KATZ, J., concurring. I agree with the majority that the trial court improperly permitted the state to introduce evidence regarding the threatening telephone call and the tire slashing incident involving the defendant, Douglas Sawyer, and that the admission of this evidence constituted harmful error. I write separately, however, because, unlike the majority, I would reach the third issue on which we requested supplemental briefing, namely, whether the Connecticut Code of Evidence (Code) constrains this court from reconsidering its holdings in previous sexual assault cases that prior sexual misconduct is viewed more liberally for admissibility than other types of prior misconduct.

At the outset, I note that, were I free to do so, I would favor reconsidering our holding in *State* v. *Kulmac*, 230 Conn. 43, 60–61, 644 A.2d 887 (1994), wherein we held that, in sexual assault cases, prior misconduct evidence may be viewed more liberally.[1] For the reasons set forth in part I of Justice Borden's dissenting and concurring opinion, however, in which he discusses the genesis and evolution of the Code, the significance of its commentary and the limitations it imposes on our flexibility, I recognize that we are constrained in so doing by the Code, which codified the holding in *Kulmac*. Thus, we are unable to reconsider that holding absent a rule change by the judges of the Superior Court, guided by the evidence code oversight committee.[2]

The majority appears to recognize that, since the adoption of the Code, the authority to change these rules lies solely with the judges of the Superior Court in the exercise of their judicial rule-making function. Nonetheless, the majority questions, but leaves to another day, whether, to the extent that evidentiary rules may "implicate substantive rights," those rules properly may be the subject of such judicial rule making, as opposed to common-law adjudication.[3] In my view, for the reasons that follow, the answer to this question is clear and straightforward and we should not suggest otherwise to the trial judges who are charged with the daily application of the Code. The Code governs where it speaks, and the courts' common-law rule-making authority governs either where the Code does not speak or where the Code requires interpretation. See Conn. Code Evid. § 1-2.[4]

The majority's questioning of this judicial rule-making authority appears to be predicated on a distinction in evidentiary rules between those that are substantive in effect and those that are, I assume, merely procedural in effect. I disagree with the majority's foundational premise. This court has stated unequivocally that "[t]he rules of evidence are procedural." *State* v. *Almeda*, 211 Conn. 441, 454, 560 A.2d 389 (1989); see also *Kelehear*

v. *Larcon, Inc.*, 22 Conn. App. 384, 391, 577 A.2d 746 (1990) ("[r]ebuttable presumptions fall within the parameters of the rules of evidence . . . and, therefore, are procedural" [citation omitted]). Accordingly, this court has held, for example, that "[a] change in the rules of evidence . . . after an offense, but before the time of trial, that allows the admission of evidence previously inadmissible does not violate the prohibition against ex post facto laws . . . even though it may work to the disadvantage of the accused." (Citations omitted.) *State* v. *Almeda*, supra, 454. Although the substantive, and perhaps dispositive, effect of the application of a procedural rule of evidence in many instances cannot be doubted, that effect does not change the inherent nature of that rule. See id., 453 (concluding that rules of evidence are procedural because they affect which facts can be placed before trier of fact, whereas "[l]aws that change the elements or facts necessary to establish guilt are substantive in nature"); cf. *State* v. *Skakel*, 276 Conn. 633, 680–81, 888 A.2d 985 (2006) (noting that, "[w]hile there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress" [internal quotation marks omitted]); *State* v. *Skakel*, supra, 682 (noting that "civil statutes of limitation are presumed to apply retroactively because they do not affect or alter substantive rights").

The fact that our rules of practice also prescribe similar rules on admissibility of evidence that are no more or less substantive in effect than the Code underscores this point. See, e.g., Practice Book § 25-35 (admissibility of recommendation of family relations counselor); Practice Book § 30-9 (admissibility of information allowed at juvenile detention hearing); Practice Book § 40-25 (inadmissibility of withdrawn alibi defense in criminal matters). Indeed, it is telling that, before the judges vote on any proposed changes to the Code, those changes must be reviewed and approved by the rules committee of the Superior Court, the same body charged with overseeing changes to provisions of the Practice Book. Thus, the Code essentially is an extension of the Practice Book, using the same format, addressing the same type of issues affecting trial court procedure and designed to effectuate the same goals of uniformity and accessibility. See Conn. Code Evid., forward, p. iv (noting that numbering system of code was modified to conform with system of Practice Book); see, e.g., Practice Book §§ 40-46 through 40-57 (setting forth additional requirements for use of deposition otherwise admissible under rules of evidence).

Finally, I question the legal foundation inherent in the majority's suggestion that the judges of the Superior Court could have had the authority to bind the courts as to purely procedural rules of evidence but not as to

those procedural rules of evidence having a substantive effect. I am unaware of any body of law that would support such a distinction. Accordingly, I would reach the issue of whether we are constrained by the Code and would conclude that the Code in fact does preclude our reconsideration of our holding in *Kulmac*.

[1] Were we able to reconsider our approach to prior misconduct evidence in sexual assault cases, I would rely on the reasons I articulated in my dissents in *State* v. *Kulmac*, supra, 230 Conn. 86–88, and *State* v. *Merriam*, 264 Conn. 617, 679–87, 835 A.2d 895 (2003), for rejecting a more liberal standard of admissibility.

[2] On balance, however, I continue to believe, consistent with the vote of the judges when we adopted the Code, that flexibility, although lost to some degree, is sufficiently afforded by both the evidence code oversight committee, which recently has reconvened to recommend changes, and the savings clause under § 1-2 (b) of the Code. See footnote 4 of this concurring opinion (setting forth text of Conn. Code Evid. § 1-2); see also part I of Justice Borden's dissenting and concurring opinion (explaining Code's recognition of need for flexibility in growth and interpretation of rules of evidence).

[3] I assume that the majority does not intend by its question as to evidentiary rules that "implicate substantive rights" to suggest that it is an open question as to whether the judges retained their common-law authority to adjudicate constitutional or other legal challenges to a rule of evidence when they voted to adopt and be bound by the Code. Our case law makes it clear that the judges retain common-law authority to adjudicate such challenges to a rule of evidence, irrespective of whether that rule derives from the Code, the rules of practice or statutes. See, e.g., *Statewide Grievance Committee* v. *Whitney*, 227 Conn. 829, 840–45, 633 A.2d 296 (1993) (discussing defendant's challenge to Practice Book provisions relating to scheduling of mandatory pretrial conferences in criminal matters as unconstitutional under state and federal constitutions but declining to review due to inadequate record), and cases cited therein; *State* v. *James*, 211 Conn. 555, 561–62, 560 A.2d 426 (1989) (recognizing legislature's shared authority with judiciary to enact rules of evidence, but noting court's prior exercise of its authority to declare such legislative rules violative of constitutional principles, such as due process and equal protection); see also General Statutes § 51-14 (a) (recognizing judicial rule-making authority but prescribing that "[s]uch rules shall not abridge, enlarge or modify any substantive right nor the jurisdiction of any of the courts"). The present case, however, raises no such challenge to the Code's rules regarding the admission and use of prior sexual misconduct evidence.

[4] Section 1-2 of the Connecticut Code of Evidence provides: "(a) Purposes of the Code. The purposes of the Code are to adopt Connecticut case law regarding rules of evidence as rules of court and to promote the growth and development of the law of evidence through interpretation of the Code and through judicial rule making to the end that the truth may be ascertained and proceedings justly determined.

"(b) Saving clause. Where the Code does not prescribe a rule governing the admissibility of evidence, the court shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience, except as otherwise required by the constitution of the United States, the constitution of this state, the General Statutes or the Practice Book. The provisions of the Code shall not be construed as precluding any court from recognizing other evidentiary rules not inconsistent with such provisions."