BORDEN, J., dissenting and concurring. As the majority notes; see footnote 1 of the majority opinion; when the court decided to consider this case en banc, we ordered the parties to file supplemental briefs on the following four questions: (1) Should this court determine that, in sexual assault cases, prior misconduct admitted under the common scheme exception is also admissible to prove the identity of the defendant as the perpetrator of the assault on the victim? (2) Should this court reconsider its holdings that, in sexual assault cases, prior sexual misconduct is viewed more liberally than other types of prior misconduct? (3) To what extent, if any, is this court constrained by the Connecticut Code of Evidence (Code) from answering either of the first two questions by changing our existing law? (4) What standards should this court adopt for "harmless error" of evidentiary rulings in criminal cases?

The majority concludes that, with respect to the first question, "prior misconduct evidence admitted under the common plan or scheme exception in sexual assault cases should not be admissible to prove the identity of the defendant as the perpetrator of the assault" on the victim, and, with respect to the second question, "our holdings in sexual assault cases that prior sexual misconduct is viewed more liberally than other types of prior misconduct should not be disturbed." See footnote 1 of the majority opinion. The majority does not, however, give its reasons for these conclusions, even though both parties have fully briefed both questions, giving their respective reasons.

As for the third question, the majority concludes that, because it has answered the first two questions essentially in the negative, albeit without explanation, "[i]t is . . . unnecessary to address the third issue," namely, whether the Code constrains us in changing any rule of evidentiary admissibility. See footnote 1 of the majority opinion.

In this connection, I agree with that part of Justice Katz' concurring opinion in which she persuasively demonstrates that there is no basis for the majority's implied questioning with respect to any limitation on the authority of the judges of the Superior Court to adopt the Code.[1] I note, first, that neither our questions posed to the parties for supplemental briefing, nor the parties' responses thereto, suggested in any way that the judges lacked any such authority. Indeed, since the Code's adoption as of January 1, 2000, no litigant in this court has raised such a question. Second, for all of the reasons stated by Justice Katz in her concurring opinion, the answer to the question is, as she states, "clear and straightforward": the judges adopted the Code in the exercise of their unquestioned rule-making

authority, involving matters of procedure, not substance, and there is simply no basis for the implied assertion that the judiciary, acting through the judges of the Superior Court, has any limitation on its authority to adopt a code of evidence.

The majority answers the fourth question by adopting a new standard for the harmless error doctrine as applied to an evidentiary error in a criminal case. The majority explains that new standard in part III of its opinion. As I explain more fully in part V of this dissenting and concurring opinion, I agree with the majority regarding the harmless error doctrine. I disagree, however, with the majority's conclusion that the defendant, Douglas Sawyer, has made the required showing of harmfulness under the newly articulated standard in the present case.

I disagree with the majority's conclusion regarding the first question. Unlike the majority, however, I think it is necessary to give my reasons for that conclusion. I conclude that, not only *should* this court determine that, in sexual assault cases, prior misconduct evidence admitted under the common scheme exception is also admissible to prove the identity of the defendant as the perpetrator of the assault on the victim, but that we have *already* done so, and that common sense and experience compel that conclusion.

I agree with the majority's ultimate conclusion regarding the second question, namely, that we should not reconsider our prior holdings that prior sexual misconduct is viewed more liberally than other types of prior misconduct. Again, unlike the majority, however, I find it necessary to give my reasons for that conclusion, which are compelled by the proper answer to the third question.

The third question asks: to what extent, if any, are we constrained by the Code from *changing* our existing evidentiary law, as embodied in that Code? In my view, we are so constrained. Put another way, the adoption of the Code by the judges of the Superior Court lodged in those judges, acting as a body, the authority to *change*, as opposed to the authority to *interpret*, the Code. Although this court, as does any court, retains the authority to interpret the Code, it cannot in the course of adjudication change the Code. In this respect, moreover, "the Code" necessarily includes, not only its black letter law, but the preexisting case law, which it was meant to embody at its adoption.

Applying these principles to the present case, I conclude that: (1) we are free to hold, and should explicitly acknowledge, that prior misconduct admitted under the common scheme exception is admissible to prove the identity of the defendant as the perpetrator in the case on trial because to do so would not in any way change the Code; and (2) irrespective of the merits of whether

we should reconsider our holdings that prior sexual misconduct is viewed more liberally in sexual assault cases than other types of misconduct, we are constrained by the Code from such reconsideration, because to do so would be to change the Code, which we cannot do. Furthermore, applying these rules of evidence to the facts of the present case, I conclude that the trial court did not abuse its discretion in admitting the telephone call as prior misconduct evidence; and that it did abuse its discretion in admitting the evidence of the tire slashing incident, but that the error was harmless. I would, therefore, affirm the judgment of the Appellate Court. *State* v. *Sawyer*, 74 Conn. App. 743, 813 A.2d 1073 (2003).

I

The Code

I begin with the third question, namely, the extent to which, if any, we are constrained by the Code from changing our rules regarding the admissibility of evidence. It is clear that we are so constrained. That is a choice that the judges of the Superior Court, including the justices of this court, as well as the judges of the Appellate Court, all of whom are also judges of the Superior Court,[2] made when we adopted the Code.

There is no dispute about the history, rationale, scope and method of adoption of the Code. In 1999, I, as chair of the rules committee of the Superior Court and as the chair of the original drafting committee of the Code, and at the request of the Connecticut Bar Journal, authored a short article explaining those matters. D. Borden, "The New Code of Evidence: A (Very) Brief Introduction and Overview," 73 Conn. B.J. 210 (1999). This article was published after the vote of the judges adopting the Code but before its effective date so that the members of the bar would have the same information regarding the Code that the judges had at its adoption.

That history, rationale and scope are as follows. What began as a cooperative effort among the judiciary, the legislature and the bar, under the aegis of the law revision commission and initially contemplated as a legislative enactment to be followed by a joint judicial and legislative oversight committee; id., 210–11; ultimately became, at the urging of the legislative leaders, a set of judicial rules of court, adopted "pursuant to the rule-making authority of the Judges," in order to insulate subsequent changes "from the political arena." Id., 211. Consequently, the original draft of the Code was submitted to a committee of judges, who made several changes to it and then submitted it, as revised, to the rules committee. That committee unanimously approved it, held a public hearing on it, and then submitted it for approval at the annual meeting of the judges of the Superior Court on June 28, 1999. Id., 211–12. The judges

approved the Code on that day, and it became effective January 1, 2000. Id., 210.

It is undisputed that the Code was intended to codify, and thus to embody, the law of evidence in our state as it existed in our case law at the time of the adoption of the Code. This was made clear by virtue of the language of the Code itself, by its commentary, which the judges explicitly adopted when they adopted the Code, and by my brief article. The rationale for having a code of evidence, as opposed to a body of case law, was clear and straightforward. It was to make it "easier and more efficient for all of the relevant actors in the litigation process—judges and lawyers—to have a code, stated in concise and familiar 'black letter' form, to which to refer. It will be printed in a separate paperback volume, like the new Practice Book format, that every judge will have with him or her on the bench, and each practitioner will be able to bring to court with him or her." Id., 212.

Section 1-2 (a) of the Code, entitled "Purposes of the Code," provides: "The purposes of the Code are to adopt the 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." (Emphasis added.) This language makes clear (1) that the Code adopts the existing case law, (2) that it does so as rules of court, and (3) that the two methods of growth and development are interpretation of the Code and judicial rule making. Significantly absent from this language is any reference to *change* of the rules of evidence, as embodied in the Code, by this court or any other court.

When the judges adopted the Code, moreover, they took an "unusual step . . . ." D. Borden, supra, 73 Conn. B.J. 213. "Unlike other situations, in which the Judges, when voting on rules, are guided by but do not formally adopt the commentary submitted by the Rules Committee that normally accompanies proposed rule changes, in adopting the Code the Judges formally adopted the Commentary as well. This is the first time that the Judges have done so. Thus, the Code must be read together with its Commentary in order for it to be fully and properly understood." Id.

That commentary makes it equally clear that the Code simply codified our preexisting case law, and that future change, as opposed to interpretation, would have to be by judicial rule making. The commentary to § 1-2 (a) provides: "Because the Code was intended to maintain the status quo, i.e., preserve the common-law rules of evidence as they existed prior to adoption of the Code, its adoption is not intended to modify any prior common-law interpretation of those rules." That same commentary also provides: "Subsection (a) provides a

general statement of the purposes of the Code. Case-by-case adjudication is integral to the growth and development of evidentiary law and, thus, future definition of the Code will be effected primarily through interpretation of the Code and through judicial rule making." Conn. Code Evid. § 1-2 (a), commentary.

Moreover, it is undisputed that the black letter law of the Code must be read in connection with the commentary and the cases cited therein, and that those cases are not meant to be exhaustive but to be illustrative of the general rules of evidence that they state. The Code is "a 'code' in the sense of a set of general statements of the rules embodied in the prior case law, without, however, being an attempt to restate every nuance, exception and different application of the rules of evidence expressed in that case law. That is why the Commentary accompanies each section, because that Commentary points to the general case law that the Code attempts to codify.

"This is a very important point: the Code cannot be properly understood without reference to the accompanying Commentary. The Commentary provides the necessary context for the text of the Code, and the text of the Code expresses in general terms the rules of evidence that the cases cited in the Commentary have established. Furthermore, the Commentary is not intended to be exhaustive. Simply because a case is not cited in the Commentary does not mean that it was intended to be excluded. Instead, the cases cited in the Commentary are intended to be representative of the rules of evidence that they establish and that are intended to be captured by the text of the Code." D. Borden, supra, 73 Conn. B.J. 212.

Finally, we, as judges of the Superior Court, did not overlook the issue of flexibility. Instead, we simply opted to provide for it by two different methods: (1) *interpretation* and *application* of the Code are to be by case-by-case adjudication; and (2) *change* of the Code is to be by rule making by the judges of the Superior Court, guided by a newly created body of judges, namely, the evidence code oversight committee.

When the judges adopted the Code, we recognized that "[o]ne of the arguments against having a code of evidence at all is that it decreases the flexibility that is part of the common-law process. Under the common-law process, the courts are able, on a case-by-case basis, to develop—and to change—the rules of evidence as experience and reason indicate such development and change to be appropriate. That kind of flexibility is, to some degree, lost when the rules of evidence are codified. *With codification, the courts are, in general, confined to interpreting and applying the Code, and changes require action by the codifying entity, in this case, the Judges of the Superior Court.* Two provisions are aimed at the amelioration of this necessary loss

of flexibility.

"First, the Code itself has a 'savings clause.' Section 1-2 (b) provides: '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.' This provision is patterned after the analogous provision of the Penal Code. See Connecticut General Statutes § 53a-4. It will provide some degree of flexibility and common law creativity on the part of a court that is confronted with an evidentiary question that is not covered, either explicitly or implicitly, by the Code." (Emphasis added.) D. Borden, supra, 73 Conn. B.J. 215. Thus, this section of the Code provides the courts with our full panoply of traditional powers in interpreting the Code and our full common-law powers in fashioning new rules of evidence for instances that are not covered by the Code either explicitly or implicitly.

"Second, when they adopted the Code, the Judges also created an ongoing Evidence Code Oversight Committee. The stated purpose of the committee is: 'to monitor the operations of the Code of Evidence as it is implemented in practice, and to make periodic recommendations for revision and clarification to the Rules Committee of the Superior Court.' " Id., 215–16. The evidence code oversight committee, which is composed of judges and practicing attorneys, both private and public, has been fully functioning since its inception in 2000.

From this discussion, the following conclusions could not be more clear. First, the Code has adopted—codified—our law of evidence as it existed in our case law at the time of the Code's adoption. Second, if a matter is covered by the Code, this court cannot change the rule; that function is for the evidence code oversight committee, the rules committee of the Superior Court, and ultimately for the judges of the Superior Court. This court may, of course, as may any court, *interpret* the Code, as applied to any set of facts in a given case.[3] Third, whether a matter is covered by the Code is determined, not only by the black letter language of the Code, but by its commentary and the case law referred to therein. Fourth, the case law referred to in the commentary is meant to be representative, not exhaustive; other case law not in conflict with those cases must also be considered as part of the Code.

Applying these principles to the question of whether this court has the authority to reconsider our prior holdings that, in sexual assault cases, evidence of prior

sexual misconduct is viewed more liberally than other types of misconduct, I conclude that we do not have such authority. Section 4-5 of the Code governs the admissibility of "other crimes, wrongs or acts . . . ."[4] Subsection (a) states the general rule that such evidence "is inadmissible to prove the bad character or criminal tendencies of" the actor. Conn. Code Evid. § 4-5 (a). Subsection (b), which is at issue in the present case, provides that such evidence "is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, *common plan or scheme*, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." (Emphasis added.) Id., § 4-5 (b). Although the common plan or scheme exception is not specifically mentioned in the commentary, we have firmly established that in sexual assault cases, we view evidence of prior sexual misconduct more liberally for purposes of admissibility than we do other types of misconduct. We first articulated this rule in *State* v. *Hauck*, 172 Conn. 140, 145, 374 A.2d 150 (1976), and have consistently followed it since. See, e.g., *State* v. *Aaron L.*, 272 Conn. 798, 804–805, 865 A.2d 1135 (2005); *State* v. *Ellis*, 270 Conn. 337, 355, 852 A.2d 676 (2004); *State* v. *Kulmac*, 230 Conn. 43, 60, 644 A.2d 887 (1994). Thus, it must be considered as embodied in the Code. Furthermore, to "reconsider" it would not be to interpret the Code; it would, instead, be to change the Code. Therefore, we cannot do so.

II

Common Scheme Evidence As Proof of Identity

The first question that we ordered the parties to brief was whether we should determine that, in sexual assault cases, evidence of prior misconduct admitted under the common scheme exception to the general rule is also admissible to prove the identity of the defendant as the perpetrator of the assault on the victim in the case on trial. As I have already stated, I conclude that we have already explicitly done and said so, and that common sense and experience compel that conclusion.[5]

It is first necessary to clear away some underbrush that has confused our jurisprudence in this area. I agree with the majority that we have traditionally articulated two—among others—separate exceptions to the general rule of inadmissibility of prior misconduct evidence, namely, identity evidence and common scheme evidence. I also agree that our test for the identity evidence is the so-called "logo" or "signature" test; see, e.g., *State* v. *Mooney*, 218 Conn. 85, 131–32, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991); and our test for the common scheme evidence is the three part test articulated by the majority, namely, that the common scheme evidence is not too remote in time, involved similar conduct to the

crime charged, and involved similar victims. See, e.g., *State* v. *Romero*, 269 Conn. 481, 498, 849 A.2d 760 (2004). Simply because the two tests are different, however, does not necessarily mean that they both cannot prove the same thing, namely, that the person who committed the prior misconduct also committed the criminal conduct in the case on trial. In fact, both our case law and our common sense demonstrate that common scheme evidence, just like "logo" evidence, necessarily permits the jury to infer that the person who committed the common scheme conduct also committed the crime charged. This is the same as saying, in the language of our question to the parties, that common scheme evidence is admissible to prove the identity of the defendant as the perpetrator of the assault on the victim.

It is also necessary to clear away any confusion about what we are really discussing. Although the defendant in the present case phrased his claims of error in terms of the *admissibility* of the common scheme evidence and although we phrased our questions to the parties in similar terms,[6] the question also involves what the trial court may or should tell the jury about the evidence admitted. As the majority acknowledges, there was no limiting instruction requested or given at the time of the admission of the testimony, but in its final instructions to the jury the court told the jury that it could use the evidence to establish the "identity" of the defendant. Thus, the question in the present case involves, not only the admissibility of the evidence under the common scheme exception, but the use to which that evidence may be put by the jury in its fact-finding function.

With this background in mind, I return to our case law on this question. Both before and after the promulgation of the Code, our case law recognized that evidence admitted under the common scheme exception permits the jury to infer the identity of the defendant as the perpetrator of the assault charged.

We first articulated the three part test for admissibility of common scheme evidence in sex crime cases in *State* v. *Hauck*, supra, 172 Conn. 145, stating: "Evidence of another sex offense is admissible to show a common scheme or plan if the offense is proximate in time, similar to the offense charged, and committed with persons similar to the prosecuting witness." (Internal quotation marks omitted.) We also clearly indicated that this evidence could be used by the jury to establish the identity of the defendant as the perpetrator of the crime charged, by ruling that, not only was the evidence in that case properly admitted, but that the trial court, "in its charge to the jury, properly instructed them that the other crimes evidence was to be considered only to show a circumstance, design or innate peculiarity in the two different crimes to *justify the indication that the commission of one would 'tend to directly affect the principal crime*,' and that it was not to show that

the defendant was of bad character." (Emphasis added.) Id., 147.

We reiterated the three part test in *State* v. *Esposito*, 192 Conn. 166, 169–70, 471 A.2d 949 (1984), stating: "Evidence of prior sex offenses committed with persons other than the prosecuting witness is admissible to show a common design or plan where the prior offenses (1) are not too remote in time; (2) are similar to the offense charged; and (3) are committed upon persons similar to the prosecuting witness." We further explained the rationale for such admissibility in terms making it quite clear that the common scheme evidence was admitted to prove that the defendant, who committed the common scheme conduct, also committed the crime charged: "When evidence of other offenses is offered to show a common plan or design the marks which the uncharged and the charged offenses have in common must be such that *it may be logically inferred that if the defendant is guilty of one he must be guilty of the other*." (Emphasis added.) Id., 172.

In *State* v. *Kulmac*, supra, 230 Conn. 61–62, we again reiterated the three part test for common scheme evidence, and its tendency to establish the identity of the defendant as the perpetrator of the crime charged: "In this case, the trial court admitted the evidence that the defendant had sexually abused S because of its tendency to prove that the defendant possessed a common scheme to abuse young girls sexually. When evidence of other offenses is offered to show a common plan or design the marks which the uncharged and the charged offenses have in common must be such that it *may be logically inferred that if the defendant is guilty of one he must be guilty of the other*. *State* v. *Esposito*, supra, 192 Conn. 172. To guide this analysis, we have held that [e]vidence of prior sex offenses committed with persons other than the prosecuting witness is admissible to show a common design or plan where the prior offenses (1) are not too remote in time; (2) are similar to the offense charged; and (3) are committed upon persons similar to the prosecuting witness. Id., 169–70." (Emphasis added; internal quotation marks omitted.)

Finally, subsequent to the promulgation of the Code, we decided *State* v. *Merriam*, 264 Conn. 617, 835 A.2d 895 (2003). In that case, we held that the prior sexual misconduct offered by the state, although not admissible under the identity exception, was admissible under the common scheme exception; but that the trial court abused its discretion in permitting the state to introduce the common scheme evidence for the purpose of "establish[ing] the defendant's identity as the perpetrator of the sexual assault alleged in [that] case." Id., 665.[7] Nonetheless, we held that the evidentiary error was harmless because the evidence had been properly admitted under the common scheme exception and was relevant to the

issue of the defendant as the perpetrator of that assault. Id., 667–68. Although I was part of the *Merriam* panel and joined the opinion in full, I now realize that our two holdings—(1) that the common scheme evidence was *inadmissible* to establish the identity of the defendant as the perpetrator of the sexual assault charged; and (2) the error was nonetheless harmless because that same evidence was *relevant* to the issue of the defendant as the perpetrator of the sexual crime charged—were in hopeless conflict with each other. Our discussion of the harmlessness of the error makes that conflict evident, and reinforces what we had been saying all along about common scheme evidence, namely, that it does in fact tend to establish the identity of the defendant as the perpetrator of the crime charged in the case on trial.

As a central part of our harmlessness analysis we stated: "[T]he evidence of the defendant's prior misconduct, which tended to establish a common plan or scheme, was relevant to establish that the defendant, and not someone else, had perpetrated the assault of the victim. In essence, therefore, *the prior misconduct evidence was admitted under the common plan or scheme exception to establish circumstantially the identity of the perpetrator*. In such circumstances, and in light of the trial court's instructions emphasizing that the prior misconduct evidence was not to be considered for the purpose of determining whether the defendant had a propensity to commit the crimes with which he had been charged, we conclude that the improper admission of that prior misconduct evidence to prove identity was harmless." (Emphasis added.) Id.

It is clear, therefore, that both prior to and subsequent to the promulgation of the Code, our case law has recognized that common scheme evidence tends to prove the identity of the defendant as the perpetrator of the sexual assault on trial. Indeed, it is impossible for me to see how it could be otherwise, as a matter of common sense and common inference. Whenever we admit common scheme evidence in a sexual assault case, under the three part test we have articulated, the inescapable underlying premise of that purpose is that it is relevant because it shows that, because the defendant acted in a generally similar way before, he is likely to have committed the conduct with which he is currently charged. Put another way, admitting such evidence to prove conduct of the defendant amounting to a common scheme or plan, explicitly rests on the fact that the prior misconduct was committed by the same person, namely, the defendant, and that, therefore, because he acted in a certain way before, he is likely to have acted in a certain way in the case at hand. I simply fail to see any other theory of relevance. In addition, this acknowledgment is consistent with the rationale for the more liberal standard of admissibility of prior sexual misconduct as explained in *Merriam*. That rationale rests, in

part at least, on the notion that, when human conduct involves sexual misconduct, people tend to act in generally consistent patterns of behavior, and that it is unlikely (although, of course, not impossible) that the same person will be falsely accused by a number of different victims. See id., 670–71.

Thus, we ought to acknowledge what we have been saying, both explicitly and implicitly, namely, that in sexual assault cases, at least, evidence admitted under the common scheme exception is admissible ultimately to prove the identity of the defendant as the perpetrator of the assault on the victim, D,[8] in the case at hand.[9] What is impermissible is that the prior misconduct evidence be admitted to prove the defendant's general bad character or his general criminal propensities; it is permissible, however, to admit such evidence to establish what logic and human experience suggest is relevant.

Moreover, it is impossible for me to conceive of a rational juror using it for any other purpose. Consider this scenario: the jury is permitted to hear that the defendant committed some prior sexual misconduct, and is told by the court that it is admitted to show a common scheme or plan. What possible relevance could the juror imagine it to have, other than that, because the defendant engaged in similar conduct before, he is likely to have done so in the case at hand? This does not mean, of course, that the juror is required to draw the inference that the state asks him to draw, namely, that because the defendant committed the prior conduct he committed the conduct charged; it simply means that, if the jury believes the prior misconduct evidence, it may draw the suggested inference.

This recognition is not meant, however, to be an open door policy for the admission of any and all prior sexual misconduct evidence. I repeat here what we stated in *Merriam*: "We emphasize, however, that our approach does not vest trial courts with carte blanche to allow the state to introduce any prior sexual misconduct evidence against an accused in sex crime cases. Rather, trial courts first must carefully determine whether the prior misconduct evidence sought to be admitted is being offered for a purpose other than to establish the defendant's bad character or criminal tendencies and whether that evidence falls within an exception to the general rule barring admissibility. See Conn. Code Evid. § 4-5 (a) and (b); see also, e.g., *State* v. *George B.*, [258 Conn. 779, 791–92, 785 A.2d 573 (2001)]. Courts then must scrupulously evaluate whether the probative value of such evidence outweighs the prejudicial effect that invariably flows from its admission. See, e.g., *State* v. *George B.*, supra, 793–94; see also Conn. Code Evid. § 4-3." *State* v. *Merriam*, supra, 264 Conn. 671–72.

Inexplicably, the majority simply ignores both this well established case law and the inescapable logic on

which it rests. Indeed, the majority does not even offer any explication for its conclusion to the contrary.[10]

III

The Telephone Call Evidence

I now turn to the trial court's ruling on the admissibility of the telephone call evidence under the common scheme exception. I conclude, contrary to the majority, that this ruling was within the trial court's discretion.

It is useful to recount how the trial court handled these evidentiary issues. At the pretrial hearing on the defendant's motion in limine regarding both the telephone call and the tire slashing evidence, the defendant indicated to the court that his theory of defense regarding the crimes charged was that D had fabricated the entire incident, and that, if there was an act committed upon her, he was not the perpetrator because he was not there at the time. He acknowledged that this theory was one of identity: the defendant was not the perpetrator of the crimes charged.

Upon a voir dire on the defendant's motion,[11] C, who was, at the time of the crimes charged, the wife of the defendant and, at the time of the trial, the former wife of the defendant, testified that, although she had graduated from high school, she had attended special classes there, and was "on disability" due to her inability to work and receipt of payments from the state department of mental retardation. C also testified that, at the time of the crimes charged, she and the defendant had lived across the street from D. C testified further that, several months prior to the start of the trial, in June, 2001, the defendant, to whom she was no longer married, telephoned her and threatened to make her life "hard and miserable" if she refused to have sexual relations with him. Although C refused to accede to this demand, the stress of the telephone call caused her great anxiety that necessitated her hospitalization. The trial court denied the defendant's motion as to this evidence, finding that both C and D were unmarried at the time of the defendant's relevant conduct and shared a similar mental incapacity,[12] that the defendant's strength and intellect were superior to that of C and D, that C and D both lived in close proximity to the defendant, who thereby had easy access to them, and that both the charged and uncharged misconduct involved threats of harm if C and D did not submit to his sexual demands.[13]

Thereafter, in the jury's presence, C testified that, on April 22, 2001, the defendant had telephoned her and had asked her for sex, and that she had refused. C testified that her refusal had angered the defendant, and he had told her that he would make her life "hard" and "miserable," and that, unless she had sex with him, he would tell her new boyfriend that she was continuing to have sexual relations with him. C also testified that

she was afraid of the defendant because he was stronger, older and bigger than she, and that she had reported the incident to the police.

Although the defendant did not request a limiting instruction to the jury when this evidence was admitted, during its final instructions, the court referred to the evidence and specifically charged the jury that the evidence "[had] not [been] admitted to prove the bad character of the defendant or his propensity to commit criminal acts." Instead, the court charged, the evidence was "admitted solely to show or establish the existence of intent which is a necessary element of the crime charged, *the identity of the person who committed the crime*, and the defendant's knowledge or possession of the means that might have been useful or necessary for the commission of the crime charged." (Emphasis added.)

The majority concludes that this evidence was inadmissible under the common scheme exception. The majority, however, misapplies the test for that admissibility and fails to afford the trial court's ruling the broad deference that our case law provides. In this regard, it is well settled that the trial court's ruling must be sustained so long as it does not amount to an abuse of discretion; *State* v. *Romero*, supra, 269 Conn. 497; and that this standard of review is to be viewed through the viewpoint that we are more liberal in admitting prior misconduct evidence in sexual assault cases. Id., 497–98. Furthermore, in applying the three part test, the "inquiry should focus upon each of the three factors, as a single factor will rarely be dispositive." Id., 498.

First, the three year time period was well within the temporal parameters that we previously have sustained. For example, in *State* v. *Romero*, supra, 269 Conn. 498–500, we sustained a nine year time period, and cited with approval our previous cases sustaining time periods of seven, ten and even more years. Id., 499. Significant to that conclusion was that there were "distinct parallels" in the conduct and the victims. Id., 500. In the present case, although the specific conduct was only similar in certain respects, the defendant's conduct in choosing his victims was distinctly parallel. In this respect, the second and third parts of the test overlap, because the defendant's choice of sexual victims is part and parcel of his sexual misconduct. C and D were sisters of nearly the same age; they both had a family relationship with him—C being his former wife at the time of the telephone call, and D being his former sister-in-law at the time of the offense charged; and they both shared a common mental disability of which he was vividly aware, making both of them singularly vulnerable to him. Furthermore, the three year time period was well within the time period established by prior case law, even in the absence of such distinctly parallel activity. See, e.g., id., 498–500 (nine year time period not too

remote). With respect to the second factor, namely, whether the conduct was similar to the charged offense, although there were certainly differences between the two, the trial court's findings of similarity were not an abuse of discretion. Specifically, the elements of, in the prior misconduct, attempted sexual intimidation of a very vulnerable victim, and, in the charged offenses, actual intimidation of and physical threats against a strikingly similar victim for a sexual purpose, were similar enough to come within the trial court's broad discretion. This is particularly true, given the relatively short period in the first factor, and the strength of the third factor, namely, the striking similarities between the two victims, which I have already discussed in the context of the time period. In addition, the admissibility of the evidence is further supported by the doctrine of greater liberality of the admission of such evidence in sexual assault cases. Finally, I can see no abuse of discretion in the court's determination that the probative value of this evidence outweighed its prejudicial effect.

IV

The Tire Slashing Evidence

I turn, next, therefore, to the admissibility of the tire slashing evidence. I agree with the majority that this evidence was improperly admitted. I conclude, however, that its admission was harmless.

This evidence was also the subject of the defendant's motion in limine described in part III of this opinion. The trial court had denied the defendant's motion as to this evidence, on the basis that the threats issued by the defendant were sufficiently similar to the threats made against D to be probative of the occurrence of the offenses charged and, therefore, the identity of the defendant as the perpetrator, based on his possession of and wielding of a knife. The court referred to this evidence in its final instructions to the jury, as indicated previously, permitting the jury to use this evidence to find intent, identity, and the defendant's possession of the means of committing the crimes charge.

This evidence was introduced as follows. The defendant took the stand and testified that he had not committed the crimes charged. In its cross-examination, the state asked whether he had owned a folding knife in 1998, which was when the tire slashing incident took place. The defendant responded in the affirmative. The state then asked why the knife had been confiscated and, over the defendant's objection, the court permitted the state to elicit from the defendant the particulars of the tire slashing incident.

The state, properly, does not attempt to bring this evidence under the rubric for admissibility of prior sexual misconduct based on common scheme. Instead, the state argues that the Appellate Court was correct in that this evidence was admissible to prove identity as

signature or "logo" evidence. *State* v. *Sawyer*, supra, 74 Conn. App. 757–58. The state also argues that, even if improperly admitted under that exception, the admission was harmless.

I agree with the majority that this evidence cannot be regarded reasonably as signature or logo evidence to establish the identity of the defendant as the perpetrator of the crimes charged in the present case. I also agree with the state, however, that the admission of this evidence was harmless.

First, this was not a case, as asserted by the defendant, solely of D's word against that of the defendant. The defendant's theory of defense was that the crimes never happened, and he testified that he had not been present at D's home on the day of the offenses. This testimony was directly contradicted by three witnesses with whom D lived, namely, D's fiancé, William Mercier, and two other persons, Charles Schilling and Holly Schilling. Mercier testified that he had arrived home at approximately 3 p.m. that day and had encountered the defendant in the living room, and that the defendant, who was carrying a folding knife on his hip, told Mercier that he previously had come into the house to yell at D about certain conduct of her children. Holly Schilling testified that she had seen the defendant leave the house that day and had heard the defendant tell Mercier that D should watch her children instead of watching television. Charles Schilling testified that, when he and Holly Schilling arrived, he saw the defendant outside the back door of D's house. Second, there was ample other evidence from numerous witnesses that the defendant regularly carried a knife in a sheath on his belt, and the defendant himself had testified that he had a violent and explosive temper. Thus, the majority's emphasis on evidence of the defendant's intimidating and threatening nature is exaggerated. That nature did not derive solely from this evidence; it was corroborated by the defendant's own testimony, and by the testimony of others, including that of D and C. Third, although this prior misconduct was somewhat serious in nature, it was not the type of evidence that was likely to arouse the passions or emotions of the jury, and it paled in comparison to the graphic nature of the evidence of the sexual assault on D. Fourth, the court gave a limiting instruction that prohibited the jury from inferring from this evidence a general bad character or criminal propensity on the part of the defendant. Thus, unlike the majority, I have a fair assurance that this evidentiary error did not substantially affect the verdict.

V

The New Harmless Error Standard

I agree with the majority's adoption of a new standard for determining whether a nonconstitutional error requires reversal in a criminal case. As I have stated

previously in this dissenting and concurring opinion, however, I disagree with the majority's application of the standard to the facts of the present case, and I conclude that any error by the trial court was harmless. I write further to underscore why I think we rightly abandon the prior standard, which required the defendant to establish that it was more probable than not that the error resulted in the guilty verdict.

The "more probable than not" standard suggests that if our appellate minds are in equipoise on the question of the harm caused by a trial error, the error is deemed to be harmless and the defendant has not carried his burden of establishing harm. Although it is, in my view, a close question, I am persuaded that, if the defendant successfully brings our minds to that point of equipoise, then we do not have a fair assurance that the error did not substantially affect the verdict, and the defendant should be granted a new trial. In other words, whether the error was serious enough to require a new trial should not, in my view, rest on such a finely honed knife's edge. I therefore agree with the majority that the formulation of the harmless error standard by the Second Circuit Court of Appeals in *United States* v. *Grinage*, 390 F.3d 746, 751 (2d Cir. 2004), more aptly captures the essence of that important appellate judgment call.

[1] I disagree, however, with Justice Katz' suggestion that, were we free to do so, we should reconsider our holding in *State* v. *Kulmac*, 230 Conn. 43, 60, 644 A.2d 887 (1994).

[2] General Statutes § 51-165 provides that the justices of this court, as well as the judges of the Appellate Court, are also judges of the Superior Court. Indeed, all of the justices' commissions explicitly acknowledge our appointments as judges of the Supreme Court and of the Superior Court.

[3] In my view, in most cases, as in the present case, the difference between changing and interpreting the Code will be clear. There will, of course, be close questions in that regard, and those will require the exercise of judgment on the part of the court.

[4] Section 4-5, including the commentary of the Code, provides: "(a) Evidence of other crimes, wrongs or acts inadmissible to prove character. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character or criminal tendencies of that person.

"(b) When evidence of other crimes, wrongs or acts is admissible. Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony.

"(c) Specific instances of conduct when character in issue. In cases in which character or a trait of character of a person in relation to a charge, claim or defense is in issue, proof shall be made by evidence of specific instances of the person's conduct.

"COMMENTARY

"(a) Evidence of other crimes, wrongs or acts inadmissible to prove character.

"Subsection (a) is consistent with Connecticut common law. E.g., *State* v. *Santiago*, 224 Conn. 325, 338, 618 A.2d 32 (1992); *State* v. *Ibraimov*, 187 Conn. 348, 352, 446 A.2d 332 (1982). Other crimes, wrongs or acts evidence may be admissible for other purposes as specified in subsection (b). Although the issue typically arises in the context of a criminal proceeding; see *State* v. *McCarthy*, 179 Conn. 1, 22, 425 A.2d 924 (1979); subsection (a)'s exclusion applies in both criminal and civil cases. See, e.g., *Russell* v. *Dean Witter Reynolds, Inc.*, 200 Conn. 172, 191–92, 510 A.2d 972 (1986).

"(b) When evidence of other crimes, wrongs or acts is admissible.

"Subsection (a) specifically prohibits the use of other crimes, wrongs or acts evidence to prove a person's bad character or criminal tendencies.

Subsection (b), however, authorizes the court, in its discretion, to admit other crimes, wrongs or acts evidence for other purposes, such as to prove:

"(1) intent; e.g., *State* v. *Lizzi*, 199 Conn. 462, 468–69, 508 A.2d 16 (1986);

"(2) identity; e.g., *State* v. *Pollitt*, 205 Conn. 61, 69, 530 A.2d 155 (1987);

"(3) malice; e.g., *State* v. *Barlow*, 177 Conn. 391, 393, 418 A.2d 46 (1979);

"(4) motive; e.g., *State* v. *James*, 211 Conn. 555, 578, 560 A.2d 426 (1989);

"(5) a common plan or scheme; e.g., *State* v. *Morowitz*, 200 Conn. 440, 442–44, 512 A.2d 175 (1986);

"(6) absence of mistake or accident; e.g., *State* v. *Tucker*, 181 Conn. 406, 415–16, 435 A.2d 986 (1980);

"(7) knowledge; e.g., *State* v. *Fredericks*, 149 Conn. 121, 124, 176 A.2d 581 (1961);

"(8) a system of criminal activity; e.g., *State* v. *Vessichio*, 197 Conn. 644, 664–65, 500 A.2d 1311 (1985), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986);

"(9) an element of the crime [charged]; e.g., *State* v. *Jenkins*, 158 Conn. 149, 152–53, 256 A.2d 223 (1969); or

"(10) to corroborate crucial prosecution testimony; e.g., *State* v. *Mooney*, 218 Conn. 85, 126–27, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991).

"Admissibility of other crimes, wrongs or acts evidence is contingent on satisfying the relevancy standards and balancing test set forth in Sections 4-1 and 4-3, respectively. For other crimes, wrongs or acts evidence to be admissible, the court must determine that the evidence is probative of one or more of the enumerated purposes for which it is offered, and that its probative value is not outweighed by its prejudicial effect. E.g., *State* v. *Figueroa*, 235 Conn. 145, 162, 665 A.2d 63 (1995); *State* v. *Cooper*, 227 Conn. 417, 425–28, 630 A.2d 1043 (1993).

"The purposes enumerated in subsection (b) for which other crimes, wrongs or acts evidence may be admitted are intended to be illustrative rather than exhaustive. Neither subsection (a) nor subsection (b) precludes a court from recognizing other appropriate purposes for which other crimes, wrongs or acts evidence may be admitted, provided the evidence is not introduced to prove a person's bad character or criminal tendencies, and the probative value of its admission is not outweighed by any of the Section 4-3 balancing factors.

"(c) Specific instances of conduct when character in issue.

"Subsection (c) finds support in Connecticut case law. See *State* v. *Miranda*, 176 Conn. 107, 112, 365 A.2d 104 (1978); *Norton* v. *Warner*, 9 Conn. 172, 174 (1832)."

[5] Indeed, even the defendant in the present case, although maintaining of course that the evidence should not have been admitted under the common scheme exception, explicitly conceded at oral argument in this court that evidence that *is* admitted under the common scheme exception may be used to establish the identity of the defendant as the perpetrator of the assault charged.

[6] For example, we asked whether "prior misconduct evidence admitted under the common scheme exception is also admissible to prove the identity of the defendant as the perpetrator of the assault on the victim?" See footnote 1 of the majority opinion.

[7] Indeed, as far as I can tell, *State* v. *Merriam*, supra, 264 Conn. 667–68, was the first time that this court had held that evidence admitted under the common scheme exception could not also be used by the jury to establish that the defendant was in fact the perpetrator of the crime under consideration.

[8] In keeping with our policy to protect the privacy interests of the victims of sexual abuse, we decline to identify the victim or others through whom her identity may be revealed. See General Statutes § 54-86e.

[9] Indeed, the same rationale applies where prior misconduct is admitted, not as common scheme evidence, but to prove motive or intent: the only relevance of the prior misconduct evidence is that, because the *defendant* acted in a particular way on a prior occasion, it is likely that *he* acted as charged in the case at hand. In all such cases, if the jury believes the prior misconduct evidence, it is a permissible inference from that evidence that *he* committed the crime as charged. That is what is known as identity.

[10] The closest the majority comes to an explanation for this conclusion is the following passage contained in part I of the majority opinion: "Evidence of another sex offense is admissible to show a common scheme or plan if the offense is proximate in time, similar to the offense charged, and committed with persons similar to the prosecuting witness. . . . This principle does not apply when uncharged misconduct evidence is admitted to prove identity because the degree of similarity between the charged crime and

the uncharged misconduct in *unrelated* incidents is the key consideration in establishing that the same individual committed both offenses. See *State* v. *Shindell*, 195 Conn. 128, 134–35, 486 A.2d 637 (1985)." (Citation omitted; emphasis in original; internal quotation marks omitted.)

This is wholly inadequate as an explanation. First, the passage from *Shindell* cited to does no more than repeat the unremarkable proposition that evidence admitted under the separate, identity exception, must be similar enough so as to be like a signature, and that the evidence offered in that case was offered, instead, under the common scheme exception, which in that case was that strand of the common scheme exception for evidence constituting "a continuing system of criminal activity." *State* v. *Shindell*, supra, 195 Conn. 135. Second, it neither says nor suggests that, once admitted under the common scheme exception, the evidence may not also form the basis of an inference that, because the defendant committed the prior misconduct he is likely to have committed the present crime. Indeed, precisely because the prior misconduct in *Shindell* was evidence of an ongoing system of criminal activity, that was precisely the basis for its relevance. Third, this passage says nothing about the other well established case law demonstrating that common scheme evidence lays the basis for an inference of identity of the defendant as the perpetrator of the sexual assault charged in the case at bar.

This demonstrates the majority's fundamental misunderstanding of the question that we asked of the parties, and that the majority incorrectly answers. The question is not, as the majority assumes, whether the two tests are the same. Of course, they are not. The question is, instead, whether, once evidence is admitted under the common scheme exception, the jury may use it as a basis for an inference that the defendant is the perpetrator of the crime charged. Of course, it may, because that is the only basis for its relevance.

[11] I describe the procedural posture of the tire slashing incident in part IV of this opinion, because it did not arise in the same fashion.

[12] The corresponding evidence regarding D was as follows. D was mentally disabled, could not read, and could write only her own name. D had failed to graduate high school, despite having been in special classes. D was unable to work and received social security disability payments. Because D was unable to work, she stayed at home caring for her two minor children. D was forty years old at the time of trial, and her sister, C, was one year younger.

[13] The trial court also denied the defendant's motion in limine regarding the tire slashing incident, which I discuss in more detail in part IV of this opinion.