, we must decide whether the penetration requirement of forcible sexual intercourse by fellatio is satisfied when the victim of the sexual assault is compelled to lick the perpetrator's penis without necessarily also being compelled to insert the penis into her mouth. Contrary to the majority, I would conclude that it is. In other words, I do not distinguish between a penis that is stimulated orally inside the mouth and one that is stimulated orally by the tongue protruding beyond the lips.

It is well established that, when determining the meaning of a word, ''it is appropriate to look to the common understanding of the term as expressed in a dictionary.'' *State* v. *Indrisano*, 228 Conn. 795, 809, 640 A.2d 986 (1994). ''Penetration'' generally is defined as ''the act or process of penetrating,'' and ''penetrate'' means ''to pass into or through . . . to extend into the interior of . . . .'' Webster's Third New International Dictionary. As we recently have indicated, however, ''the plain language of [General Statutes § 53a-65 (2)] does not specify *what* must be penetrated . . . .'' (Emphasis in original.) *State* v. *Albert*, 252 Conn. 795, 804, 750 A.2d 1037 (2000).

I agree with the state that the penetration requirement

is met when an accused, by the use or threat of use of force, compels a victim to extend her tongue outside the mouth's customary boundary, that is, the lips, for the purpose of forcing the victim to take the accused's penis onto her tongue. The tongue is an integral part of the mouth, in essence, its floor. Indeed, it is difficult to imagine an act of fellatio without the use of the tongue. In these particular circumstances, it is reasonable to treat the usual boundary of the mouth as having been extended by the reach of the victim's tongue beyond the lips. When the forcible extension of the victim's tongue from its usual place within the oral cavity is viewed as extending the boundary of the mouth, the conduct of the accused in compelling the victim to lick his penis reasonably may be considered a violation, or penetration, of the boundary of the mouth as so extended.

This conclusion is supported by the fact that ''the legislature, in using the phrase '[p]enetration, however slight,' [in § 53a-65 (2)] evinced an intent to incorporate, into our statutory law, the common-law least penetration doctrine.'' Id. Like the majority, I turn to the explanation we provided in *Albert*. ''We first encounter the notion that the least penetration is sufficient to complete the crime of rape[2] in *State* v. *Shields*, 45 Conn. 256 (1877). [In *Shields*, the] defendant requested that the trial court charge the jury that to constitute rape actual penetration of the *body* of the woman by the insertion into her of the private parts of the accused is absolutely necessary. Id., 259. After charging as requested, the court added, but the least penetration is sufficient . . . . Id. [This court] affirmed the charge as correct. Id., 263. . . . [Thus] . . . in *Shields*, we upheld a jury charge that referred to penetration of the *body* . . . id., 259; and stated that the least penetration is sufficient [to commit rape]. . . . *We conclude that the public policy underlying our holding in Shields, namely, that the least penetration of the body is sufficient to commit rape, was to protect victims from unwanted intrusions into the interior of their bodies.* The legislature endorsed this public policy through its codification of the phrase [p]enetration, however slight in § 53a-65 (2).'' (Citation omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Albert*, supra, 252 Conn. 804–805.

The public policy underlying the least penetration doctrine of § 53a-65 (2), which defines the term ''sexual intercourse'' for purposes of § 53a-70, would be furthered by a determination that the conduct at issue in the present case satisfies the penetration requirement of that statutory provision. Although the tongue may be extended from its usual location inside the oral cavity, it is a part of the mouth's *internal* structure. Thus, when an attacker compels his victim to lick his penis by forcibly removing the victim's tongue from inside her mouth, the gross nature of that unwanted bodily intru-

sion is obvious. As we have stated, ''[t]he penetration, however slight language of [§ 53a-65 (2)] is a common-law carryover that was designed to . . . punish the fact, not the degree, of penetration.'' (Internal quotation marks omitted.) Id., 805. A conclusion that the defendant's conduct here does not satisfy the least penetration principle would fly in the face of common sense and, even more importantly, the clear public policy underlying our sexual assault statutes generally and § 53a-65 (2) specifically. See, e.g., *State* v. *Cobb*, 251 Conn. 285, 387, 743 A.2d 1 (1999), cert. denied, U.S. , 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000) (''This court does not interpret statutes in a vacuum, nor does it refuse to consider matters of known historical fact. . . . And although criminal statutes are strictly construed, it is equally fundamental that the rule of strict construction does not require an interpretation which frustrates an evident legislative intent.'' [Internal quotation marks omitted.]).

I recognize that the common definition of fellatio is oral stimulation of the penis and that fellatio can exist in the absence of penetration of the oral cavity. By adding to that definition the requirement of penetration, the legislature made mere placement of the victim's mouth on the penis insufficient as a basis upon which to convict under § 53a-70. In my view, the element of penetration is satisfied by penetration of the oral cavity, that is when the victim has been forced to extend her tongue outside the mouth's customary boundary, the lips. The extension of the victim's tongue from its customary home extends the boundary of the mouth, and the placement of the penis on the tongue constitutes actual penetration. When the defendant forcibly touches the victim's tongue with his penis, whether the victim's tongue happens to be inside or outside the mouth when the unwanted touching occurs, the penetration requirement is satisfied. A statute should not be interpreted to thwart its purpose simply because the legislature's purpose could have been more clearly stated. See *Frillici* v. *Westport*, 231 Conn. 418, 435–36, 650 A.2d 557 (1994). '' '[W]e will assume that the legislature intended to accomplish a reasonable and rational result.' '' *State* v. *Brown*, 235 Conn. 502, 516, 668 A.2d 1288 (1995), quoting *State* v. *Breton*, 235 Conn. 206, 226, 663 A.2d 1026 (1995). It is inconceivable to me that the legislature intended to draw the distinction that the defendant makes and the majority endorses.[3]

Accordingly, I respectfully dissent.

[1] The jury, by virtue of its guilty verdict on the charge of attempted sexual assault in the first degree by fellatio, necessarily found that the defendant had attempted to compel the victim to stimulate his penis orally.

[2] The crime of rape has been assimilated into our state's sexual assault statutes.

[3] ''We are not satisfied to be right, unless we can prove others to be quite wrong.'' W. Hazlitt, Note-Books (1856) p. 236. Therefore, I look to the legislature to *clarify* the meaning of penetration in accordance with this dissent.