KATZ, J., dissenting. The Connecticut Code of Evidence (code) is a judicial codification of general rules of prospective application. These rules are the functional equivalent of laws. The judges of the Superior Court, a title that the justices of this court and the judges of the Appellate Court also hold, adopted the code in the exercise of their heretofore unquestioned rule-making authority in matters of procedure. Nonetheless, the majority[1] concludes that, "despite the adoption of the code by the judges of the Superior Court, the appellate courts of this state retain the authority to develop and *change* the rules of evidence through case-by-case common-law adjudication." (Emphasis added.) In one fell swoop, the majority has eviscerated the force of the code and crowned itself the "evidentiary monarch"; C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) § 1.3.2, p. 19; entitled to make changes to the code at will. In my view, it is the exclusive purview of the evidence code oversight committee, the rules committee of the Superior Court, and ultimately the judges of the Superior Court to make changes to the code.[2]

I also disagree with the majority's conclusion that this case should be remanded for a new trial on the kidnapping charge and that *State* v. *Sanseverino*, 287 Conn. 608, 949 A.2d 1156 (2008), should be overruled to achieve the majority's intended outcome. In so concluding, the majority has failed to apply the analytical framework in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), which dictates directing a judgment of acquittal on the kidnapping charge for the defendant, Carlos DeJesus, in light of the evidence presented to the jury in this case. Accordingly, I respectfully dissent.

I

The majority posits four reasons why this court is not constrained in its ability to overrule or modify a rule of evidence despite the fact that the judges of the Superior Court have codified that rule into the code: (1) "Although it is clear [from the stated purpose of the code under § 1.2 (a)] that the judges of the Superior Court intended the law of evidence to grow and develop in the future through 'interpretation of the [c]ode' and through 'judicial rule making,' the meaning of these two terms . . . is unclear"; (2) the history of the code only "reflects that [it] was intended to provide the bench and the bar with a concise and authoritative restatement of the state's common law and identified statutory rules of evidence"; (3) there is no express evidence in the text of the code or its history to "support the conclusion . . . that the code was intended to divest this court of its inherent authority to change and develop the law of evidence through case-by-case common-law adjudication"; and (4) the majority's construction "is consistent

with our duty to interpret statutes in a manner that avoids placing them in constitutional jeopardy . . . because it is questionable whether the judges of the Superior Court have the authority under article fifth, § 1, of the state constitution to codify a code of evidence that strips the appellate courts of their common-law adjudicative function." (Citations omitted.) In my view, these reasons are unsupported and untenable.

The issue of whether this court has authority to overrule or modify a rule it had prescribed in an adjudication after the judges of the Superior Court subsequently have adopted that rule as part of the code was addressed extensively in Justice Borden's concurring and dissenting opinion in *State* v. *Sawyer*, 279 Conn. 331, 374, 904 A.2d 101 (2006).[3] Therefore, I need not set forth at great length the history, rationale, scope and method of adoption of the code, as those subjects have been well documented. See generally D. Borden, "The New Code of Evidence: A (Very) Brief Introduction and Overview," 73 Conn. B.J. 210 (1999). Suffice it to say that, 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; see id., 210–11; ultimately became, at the urging of 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. In other words, rather than adopting the code itself, as a set of statutes much like the Penal Code; see General Statutes, tit. 53a; the legislative committee charged with oversight of this subject, in accordance with General Statutes § 51-14,[4] submitted the code to former Chief Justice Callahan, as head of the judicial branch, for consideration and adoption. In accordance with that request, Chief Justice Callahan appointed a committee to consider and revise the proposed code and commentary for adoption by the judges of the Superior Court. The decision to adopt our case law, without modification, was determined to be the best course of action as a matter of expediency, not as a matter of deference. See C. Tait & E. Prescott, supra, § 1.2.2, p. 7.

It is undisputed that the code was intended to codify, and thus embody, the law of evidence in our state as it existed in our case law at the time of the adoption of the code. The purposes of the code, as set forth in § 1-2 (a), 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 [c]ode and through judicial rule making to the end that the truth may be ascertained and proceedings justly determined." With respect to the first of the two purposes, the commentary explains that the intent "was to place common-law rules of evidence and certain identified statutory rules of evidence into

a readily accessible body of rules to which the legal profession conveniently may refer." Conn. Code Evid. § 1-2 (a), commentary.

It is significant that the compilation of rules was not designated a *handbook* of evidence, which would have accomplished this general purpose but not constitute binding law. Indeed, there was no need for a nonbinding compilation of the rules of evidence, as there already was such a source then available to the bar, which was updated regularly to reflect changes to the case law and on which our courts frequently relied at the time the process for adoption of the code was initiated.[5] See C. Tait & J. LaPlante, Handbook of Connecticut Evidence (2d Ed. 1988), preface, p. xxxv ("[t]he purpose of this [h]andbook is to reduce this substantial body of material [found in common case law, statutes and constitutional provisions] to a concise statement of the law in a form readily accessible to judges, lawyers and students"). Thus, for the judges of the Superior Court merely to have intended to reduce the substantial body of material to something that was handy to use, but had no binding effect, the six years spent by the two drafting committees (one instituted by the legislature and the other instituted by the judicial branch at the legislature's behest) would have been a waste of time and resources.[6]

Rather, there was a need for an authoritative, binding statement of rules. Thus, a "code" of evidence was created, analogous to the Federal Rules of Evidence. See Conn. Code Evid. § 1-2 (a), commentary.[7] A code, however, unlike a handbook, "is the functional equivalent of legislation, namely, a set of generalized rules of prospective application not arising out of a particular case or controversy to be determined under the court's adjudicatory powers." C. Tait & E. Prescott, supra, § 1.2.2, p. 13; see, e.g., Code of Judicial Conduct; Uniform Commercial Code, General Statutes, tit. 42a; State Building Code, General Statutes § 29-252; Fire Safety Code, General Statutes § 29-292; Public Health Code, General Statutes § 19a-36. Indeed, the codification of certain statutory rules of evidence along side the common-law rules; see Conn. Code Evid. § 1-2 (a), commentary; evidences this intended effect.

The language of § 1-2 (a), therefore, makes clear that (1) the code adopted the existing case law *as rules of court*, and (2) the two methods of growth and development in the law of evidence were to be through interpretation of the code and judicial rule making. See id. ("[b]ecause the [c]ode was intended to maintain the status quo, i.e., preserve the common-law rules of evidence as they existed prior to adoption of the [c]ode, its adoption is not intended to modify any prior common-law interpretation of those rules"); id. ("[c]ase-by-case adjudication is integral to the growth and development of evidentiary law and, thus, future definition of

the [c]ode will be effected primarily through interpretation of the [c]ode and through judicial rule making").

The first identified method of growth—interpretation—readily can be understood in accordance with its commonly understood meaning as applied in scores of cases. " '[I]nterpret' " is defined as "[t]o construe; to seek out the meaning of language"; Black's Law Dictionary (6th Ed. 1990); " 'interpretation' " is defined as "[t]he art or process of discovering and ascertaining the meaning of a statute, will, contract, or other written document . . . ." Id. When a court interprets, it cannot change the inherent meaning of words or supply additional terms to change the meaning of the provision at issue. See *Testa* v. *Geressy*, 286 Conn. 291, 308, 943 A.2d 1075 (2008) ("[t]he process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case" [internal quotation marks omitted]); *Lucarelli* v. *State*, 16 Conn. App. 65, 70, 546 A.2d 940 (1988) ("[c]ourts must interpret statutes as they are written . . . and cannot, by judicial construction, read into them provisions which are not clearly stated" [citations omitted]). Thus, the code recognizes that the law of evidence will grow by way of construction of ambiguities and gaps in the rules. Case-by-case adjudication necessarily is one means by which that interpretation may occur.

The second method of growth identified under § 1-2 (a) is by way of "judicial rule making." Rule making is a term generally associated with the exercise of a legislative type function, typically a process whereby a body prescribes a general rule of prospective effect unconnected to a particular party or matter.[8] See *Petrowski* v. *Norwich Free Academy*, 2 Conn. App. 551, 556–57, 481 A.2d 1096 (1984) ("[it is particularly important to note that [the case discussed] did not involve a public body acting in a quasi-judicial capacity, but, rather, one in a legislative or rulemaking capacity since the procedure or formula used by the authority applied equally to all those to be assessed"), rev'd on other grounds, 199 Conn. 231, 506 A.2d 139 (1986). "*Judicial* rule making" consistently has been used by our courts to describe the legislative type function exercised by the judicial branch when it adopts rules of practice and procedure. See, e.g., *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 286, 914 A.2d 996 (2007) (citing case that discusses Practice Book provision and noting that "subject matter jurisdiction is, with certain constitutional exceptions . . . a matter of statute, not judicial rule making"); *State* v. *Sawyer*, supra, 279 Conn. 331–32 n.1 ("[W]e acknowledge that, since 2000, the year in which the [code] was adopted, the authority to change the rules of evidence lies with the judges of the Superior Court in the discharge of their rule-making function. . . . To the extent that our evidentiary rules may be deemed to implicate substantive rights, we believe that it is unclear

whether those rules properly are the subject of judicial rule making rather than the subject of common-law adjudication."); *Stafford Higgins Industries, Inc.* v. *Norwalk*, 245 Conn. 551, 577 n.20, 715 A.2d 46 (1998) (stating when discussing effect of rules of practice that "[w]e have indicated that subject matter jurisdiction is, with certain constitutional exceptions not applicable here, a matter of statute, not judicial rule making"); *Pamela B.* v. *Ment*, 244 Conn. 296, 307, 327, 709 A.2d 1089 (1998) (stating in response to defendants' claim that relief sought by plaintiff from defendant chief court administrator "would supersede the rule-making power of the judges of the Superior Court" that "we are unconvinced that the plaintiff's first claim for relief necessarily would result in or be tantamount to an impermissible encroaching by [the defendant chief court administrator] upon judicial rule-making authority"); *State* v. *Murray*, 225 Conn. 355, 356, 623 A.2d 60 ("[t]he issue in this appeal is whether Practice Book § 986 [4] is a valid exercise of the judicial rule-making authority, or whether, as the trial court held, § 986 [4] is unconstitutional because it violates the separation of powers between the legislative and judicial branches"), cert. denied, 510 U.S. 821, 114 S. Ct. 78, 126 L. Ed. 2d 46 (1993); *Rules Committee of the Superior Court* v. *Freedom of Information Commission*, 192 Conn. 234, 242–43, 472 A.2d 9 (1984) (stating when considering whether rules committee was subject to Freedom of Information Act that, "[i]n determining the proper scope of judicial rule-making, three classes of concerns may be identified: concerns that go to substantive rules, concerns that go to procedural rules, and concerns that go to administrative rules"); *State* v. *Clemente*, 166 Conn. 501, 532, 353 A.2d 723 (1974) ("[t]he history of legislative authorization for judicial rule-making, the legislature's authority to make procedural rules and its relation to the court's inherent rule-making ability were discussed in *In re Appeal of Dattilo*, 136 Conn. 488, 492, 494, 72 A.2d 50 [1950], in which it was indicated that the statute in question was within both the legislative power and the court's inherent rule-making ability"); *Burton* v. *Planning Commission*, 13 Conn. App. 400, 405, 536 A.2d 995 (1988) ("We do not read the language, '[a]t the hearing,' in General Statutes § 8-28 [b] to mean that the Practice Book rules providing for such a hearing must be ignored. Indeed, were we to do so we would be required to confront a constitutional question of the separation of powers between the legislature and the judiciary because of the possibility of a 'legislative intrusion on the judicial rule-making function.' "), aff'd, 209 Conn. 609, 553 A.2d 161 (1989); see also *Norwalk Street Ry. Co.'s Appeal*, 69 Conn. 576, 595, 37 A. 1080 (1897) ("means of a legislative nature must be used by courts in establishing necessary rules of practice").

The authority reserved to the courts in their adjudicative capacity as a result of the conferral of rule-making

authority on the judges of the Superior Court expressly is addressed in the saving clause set forth in § 1-2 (b) of the code. Because, "[w]ith codification, the courts are, in general, confined to interpreting and applying the [c]ode, and changes require action by the codifying entity, in this case, the Judges of the Superior Court"; *State* v. *Sawyer*, supra, 279 Conn. 374 (*Borden*, *J.*, concurring and dissenting); this provision was added to the code to temper this necessary loss of flexibility that previously was part of the common-law process. Id. The saving clause expressly and unambiguously provides: "*Where the* [*c*]*ode 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 [c]ode shall not be construed as precluding *any* court from recognizing other evidentiary rules *not inconsistent* with such provisions." (Emphasis added.) Conn. Code Evid. § 1-2 (b). As was explained by the chair of the drafting committee when the code first was introduced: "This provision is patterned after the analogous provision of the Penal Code. See . . . General Statutes § 53a-4.[9] 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* [*c*]*ode*." (Emphasis added.) D. Borden, supra, p. 215. "Thus, this section of the [c]ode provides the courts with our full panoply of traditional powers in interpreting the [c]ode and our full common-law powers in fashioning new rules of evidence for instances that are *not covered by the* [c]ode either explicitly or implicitly." (Emphasis added.) *State* v. *Sawyer*, supra, 374 (*Borden*, *J.*, concurring and dissenting). As seems abundantly clear from the express language of § 1-2 (b), where the code *does* cover a rule of evidence, the courts cannot overrule or modify that rule, as such an action would be inconsistent with the code provision, unless some statutory or constitutional conflict arises. Indeed, this court previously has acknowledged that it cannot construe the code to effectuate a substantive change to the common-law rules codified therein. See *State* v. *Whitford*, 260 Conn. 610, 639–40, 799 A.2d 1034 (2002) (Stating, when rejecting the defendant's interpretation of a code provision that was not in accordance with the common-law rule adopted as a rule of court: "In propounding his argument regarding § 4-5 (c) of the code [addressing character evidence], the defendant ignores that portion of § 1-2 of the code and its commentary, previously cited, which indicates that the code was intended only to codify the common law. If, as the defendant suggests, we were to read § 4-5 (c) as permitting introduction of evidence regarding a victim's specific violent acts, we would be interpreting the code in a manner that would

effectuate a substantive change in the law. Because such a result would be contrary to the express intention of the code's drafters, we reject it.").

It is also significant that, in order to execute effectively the judicial rule-making power, the judges of the Superior Court, when adopting the code, created an evidence code oversight committee. The stated purpose of that committee is " 'to monitor the operations of the [code] as it is implemented in practice, and to make periodic recommendations for revision and clarification to the [r]ules [c]ommittee of the Superior Court.' " D. Borden, supra, p. 216. In so doing, the judges decided to treat the code as a component to, and a corollary of, the rules of practice, as proposed rules of evidence cannot be submitted for adoption by the judges of the Superior Court unless they are approved by the rules committee that oversees the rules of practice.

It is well understood that, pursuant to the legislative delegation of authority under § 51-14 (a); see footnote 4 of this dissenting opinion; the judges of the Superior Court are "empowered to adopt and promulgate rules regulating pleading, practice and procedure in judicial proceedings in courts in which they have the constitutional authority to make rules, for the purpose of simplifying proceedings in the courts and of promoting the speedy and efficient determination of litigation upon its merits." (Internal quotation marks omitted.) *Steadwell* v. *Warden*, 186 Conn. 153, 162, 439 A.2d 1078 (1982). This court previously has "recognize[d] that the rules of practice and the codes adopted by the judges of the Superior Court have the force of law." *Mozzochi* v. *Beck*, 204 Conn. 490, 501 n.7, 529 A.2d 171 (1987); accord *Noble* v. *Marshall*, 23 Conn. App. 227, 231, 579 A.2d 594 (1990) ("[t]he rules that have been adopted by the judges of the Superior Court have the force of law"); see also *State* v. *McCahill*, 265 Conn. 437, 446, 828 A.2d 1235 (2003) ("our rules of statutory construction apply with equal force to interpretations of the rules of practice"); *State* v. *Strickland*, 42 Conn. App. 768, 780 n.8, 682 A.2d 521 (1996) ("[t]he rules of practice are designed to regulate pleading, practice and procedure; see General Statutes § 51-14 [a]; and are to be construed in accordance with our rules of statutory construction"), rev'd on other grounds, 243 Conn. 339, 703 A.2d 109 (1997). Certainly, it could not be suggested that, other than interpreting statutes or striking them as unconstitutional, this court could amend or disregard a statute. Accordingly, this court has recognized that the appellate courts are not free to amend, disregard or overrule rules of practice "because that authority is vested in the judges of the Superior Court. See General Statutes § 51-14 (a); cf. *Kupstis* v. *Michaud*, 215 Conn. 435, 437, 576 A.2d 152 (1990) (observing that '[t]he problem illuminated by [the] litigation [in that case] call[ed] for a change in the rules of practice that this court [could not] enact')." *Weinstein* v. *Weinstein*, 275 Conn.

671, 736, 882 A.2d 53 (2005) (*Zarella*, *J.*, dissenting); accord *Oakley* v. *Commission on Human Rights & Opportunities*, 237 Conn. 28, 30, 675 A.2d 851 (1996) ("[d]espite [the] legitimacy [of the concern raised by the certified question], the concern is one that cannot be addressed through the process of appellate review but requires a change in the appropriate provisions either of the General Statutes or of the Practice Book"); *State* v. *Johnson*, 228 Conn. 59, 61–62, 634 A.2d 293 (1993) ("[a]lthough a clarifying amendment of the rules of practice to address the problem illuminated by this case might well be desirable, this court does not sit as the [r]ules [c]ommittee of the Superior Court"); *State* v. *Jennings*, 216 Conn. 647, 665 n.11, 583 A.2d 915 (1990) ("We do not sit to decide the utility or need for written instructions in the Connecticut courts. To the extent that the defendant seeks such a decision, his request is more properly directed to the [r]ules [c]ommittee of the Superior Court."). Thus, just as this court has recognized on numerous occasions that this court lacks authority to make changes to the rules of practice, there is no principled rationale for treating the code rules any differently.[10] The majority's attempt to distinguish the two by virtue of the fact that the rules of evidence "facilitate the court's core judicial truth-seeking function" is undermined by this court's previous recognition that rules of practice are essential to that same function; see *State* v. *Robinson*, 230 Conn. 591, 598, 646 A.2d 118 (1994) (explaining in reference to then Practice Book § 876 [now § 42-36], that "[t]he right to have witnesses sequestered is an important right that facilitates the truth seeking and fact-finding functions of a trial"); *State* v. *Whitaker*, 202 Conn. 259, 266, 520 A.2d 1018 (1987) (recognizing in context of then Practice Book §§ 756 through 768 [now §§ 40-17 through 40-25], which address, inter alia, defenses of mental disease or defect and alibi, that "some degree of mutual discovery is essential to the truth-seeking process"); and there are numerous rules of practice that undoubtedly are essential to that function; see, e.g., Practice Book §§ 13-22 through 13-24 (use of admissions); Practice Book § 25-32 (mandatory disclosure in family matters); Practice Book § 13-31 (use of depositions at trial); Practice Book §§ 16-1 through 16-38 (setting forth, inter alia, rules governing matters that jury may consider and jury deliberations). Indeed, the opinion of the court in *State* v. *Sawyer*, supra, 279 Conn. 331 n.1, joined by every member of the majority in this case except Chief Justice Rogers, who had not yet been appointed to this court, expressly "acknowledge[d] that, since 2000, the year in which the [code] was adopted, the authority to change the rules of evidence lies with the judges of the Superior Court in the discharge of their rule-making function."[11] See also *State* v. *Whitford*, supra, 260 Conn. 639–40 (rejecting interpretation that would make substantive change to code "[b]ecause such a result would be contrary to the express intention of the code's drafters").

From the foregoing textual analysis, I agree with Justice Borden that "the following conclusions could not be more clear. First, the [c]ode has adopted—codified—our law of evidence as it existed in our case law at the time of the [c]ode's adoption. Second, if a matter is covered by the [c]ode, 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 [c]ode, as applied to any set of facts in a given case."[12] *State* v. *Sawyer*, supra, 279 Conn. 375 (*Borden*, *J.*, concurring and dissenting). Additionally, when the code is silent, *in the context of their adjudicative function*, the courts have at their disposal our full common-law powers in fashioning new rules of evidence. See, e.g., *Monti* v. *Wenkert*, 287 Conn. 101, 125–26, A.2d (2008) (setting forth rule regarding disclosure and admissibility of verdict contingent settlement agreements, but limiting use of such evidence to be consistent with § 4-8 [a] of code).

The majority's textual analysis dismisses as irrelevant the clear language in § 1-2 (b) that precludes "any court" from acting in its common-law adjudicative capacity to modify or overrule code provisions except when a conflict arises between a provision of the code and a provision of the state constitution, federal constitution, General Statutes or rules of practice. Their rationale for so doing, relegated to a footnote of their opinion, is nothing short of extraordinary. They posit that, because the commentary to the code provides that it governs "evidentiary issue[s] that might arise *during trial*"; (emphasis added) Conn. Code Evid. § 1-2 (b), commentary; the saving clause is, therefore, "applicable exclusively to the Superior Courts, rather than to the Appellate Court or to this court." See footnote 17 of the majority opinion. This reasoning begs the question—are not the only evidentiary issues that an appellate court examines ones that arise during a trial? Evidentiary rulings are made in the trial court in the first instance. Our appellate courts have no authority to render advisory opinions unconnected to a contested issue that has arisen in the course of a trial court proceeding. *Packer* v. *Board of Education*, 246 Conn. 89, 122–23, 717 A.2d 117 (1998) (*Berdon*, *J.*, concurring); see *Pizzuto* v. *Commissioner of Mental Retardation*, 283 Conn. 257, 263–64, 927 A.2d 811 (2007). Thus, the commentary's acknowledgment of the context in which evidentiary issues will arise in the first instance does not render the saving clause inapplicable to appellate courts. See Conn. Code Evid. § 1-2 (b) and commentary (referring, respectively, to "any court" and "courts" in plural).

After ignoring the clear mandate of § 1-2 (b) that clearly answers the question before us, the majority then concludes that the language in § 1-2 (a) designating

"interpretation" and "judicial rule making" as the methods for further development of the law of evidence is at least ambiguous as to the question before us in light of two references in the commentary. Specifically, the majority concludes that, because the commentary provides that "[*c*]*ase-by-case adjudication* is integral to the growth and development of evidentiary law"; (emphasis added) Conn. Code Evid. § 1-2 (a), commentary; we should read the term "interpretation" broadly, presumably so broadly that it means to allow appellate courts to modify the code. The majority inexplicably rejects the common and universally applied meaning of interpretation, which would limit the court's authority to explaining or construing a provision in the code, to find an ambiguity where there is none.

The majority also reasons that, "[b]ecause the commentary to § 1-2 refers to evidentiary law developed via case-by-case common-law adjudication as 'rules of evidence,' it appears that the judges of the Superior Court intended the term 'judicial rule making' to include evidentiary law developed through case-by-case common-law adjudication." Although the commentary refers to "rules" of evidence developed through common-law adjudication, I am at a loss to imagine what else the commentary would or indeed *could* label such tenets. The generic term "rules" is not synonymous with the legal term of art "judicial rule making," which, as the cases previously cited indicate, is used to describe the legislative type function exercised by the judicial branch when making procedural rules.[13] Judicial rule making involves a "formal procedural process with its attendant time constraints and expository limitations." C. Tait & E. Prescott, supra, § 1.6.2, p. 24. A single trial court judge can set forth a "rule" in a given case, but "[n]o single judge may usurp th[e] [rule-making] power from the entire judiciary. Orderly procedure and due process in the administration of justice requires the uniform application of the rules of practice properly adopted by the authorized body." *Park City Hospital* v. *Commission on Hospitals & Health Care*, 14 Conn. App. 413, 423, 542 A.2d 326 (1988) (*Bieluch*, *J.*, dissenting), aff'd, 210 Conn. 697, 556 A.2d 602 (1989). Indeed, "[i]f judges, acting in their adjudicatory capacity, were free to expand, contract, or otherwise alter the rules they promulgated in their own [Code of Judicial Conduct, it] would cease to function as a code, with a code's attendant attributes of completeness, ease of access, and authoritativeness." C. Tait & E. Prescott, supra, § 1.7.2, p. 27.

Therefore, the majority ignores both the well understood meaning of "interpretation" and "judicial rule making" as well as the *express* limitation that new rules of evidence through common-law adjudication only may be fashioned in instances that are *not covered by the code* either explicitly or implicitly; Conn. Code Evid. § 1-2 (b); to reach its conclusion that the code is silent

on the court's ability to change the rules of evidence through case-by-case common-law adjudication. Buoyed by their manufactured ambiguities, the majority turns to the discussion at the judges' meeting at which the code was adopted for express evidence regarding the effect that adoption of the code would have upon this court's authority to change evidentiary law on a case-by-case basis. Although I acknowledge that the minutes of that meeting do not reflect the express statement in Justice Borden's presentation to that group that I am sure both he and I regret in hindsight, that silence is hardly dispositive.

First, it is well-known that, as chair of both the evidence code drafting committee and the Practice Book rules committee, Justice Borden spent many hours at judges' association meetings explaining the code prior to his official presentation. Thus, his statements at the official meeting reasonably should be viewed as a summation, not a comprehensive discussion of all of the ramifications of adoption of the code. Second and of greater significance, the majority improperly assumes that the judges of the Superior Court, many of whom had served on either the evidence code drafting committee or the rules committee: had no understanding or appreciation of what it means to adopt a *code*, as opposed to a handbook; failed to understand the meaning of the saving clause setting forth the scope of the courts' authority with respect to the code; and had no knowledge of our case law recognizing similar constraints on the courts' authority with respect to the rules of practice. Because these facts are evident, however, I assume that, despite Justice Borden's failure to state *spell it out* for them, the judges of the Superior Court were aware that they would have plenary power over both the rules of practice and the code, thus relieving the appellate courts of authority to change such rules. Indeed, had it not then been clear, one would have expected some response to Justice Borden's law review article, published prior to the effective date of the code, explaining that the saving clause of the code was modeled on the saving clause of the Penal Code; see footnote 9 of this dissenting opinion and accompanying text; the latter of which judges clearly understood to limit the appellate courts' authority to change common-law crimes or defenses previously set forth in case law and codified into that code. See *Valeriano* v. *Bronson*, 209 Conn. 75, 92–95, 546 A.2d 1380 (1988) (recognizing that, if court had adopted common-law "year and a day rule," rule was abrogated by Penal Code and saving clause of that code would preclude court from readopting that rule); see also *State* v. *Guess*, 244 Conn. 761, 778–79, 715 A.2d 643 (1998) (determining that rule being considered was not inconsistent with Penal Code and therefore court not barred from adopting rule under saving clause); *State* v. *Walton*, 227 Conn. 32, 44–45, 630 A.2d 990 (1993) (same).

I also question the majority's reliance on anecdotal evidence. The fact that any one trial judge, no matter how senior or well respected, did not appreciate the full import of his or her vote does not mean that the code is not what it expressly purports to be. Indeed, given that this court generally accords special weight to statements of intent by legislators who sponsor or draft a bill at issue; *Cotto* v. *United Technologies Corp.*, 251 Conn. 1, 9 n.6, 738 A.2d 623 (1999); *United Illuminating Co.* v. *Groppo*, 220 Conn. 749, 760 n.14, 601 A.2d 1005 (1992), aff'd, 226 Conn. 191, 627 A.2d 407 (1993); *State* v. *Guckian*, 27 Conn. App. 225, 237, 605 A.2d 874 (1992); one would think that the interpretations offered by Justice Borden, as chair of the committee charged with drafting the code, and by Professor Colin Tait, as one of the original members of the drafting committee; see footnote 12 of this dissenting opinion; would carry greater weight. Indeed, if anecdotal evidence were persuasive, I would point the majority to a letter in the files for the evidence code oversight committee from Justice Borden to me in my capacity as chair of that committee, dated a few weeks after the effective date of the code. That letter not only reflects that the text of the code clearly conveyed that the code foreclosed the majority's conclusion in this case that "the appellate courts of this state retain the authority to . . . change the rules of evidence through case-by-case common-law adjudication," it further indicates, as reflected in questions posed to Justice Borden, that it was clear that the code first would have to be amended before the appellate courts would have authority to change a rule under the code.[14]

If all else fails, the majority relies on the maxim of statutory construction that we construe statutes, whenever possible, to avoid constitutional infirmities; *Denardo* v. *Bergamo*, 272 Conn. 500, 506 n.6, 863 A.2d 686 (2005); to conclude that this court *must* retain authority to change the rules of evidence through case-by-case common-law adjudication. Specifically, the majority posits that "*it is questionable* whether the judges of the Superior Court have the authority under article fifth, § 1, of the state constitution to codify a code of evidence that strips the appellate courts of their common-law adjudicative function." (Emphasis added.) Although the aforementioned maxim is a reliable tool of statutory construction, it should not be invoked when there is no real constitutional threat. The majority has failed to demonstrate that such a threat exists.

The numerous cases, previously discussed, in which this court has held that the appellate courts have no authority to change rules of practice, as that authority is vested exclusively in the judges of the Superior Court, squarely repudiate the notion that the binding effect of the code violates the constitution. The process by which those rules are adopted is identical to the process by

which the rules under the code were adopted. If the binding effect of the code is unconstitutional, so too is the binding effect of the Practice Book. This court has considered constitutional challenges regarding separation of powers concerns via legislative intrusion into the court's authority to adopt rules of practice, without ever suggesting that the procedure within the judicial branch itself may be constitutionally suspect. See *Bleau* v. *Ward*, 221 Conn. 331, 603 A.2d 1147 (1992); *Mitchell* v. *Mitchell*, 194 Conn. 312, 481 A.2d 31 (1984); *Steadwell* v. *Warden*, supra, 186 Conn. 153; *State* v. *Clemente*, 166 Conn. 501, 353 A.2d 723 (1974); see also *Fishman* v. *Middlesex Mutual Assurance Co.*, 4 Conn. App. 339, 494 A.2d 606, certs. denied, 197 Conn. 806, 807, 499 A.2d 57 (1985).

To the extent that our cases have recognized inherent rule-making authority independent of statutory or constitutional grant, this court has recognized that such authority is not vested exclusively in the Supreme Court and never has suggested that the lower courts' inherent authority is subservient to this court's adjudicatory authority. See, e.g., *Massameno* v. *Statewide Grievance Committee*, 234 Conn. 539, 553–54, 663 A.2d 317 (1995) ("The Superior Court possesses inherent authority to regulate attorney conduct and to discipline the members of the bar. . . . The judiciary has the power to admit attorneys to practice and to disbar them . . . to fix the qualifications of those to be admitted . . . and to define what constitutes the practice of law. . . . In the exercise of its disciplinary power, the Superior Court has adopted the Code of Professional Responsibility." [Citations omitted; internal quotation marks omitted.]); *State* v. *Sanabria*, 192 Conn. 671, 691–92 n.16, 474 A.2d 760 (1984) ("The judicial *branch* has inherent authority to make rules of administration, practice, and procedure with regard to its functions. . . . If the judges of the Superior Court had adopted Practice Book procedures for probable cause hearings before the enactment of [No. 83-210 of the 1983 Public Acts], the constitutional grand jury provision would have taken effect at that time. . . . [I]f both the General Assembly and the judges of the Superior Court failed to establish procedures, thereby leaving the constitutional provision in limbo for an unreasonable period, this court could have imposed such procedures in order to effectuate the amendment. Because the legislature did act within a reasonable period, it was not necessary for us to do so." [Citations omitted; emphasis added.]); *State* v. *King*, 187 Conn. 292, 297, 445 A.2d 901 (1982) ("[C]ourts have an inherent power, independent of statutory authorization, to prescribe rules to regulate their proceedings and facilitate the administration of justice as they deem necessary. . . . It was in the exercise of this power that the judges of the Superior Court adopted [the rule of practice relating to disclosure of presentence investigation reports] as part of a major revision

of the rules of criminal procedure." [Citation omitted; internal quotation marks omitted.]); see also *In re Appeal of Dattilo*, supra, 136 Conn. 492 ("[T]he statutes now give the judges of the Superior Court authority not only to make rules to carry out the provisions of the Practice Act [of 1879] but also, in the words of [Public Acts 1855, c. 26, §§ 9, 13], to 'make all necessary and proper rules, not contrary to law, for the trial of causes and other proceedings in said superior court.' Even if this were not so, it was within the power of the judges to make the particular rule in question. Apart from legislative authority, courts acting in the exercise of common-law powers have an inherent right to make rules governing procedure in them.").

The majority also seems to overlook the circumstances leading to the adoption of the code and the effect of § 51-14. Former Chief Justice Peters, as head of the entire judicial branch, requested that the legislature adopt a code of evidence. Had the legislature acceded to that request, this court could not assert that its adjudicatory authority unconstitutionally had been abridged because it no longer could change common-law rules codified by the legislature.[15] The court would be limited to its traditional common-law adjudicatory function of interpreting those rules, even if we determined that the reasons first leading us to adopt the rules no longer are sound.[16] The chairs of the judiciary committee, however, chose to leave the adoption of the code to the judicial branch. To the extent that a formal delegation of authority to the judicial branch would have been required, none was necessary, as the legislature previously had executed a delegation by way of § 51-14. See footnote 4 of this dissenting opinion.

It is conceivable that Chief Justice Callahan, as then head of the judicial branch, could have initiated a rule-making process governed exclusively by the Supreme Court. The fact that he initiated a process governed by the judges of the Superior Court, however, is entirely consistent with § 51-14. Indeed, such a procedure for judicial rule making has been sanctioned by the legislature by statute since the mid-1800s; see *In re Appeal of Dattilo*, supra, 136 Conn. 490–92; and the legislature expressly has directed the Superior Court to promulgate numerous other procedural rules under the authority delegated pursuant to § 51-14.[17]

I also would point out that our state constitution, unlike those of many other states, does not confer express authority on the state's highest court to make rules of practice and procedure generally, including rules of evidence, or confer express rule-making authority specifically over all lower courts.[18] Indeed, if one were to examine the various state constitutions to glean whether they reflect a view that the states' highest courts have inherent rule-making authority over trial courts, several states' constitutions would suggest to

the contrary. In Georgia, where the state constitution vests the legislature with ultimate authority over rule making, but vests the Supreme Court with authority to adopt rules not inconsistent with law, that court's rules are not effective until the rules are approved by the lower court that would be subject to the rules. See Ga. Const., art. VI, § 1, paras. 1 and 9; *Bell* v. *Austin*, 278 Ga. 844, 846, 607 S.E.2d 569 (2005). In California, the state constitution vests rule-making authority in a judicial council, whose voting members consist of the Chief Justice and one other judge of the Supreme Court, three judges of the Court of Appeal and ten judges of the Superior Court. Cal. Const., art. VI, § 6. That scheme is notable in that the Superior Court judges constitute a majority of voting council members and thus necessarily could determine rules that would be binding on the Supreme Court.

Several other states' constitutions confer rule-making power on their highest court, but subject that power to legislative oversight by either allowing the legislature to disapprove rules enacted by the court or requiring the court's rules to be consistent with the law.[19] In some states, in the absence of any express constitutional conferral of authority or when the constitution vests authority in the legislature, a state's legislature may, by statute, delegate its rule-making authority to the state's highest court.[20] Our legislature, of course, has addressed rule making, but has delegated authority to all of our courts. See General Statutes § 51-14 (a). Thus, given the absence of any express and exclusive constitutional grant of rule-making authority to *this* court, the variety of constitutional schemes for rule making and the delegation of authority under § 51-14,[21] I see nothing to indicate that a constitutional conflict would arise by construing the code, as written, to allow the judges of the Superior Court to make rules that bind this court. The mere fact that, predating our constitution, this court had set forth rules of evidence in the context of an adjudication simply demonstrates what is undisputed—that this court has authority to do so—it does not answer the question in dispute, that is, whether another judicial body can adopt rules that this court cannot overrule.

In his concurrence, Justice Palmer acknowledges that the code clearly precludes changes to the code except by the rule-making process under the aegis of the judges of the Superior Court, but posits that this limitation applies only to the Superior Court—despite express language in § 1-2 (b) that this limitation applies to "*any* court"—because a different conflict would arise if that section were deemed to bind the appellate courts. (Emphasis added.) Specifically, the concurrence concludes that such a result would be inconsistent with this court's *inherent* supervisory authority over the administration of justice.[22] I disagree.

Because "[o]ur supervisory powers are invoked only in the *rare* circumstance where [the] traditional protections are inadequate to ensure the fair and just administration of the courts"; (emphasis added) *State* v. *Hines*, 243 Conn. 796, 815, 709 A.2d 522 (1998); undoubtedly that would not afford a basis of free-floating authority to overrule code provisions for any reason that we deem proper. I agree, however, that this court's supervisory authority extends to the adoption of rules to guide the trial courts in both the civil and criminal context. Nonetheless, such authority is exercised in the *absence* of a rule, when there are *gaps* in a rule or *to supplement* procedures under a rule. See, e.g., *State* v. *Gould*, 241 Conn. 1, 15, 695 A.2d 1022 (1997) (prescribing rule, in conjunction with existing rule of practice vesting trial court with discretion to allow jury to replay videotaped deposition testimony, that "it must be done in open court under the supervision of the trial judge and in the presence of the parties and their counsel"); *State* v. *Patterson*, 230 Conn. 385, 400, 645 A.2d 535 (1994) (prescribing rule, consistent with rules of practice, requiring trial judge to be present during voir dire in criminal cases but imposing further limitation not addressed in rule that neither party can waive this requirement); *State* v. *Holloway*, 209 Conn. 636, 645–46, 553 A.2d 166 (setting forth procedure to address claim of racial discrimination in exercise of peremptory challenge pursuant to *Batson* v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 [1986], in absence of procedural rules), cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989). This court also has adopted such rules when a judicial gloss was required to save a law from constitutional infirmity; see, e.g., *Roth* v. *Weston*, 259 Conn. 202, 232, 789 A.2d 431 (2002); and has provided definitions to terms prescribed under existing law where there was none; see, e.g., *Ireland* v. *Ireland*, 246 Conn. 413, 432–33, 717 A.2d 676 (1998); powers that still are reserved to the appellate courts under the code. I am unaware of any case in which this court has determined that it has inherent authority to adopt a rule that contravenes an existing rule—adopted by statute, regulation or judicial rule making—when there is no conflict with another law.[23] Indeed, this court previously has recognized the limits of its inherent supervisory authority when a conflict would arise with an existing rule. See *State* v. *Day*, 233 Conn. 813, 855–56, 661 A.2d 539 (1995) ("We need not explore in detail the specific holdings of [*McKaskle* v. *Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)]. For our purposes here, it suffices to recognize that the United States Supreme Court has sanctioned a definition of the role of standby counsel that significantly exceeds the limits imposed by Practice Book § 964 [now § 44-5]. Exercising our inherent authority to safeguard the administration of justice in this state, we urge the standing committee on rules to consider the formulation of new standards

that provide for a more active role for standby counsel, consistent with the relevant constitutional principles articulated in this opinion."); see also *State* v. *Sanabria*, supra, 192 Conn. 691 n.16 (noting that this court could have exercised its supervisory power to establish procedures required to give effect to constitutional provision for grand jury proceedings if both legislature and judges of Superior Court had failed to do so).

Finally, I would note that it is entirely appropriate for the judges of the Superior Court to have been given such authority. Rules of evidence are in fact rules guiding the process of a *trial*, not appellate procedure. Moreover, it may be many years since some appellate court judges have presided over trials, and some appellate judges may have had little time as trial advocates or as trial court judges before their appointment to the appellate bench.[24] Trial court judges are in the best position to discern the practical problems that evidentiary issues give rise to and to offer practical solutions. Because evidentiary rules, other than those necessary to address constitutional concerns, often reflect a balancing of policy considerations, crafting them by way of a legislative type process through judicial rule making, guided by an advisory committee that includes members of the bar from various practice areas and evidentiary experts, makes eminently more sense than by way of an adjudicative process in which the courts have parties before it who do not advance necessarily the broader concerns implicated by a given rule. Accordingly, I disagree with the majority's conclusion in part I of its opinion that the appellate courts have authority to overrule a provision of the code. Sadly, the result in this case may motivate the legislature to follow through on previously contemplated action to bring the rules of evidence under the supervision of that body, which the majority acknowledges has authority to adopt rules of evidence that would bind this court.

II

In light of my conclusion that this court has no authority to reconsider the liberal rule of admissibility for prior bad acts in sex crime cases, which was applied in accordance with the code in the present case, I turn to the question presented in the state's appeal as to whether the Appellate Court properly concluded that the first degree kidnapping statute, General Statutes § 53a-92 (a) (2), is unconstitutionally vague as applied to the facts of this case. On the basis of our decisions in *State* v. *Salamon*, supra, 287 Conn. 509, and *State* v. *Sanseverino*, supra, 287 Conn. 608, in which we altered our long-standing interpretation of the kidnapping statute, I disagree with the majority's decision to overrule *Sanseverino* to support its conclusion that the defendant in the present case is not entitled to a judgment of acquittal on his conviction for kidnapping in the first degree because "any insufficiency in proof was caused

by the subsequent change in the law under *Salamon*, rather than the government's failure to muster sufficient evidence." I conclude that, in the present case: (1) a sufficiency of the evidence analysis is appropriate, as it was in *Sanseverino* and *Salamon*; and (2) no reasonable jury could have found, on the basis of the evidence before it, the abduction necessary for a kidnapping because: (a) the restraint was only that necessary and incidental to the sexual assault; and (b) there was no evidence of force or intimidation.

A

I begin with my strong disagreement with the majority's decision to overrule our holding in *Sanseverino* that the defendant was entitled to a judgment of acquittal, which three members of the present majority joined less than two months ago, and with its decision to do so on a ground that was squarely presented to them in the dissent. Not only do I disagree with the majority's characterization and determinations regarding *Sanseverino*, but I am also troubled by its lack of respect for the principle of stare decisis in its willingness to cast aside precedent without persuasive justification. See *Vasquez* v. *Hillery*, 474 U.S. 254, 265–66, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) ("[Stare decisis] contributes to the integrity of our constitutional system of government, both in appearance and in fact. . . . [A]ny detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the [c]ourt has felt obliged to bring its opinions into agreement with experience and with facts newly ascertained." [Internal quotation marks omitted.]); *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 494, 923 A.2d 657 (2007) ("The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . It is the most important application of a theory of decisionmaking consistency in our legal culture and it is an obvious manifestation of the notion that decisionmaking consistency itself has normative value." [Internal quotation marks omitted.]). The majority's decision to overrule such recent precedent strikes at the very heart of these concerns.[25] As the following discussion demonstrates, the considerations that may outweigh strict adherence to stare decisis simply are not present.

In *Salamon*, the defendant had asked this court to reconsider and overrule a line of kidnapping decisions; see, e.g., *State* v. *Luurtsema*, 262 Conn. 179, 201–203, 811 A.2d 223 (2002); in which this court had held that no minimum period of restraint or degree of movement is necessary for that offense, even when the restraint is merely incidental to an underlying offense. While *Salamon* was pending before this court, we heard argument in *State* v. *Sanseverino*, supra, 287 Conn. 608, and released the decisions in the two cases concurrently,

with *Salamon* as the lead case, and with the intention that the two cases would provide guidance to the bench and bar, as application of the framework adopted had yielded different results. See *State* v. *Salamon*, supra, 287 Conn. 549 n.34 (contrasting its holding with *Sanseverino*).

In *State* v. *Salamon*, supra, 287 Conn. 542, we concluded that the intent to prevent the victim's liberation required for an abduction—and thus a kidnapping—requires something more than the restraint necessary and incidental to the underlying crime. Although we reaffirmed our long-standing rule that no minimum period of restraint or degree of movement is necessary, we determined that "[t]he guiding principle is whether the [confinement or movement] was so much the part of another substantive crime that the substantive crime could not have been committed without such acts." (Internal quotation marks omitted.) Id., 546. We concluded that this determination is a question for the jury. Id., 547–48. Because we announced a new rule, the defendant would have been entitled to a retrial if we had viewed the case as solely implicating instructional error. The defendant in *Salamon*, however, had claimed that he was entitled to a judgment of acquittal under the new interpretation that he urged the court to adopt because, "in light of the evidence adduced at trial, no juror reasonably could conclude that the restraint imposed on the victim was not incidental to the restraint used in connection with the assault of the victim." Id., 548–49. Despite the fact that there was no doubt that the state had adduced sufficient evidence to convict the defendant under the law as it existed at the time of trial, we nevertheless conducted a sufficiency of the evidence analysis and examined in detail the specific evidence adduced at trial, concluding that a retrial was warranted because the facts were such that a reasonable jury could find a kidnapping under the new rule. Id., 549–50 ("On the basis of these facts, a juror reasonably could find that the defendant's restraint of the victim was not merely incidental to his assault of the victim. . . . In light of the evidence, moreover, a juror reasonably could find that the defendant pulled the victim to the ground primarily for the purpose of restraining her, and that he struck her and put his fingers in her mouth in an effort to subdue her and to prevent her from screaming for help so that she could not escape. In such circumstances, we cannot say that the defendant's restraint of the victim necessarily was incidental to his assault of the victim. Whether the defendant's conduct constituted a kidnapping, therefore, is a factual question for determination by a properly instructed jury."). This approach was consistent with our precedent requiring us to analyze a claim of sufficiency of the evidence prior to a claim of instructional error that would result in remanding the case for a new trial. See *State* v. *Padua*, 273 Conn. 138, 178–79, 869 A.2d 192 (2005) ("[i]nterests

of judicial efficiency, sound appellate policy and fundamental fairness require a reviewing court to address a defendant's insufficiency of the evidence claim prior to remanding a matter for retrial because of trial error"); see also *State* v. *Sanseverino*, supra, 287 Conn. 651 n.9 (*Zarella*, *J.*, dissenting) ("it is well settled that we would resolve [a sufficiency of the evidence claim] prior to addressing any claims of trial error, including instructional impropriety, to avoid any double jeopardy issues").[26]

The defendant in *Sanseverino* did not expressly ask the court to reconsider the issues that were presented to us in *Salamon*, and instead claimed that the statute was void for vagueness as applied to the facts of his case. *State* v. *Sanseverino*, supra, 287 Conn. 618–19. Nonetheless, in addressing the considerations relevant to a void for vagueness challenge, namely, whether a person of ordinary intelligence could reasonably have been on notice that his conduct was criminal; *State* v. *Koczur*, 287 Conn. 145, 156, A.2d (2008); the defendant had articulated concerns that went to the heart of our holding in *Salamon*. *State* v. *Sanseverino*, supra, 619. Specifically, the defendant contended that " 'the restraint imposed was wholly incidental to the commission of the sexual assault.' " Id.

Although the defendant had not raised a sufficiency of the evidence claim on appeal, he had preserved such a claim at trial via a posttrial motion for judgment of acquittal, and his arguments on appeal were directed at whether the facts of the incident would support such a kidnapping charge, and thus, necessarily, such a conviction. For these reasons, we eschewed the vagueness challenge and applied the analytical framework adopted in *Salamon*, evaluated the evidence under our well established test for sufficiency of the evidence[27] and concluded that "no reasonable jury could have convicted the defendant of a kidnapping in light of our holding in *Salamon*." Id., 625; see also *State* v. *Ritrovato*, 280 Conn. 36, 50, 905 A.2d 1079 (2006) (stating well established rule that "we must be mindful that [t]his court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case"). Therefore, consistent with the interests of justice and judicial economy, we rendered a judgment of acquittal in *Sanseverino*, as it was clear that the state could not prevail on retrial under the new rule set forth in *Salamon*. In so doing, the *Sanseverino* majority rejected the dissent's view that the case should be remanded for a new trial to give the state another opportunity to present more evidence on the incidental nature of the restraint. See *State* v. *Sanseverino*, supra, 287 Conn. 657–58 (*Zarella*, *J.*, dissenting). Indeed, the majority concluded, "[c]ontrary to the dissent's assertion that the state '*could have proffered*' additional evidence in the present case to support the kidnapping charges had it had knowledge of the

rule announced in *Salamon*, we have found nothing in the record to indicate that there was any such evidence." Id., 625 n.16.[28]

Although it is unclear whether the majority distinguishes these two cases by virtue of the fact that the defendant in *Sanseverino* did not expressly raise a sufficiency of the evidence claim, a claim that if successful results in judgment of acquittal; *State* v. *Fernandez*, 198 Conn. 1, 21, 501 A.2d 1195 (1985); we did in fact apply a sufficiency analysis in that case. It is not without precedent under our jurisprudence[29] and that of other courts to reframe an issue raised to resolve the matter presented in a manner most consonant with the interests of justice and judicial economy.

Indeed, *United States* v. *Allen*, 127 F.3d 260, 262 (2d Cir. 1997), is instructive in this regard. In that case, the defendant had raised a claim of instructional error and a claim of void for vagueness on appeal regarding the scienter element of the federal extortion statute under which he was charged, but not a claim for insufficiency of the evidence. Id. The court concluded "that [the defendant's] vagueness argument is better framed as a challenge to the sufficiency of the evidence; that manifest injustice would result if we were to address [the defendant's] jury instruction argument without reaching the sufficiency issue; and that the evidence was insufficient to prove one of the elements of the offense beyond a reasonable doubt." Id. The court reasoned that "[t]he sufficiency of the evidence to satisfy the scienter requirement in a particular case is a threshold issue that obviates a vagueness challenge." Id., 264. Consistent with the procedural posture in *Sanseverino*, the court in *Allen* noted that, although the defendant had not raised such a claim on appeal, he had preserved it at trial by making a motion for judgment of acquittal. Id. The court concluded: "Manifest injustice would result here if we failed to consider the sufficiency of the evidence. First . . . [the defendant's] void-for-vagueness argument is closely related to the sufficiency challenge. . . . Second, even if we did not reach the sufficiency issue, we would have to vacate the verdict and remand for a new trial because the jury instructions were flawed for the reasons stated in [another] section . . . of this opinion. For us to do that in this case without addressing the looming issue of whether the evidence was sufficient to support the conviction could result in the futility of a second conviction that would have to be reversed in a second appeal. . . . Moreover, it strikes us as unjust to subject the defendant to a second trial if the evidence at the first trial was insufficient to convict." (Citation omitted.) Id.

These same propositions were applied in *Salamon* and *Sanseverino*, and they apply in the present case, in which there is also a void for vagueness claim. Whether the evidence is sufficient to support a convic-

tion is a precondition to the need for and the success of a void for vagueness claim. Thus, in light of our reexamination of the evidentiary standard for kidnapping in *Salamon*, a sufficiency of the evidence analysis is an appropriate response to the contentions regarding void for vagueness that were advanced in both of these cases. In any given case, there may be an indication that either the evidence proffered could be sufficient under the new standard to warrant retrial or the record may reflect evidentiary gaps that the state possibly could fill on retrial that might establish a restraint that went beyond that which was incidental to the underlying offense. When it is manifest from the record, however, that remand necessarily would result in acquittal, it would work an injustice on the defendant and be contrary to the interests of judicial economy to order a retrial.

The majority's reliance on *United States* v. *Ellyson*, 326 F.3d 522, 529 (4th Cir. 2003), as support for its conclusion that retrial always is appropriate because a new rule renders a claim one of instructional error, is misplaced. In that case, wherein the offense at issue was possession of child pornography, the United States Supreme Court had applied a constitutional gloss to that possession statute in another case, decided after the trial of the defendant in *Ellyson* but while his appeal was pending, which required the state to prove a different element that necessarily would have required entirely different proof—i.e., that the image was that of an actual child, not a virtual image that "appears to be . . . a minor engaging in sexually explicit conduct." Id., 529–30.

The Fourth Circuit concluded that the trial court's instruction, although consistent with valid Circuit Court precedent at the time of trial, was erroneous in light of the new interpretation and that the verdict had to be set aside on that basis. Id., 530–31. That determination notwithstanding, the court analyzed the sufficiency of the evidence in order to determine whether the defendant was entitled to a judgment of acquittal. Id., 532–34. The court determined that the state constitutionally could retry the defendant because, at the time of trial, its evidence was sufficient to satisfy the then existing legal standard, and thus the double jeopardy clause did not present an obstacle to retrial. Id., 532–33. The court went further, however, and noted that there was evidence that satisfied the new legal standard as to the images of one child and other evidence as to the other images that arguably *could* satisfy the new standard. Id., 534–35. Thus, a new trial was appropriate.

The Fourth Circuit's analysis is entirely correct in that retrial is appropriate when a change in the law requires the state to proffer additional, critical evidence to prove its case. In *Ellyson*, the record made it manifest that there was an entirely new body of evidence that

the state could put forth regarding whether some of the images involved actual children. See id. Thus, the court permitted the state to do more, when it was evident that there was more to do. These circumstances are analogous to the concerns about fairness to the state that have motivated this court to permit retrial because the evidence would have been sufficient to support a conviction but for an evidentiary error. See *State* v. *Gray*, 200 Conn. 523, 539, 512 A.2d 217 (concluding that defendant's confession was inadmissible but that retrial, as opposed to acquittal, was proper because evidence otherwise sufficient and, in light of exclusion of confession, state might have introduced evidence to replace it that otherwise would have been cumulative), cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986); accord *State* v. *Carey*, 228 Conn. 487, 496–98, 636 A.2d 840 (1994) (concluding evidentiary error entitled defendant to new probation revocation hearing but not acquittal because, but for error, evidence otherwise sufficient). In these cases, a new rule or an appellate ruling created an evidentiary gap that we could not presume that the state would be unable to fill on retrial.

It is equally apparent to me, however, that there are cases in which it is not appropriate to permit retrial when there is a new rule established or adopted. There are cases in which it is possible to discern that the state has told as complete a story as is relevant to the elements of the offense. Although in such cases double jeopardy would not bar a retrial, the question of what we may do constitutionally does not dictate what we should do in the interests of fairness to the defendant and judicial economy. See *Lockhart* v. *Nelson*, 488 U.S. 33, 39–42, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988) (double jeopardy does not bar retrial when reversal was based on evidentiary error and remaining evidence was sufficient to support conviction); *State* v. *Gray*, supra, 200 Conn. 539 (same). In *Sanseverino*, the kidnapping and the underlying crime of sexual assault clearly were part of a well-defined transaction of events. The victim walked into the room of her own accord, was sexually assaulted, and then left the room as soon as the defendant released her. *State* v. *Sanseverino*, supra, 287 Conn. 615. Because each step of that transaction, from the time the victim entered to the time she fled, was so well-defined by the evidence, it was clear that there was nothing further the state could have adduced from the victim, the only witness to the crime, that would have showed that there was restraint over and above that necessary to commit the crime of sexual assault. Id., 625 n.16. As the discussion in part II B of this dissent indicates, the same is true for the present case. I can think of no reason, therefore, why any defendant should be relegated to a pretrial status on his kidnapping conviction while the state decides whether to reprosecute, when it is clear from the record that the defendant is entitled to a judgment of acquittal or a dismissal. Indeed,

the majority's universal rule of retrial will no doubt give pause to trial judges as to whether to exercise their discretion to dismiss these cases for insufficient evidence pursuant to General Statutes § 54-56.[30] *State* v. *Kinchen*, 243 Conn. 690, 703, 707 A.2d 1255 (1998) ("a trial court is empowered to dismiss a case for insufficient cause under § 54-56 only in the most compelling of circumstances"). The defendants in these cases should not have to bear this burden.[31] *Salamon* and *Sanseverino* were intended to provide such guidance to the courts. Therefore, I disagree with the majority's conclusion that *Sanseverino* should be overruled, which in effect constitutes a sub silencio overruling of the framework we had applied in *Salamon* to determine whether acquittal or a new trial is proper.

B

In light of my conclusion that a sufficiency of the evidence analysis is appropriate in this context, I turn to its application to the facts in the present case. The following legal principles inform my conclusions. Section 53a-92 (a), pursuant to which the defendant was convicted, provides in relevant part: "A person is guilty of kidnapping in the first degree when he abducts another person and . . . (2) he restrains the person abducted with intent to (A) inflict physical injury upon him or violate or abuse him sexually . . . ." " 'Abduct' " is defined as "to restrain a person with intent to prevent his liberation by either (A) secreting or holding him in a place where he is not likely to be found, or (B) using or threatening to use physical force or intimidation." General Statutes § 53a-91 (2). As we previously have noted, abduction is the "sine qua non of the crime of kidnapping." *State* v. *Salamon*, supra, 287 Conn. 534. " 'Restrain,' " as used in these statutes, is defined as: "to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent. . . . '[W]ithout consent' means, but is not limited to, (A) deception and (B) any means whatever, including acquiescence of the victim, if he is a child of less than sixteen years old or an incompetent person and the parent, guardian or other person or institution having lawful control or custody of him has not acquiesced in the movement or confinement." General Statutes § 53a-91 (1).

We dealt with the intersection between restraint and abduction in *State* v. *Salamon*, supra, 287 Conn. 534–35, when we resolved an ambiguity between the intent necessary for a restraint and the intent necessary for an abduction. We concluded that the intent to prevent the victim's liberation necessary for an abduction requires something more than the restraint necessary and incidental to the underlying crime. Id., 542. "[A] defendant

may be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved or confined in a way that has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime. Whether the movement or confinement of the victim is merely incidental to and necessary for another crime will depend on the particular facts and circumstances of each case. Consequently, when the evidence reasonably supports a finding that the restraint was *not* merely incidental to the commission of some other, separate crime, the ultimate factual determination must be made by the jury. For purposes of making that determination, the jury should be instructed to consider the various relevant factors, including the nature and duration of the victim's movement or confinement by the defendant, whether that movement or confinement occurred during the commission of the separate offense, whether the restraint was inherent in the nature of the separate offense, whether the restraint prevented the victim from summoning assistance, whether the restraint reduced the defendant's risk of detection and whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense." (Emphasis in original.) Id., 547–48.

The line at which restraint becomes more than that necessary and incidental to the underlying crime is exemplified by contrasting the factual scenarios in *Salamon* and *Sanseverino*. In *Salamon*, the defendant had approached the victim from behind as she was ascending a flight of stairs, grabbed her by the back of the neck, causing her to fall, and held her down by her hair as she struggled to break free. Id., 549. When the victim began to scream, the defendant punched her in the mouth and attempted to insert his fingers into her throat. Id. After being restrained for approximately five minutes, the victim was able to free herself and flee for help. Id. Although it was unclear why the defendant had accosted and restrained the victim; id., 549 n.34; we concluded that a jury reasonably could have found that the defendant's five minute restraint of the victim was not merely incidental to, and therefore had independent significance from, his assault of the victim. Id., 549. Specifically, we concluded that a reasonable jury could find that the defendant had "pulled the victim to the ground primarily for the purpose of restraining her, and that he struck her and put his fingers in her mouth in an effort to subdue her and to prevent her from screaming for help so that she could not escape." Id. Accordingly, we remanded the case for a new trial. Id., 550.

In *State* v. *Sanseverino*, supra, 287 Conn. 625, which was the first case that had relied on the interpretation of the kidnapping statute set forth in *Salamon*, the

defendant, the owner of a bakery, had followed the victim, one of his employees, after she walked into a storage room, pushed her up against a wall and sexually assaulted her. After he had ejaculated, the defendant released the victim and she was able to leave the room. Id. We reversed the defendant's kidnapping conviction and directed a judgment of acquittal because we determined that "no reasonable jury could have convicted the defendant of kidnapping in the first degree in light of our . . . holding in *Salamon*." Id.

In contrast to *Salamon*, *Sanseverino* represented the quintessential example of the discrete set of facts that our interpretation of the kidnapping statute in *Salamon* was meant to guard against. The defendant physically restrained the victim only for the brief period that the sexual assault took place and immediately thereafter released her and allowed her to leave the room. Id. There was simply no other evidence that the defendant intended to prevent the victim's liberation in some manner independent of the assault. Id.. Accordingly, we reversed the defendant's kidnapping conviction and remanded the case to the trial court with direction to render judgment of not guilty on that charge. Id., 641.

Again, applying *Salamon*'s analytical framework, I would conclude that the record in the present case illustrates the same discrete set of circumstances that warranted a judgment of acquittal in *Sanseverino*. No reasonable jury could find, under the proper legal standard, that there was sufficient evidence to establish that the defendant possessed the requisite intent for abduction because the defendant had restrained the victim no more than was necessary to accomplish the sexual assault. The defendant asked the victim to go to a room in the store, and she went. He closed the door, and *may* have locked it, but not in such a manner as to prevent the victim from leaving of her own volition.[32] He removed the victim's slacks and underpants and then vaginally penetrated her while she sat on a desk in the room. When the victim protested, the defendant let her leave the room and return to work. The only restraint applied to the victim occurred when the defendant removed her clothing and then during the actual act of penetration itself. As the victim testified, when the defendant penetrated her and "it hurt," she "said no . . . got off the desk . . . *was able to move*" and "went back to work." (Emphasis added.) This restraint was undoubtedly necessary and incidental to accomplishing the sexual assault itself. Cf. *State* v. *Sanseverino*, supra, 287 Conn. 625 ("The restraint occurred . . . when the defendant grabbed [the victim] from behind and pushed her against the wall, pinning her arms over her head with his arm and pressing his body against hers to keep her from moving. These actions were clearly undertaken solely for the purpose of allowing the defendant to initiate, and to keep [the victim] from moving away from, his sexual advances.").

Thus, in accordance with the considerations that we set forth in *Salamon*: the restraint was solely directed at the purpose of accomplishing the sexual assault; it lasted only for the duration of the sexual assault; it was not for the purpose of preventing the victim from summoning assistance; and it did not increase the danger of harm to the victim.[33]

Therefore, I can see no principled way to distinguish the facts of the present case from those in *Sanseverino*. In both cases, the defendant employers followed the employee victims into a private room on the premises where they sexually assaulted the victims. Once the sexual assaults had progressed to a certain point, the defendants released the victims and allowed them to leave the room.

There is more to abduction, however, than merely considering whether the restraint was incidental to, rather than independent of, the underlying crime. In the present case, the state has failed to establish the other elements of an abduction, namely, that the defendant either had (1) secreted the victim "in a place where [s]he [was] not likely to be found"; General Statutes § 53a-91 (2) (A); or (2) held her by "using or threatening to use physical force or intimidation." General Statutes § 53a-91 (2) (B). It is starkly apparent that the state did not adduce evidence that the defendant secreted the victim in a place where she was not likely to be found, as she was in a room within the store itself. Cf. *State* v. *Suggs*, 209 Conn. 733, 759, 553 A.2d 1110 (1989) (defendant had secreted victim in place where she was not likely to be found when he sexually assaulted her at night in unlit field containing abandoned car and old railroad tracks, which was behind garage and fence).

Additionally, there is no evidence that reasonably supports a determination that there was force or intimidation of any kind. Although the victim protested verbally during the removal of her pants and the act of penetration, the defendant did not respond. The defendant did not threaten the victim verbally, nor did he strike her or pin her down. After the defendant vaginally penetrated the victim, she got off the desk and left the room with no impediment from the defendant. Thus, there is *no* evidence of physical force or intimidation to establish the abduction necessary for a kidnapping. Cf. *State* v. *Burton*, 258 Conn. 153, 175–76, 778 A.2d 955 (2001) (force and intimidation established when defendant held car door shut so victim could not escape, thereby pinning her to seat, and ignored victim's "screams to stop the car and let her out"); *State* v. *Paolella*, 211 Conn. 672, 679, 561 A.2d 111 (1989) (force or intimidation necessary for abduction established when defendant forcibly prevented victim from leaving house, tied her up and threatened her with gun); *State* v. *Sinchak*, 47 Conn. App. 134, 139, 703 A.2d 790 (1997) (physical force and threat of intimidation established

when defendant put gun to victim's head and threatened her), appeal dismissed, 247 Conn. 440, 721 A.2d 1193 (1999).

The facts that the defendant was an authority figure and the victim was of limited mental ability in and of themselves do not establish force or intimidation. A mere command from an employer reasonably cannot constitute the intimidation or threat necessary for an abduction. If that were the case, it would call into question the criminality of every situation in which an employee was forced to sit and withstand a reprimand by a supervisor. Moreover, abduction, unlike restraint and other provisions in the Penal Code involving an element of consent, does not take into account the age or mental ability of the victim when determining whether there has been force or intimidation in preventing a victim's liberation. Cf. General Statutes § 53a-91 (1) (B) (lack of consent involved in restraint includes acquiescence of incompetent person without permission of parent or guardian);[34] General Statutes § 53a-71 (a) (2) (person guilty of sexual assault in second degree if victim is "mentally defective to the extent that such other person is unable to consent to such sexual intercourse"); General Statutes § 53a-73a (a) (1) (B) (person guilty of sexual assault in fourth degree if recipient of sexual contact is mentally defective or incapacitated to extent that they cannot consent). Even if a jury were to take into account the victim's mental capacity in its determination as to whether she had been intimidated, despite the absence of instructions from the trial court, the evidence belies a conclusion that she was so intimidated that she felt forced to stay in the room with the defendant. When she wanted to leave, she was able to do so, and the defendant neither said nor did anything to stop her. Thus, because of the glaring lack of evidence of any "abduction" in the present case, the judgment with respect to the defendant's conviction of kidnapping in the first degree should be reversed and the case should be remanded to the trial court to render a judgment of not guilty on that charge. Accordingly, I dissent from part I of the majority opinion as well.

In conclusion, I note that, in this case, my colleagues have disavowed recent positions taken by this court with respect to both the binding effect of the code and the circumstances under which judgment of acquittal is proper. Understandably, the bench and bar may be somewhat confused by this result, as am I. Like Shakespeare's Puck, I can only apologize to the audience and suggest that it also pretend that this has all been a bad dream.[35]

[1] Although part II of Chief Justice Rogers' opinion addressing the effect of the code garnered only a plurality of this court, I refer to her plurality opinion on that issue as the majority for the sake of consistency throughout this dissenting opinion.

[2] Although I conclude that this court lacks the authority to overrule our case law setting forth a more liberal standard for the admission of prior bad acts in sex crime cases once that case law was codified into the code,

I reiterate my view that we should not have adopted this rule in the first instance. See *State* v. *Merriam*, 264 Conn. 617, 679–88, 835 A.2d 895 (2003) (*Katz*, *J.*, dissenting); *State* v. *Kulmac*, 230 Conn. 43, 79–88, 644 A.2d 887 (1994) (*Katz*, *J.*, dissenting). Moreover, I find it troubling that the majority essentially has rationalized maintaining a rule permitting admission of prior sex crimes evidence on the basis of facts particular to pedophiles. It is little comfort that this court finally has abandoned the legal fiction that this evidence is not being used for propensity purposes. See *State* v. *Merriam*, supra, 682–83 (*Katz*, *J.*, dissenting) (criticizing liberal admission of prior sex crimes evidence under guise of common scheme when evidence was in actuality being used as propensity evidence); *State* v. *Kulmac*, supra, 83 (*Katz*, *J.*, dissenting) (same).

[3] I also made the following observations with respect to that issue in my concurring opinion in *State* v. *Sawyer*, supra, 279 Conn. 363–64: "The majority appears to recognize that, since the adoption of the [c]ode, 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. 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 [c]ode. The [c]ode governs where it speaks, and the courts' common-law rule-making authority governs either where the [c]ode does not speak or where the [c]ode requires interpretation. See Conn. Code Evid. § 1-2." See footnote 11 of this dissenting opinion and the related text for discussion of the majority opinion in *Sawyer*.

[4] General Statutes (Sup. 2008) § 51-14 provides: "(a) The judges of the Supreme Court, the judges of the Appellate Court, and the judges of the Superior Court shall adopt and promulgate and may from time to time modify or repeal rules and forms regulating pleading, practice and procedure in judicial proceedings in courts in which they have the constitutional authority to make rules, for the purpose of simplifying proceedings in the courts and of promoting the speedy and efficient determination of litigation upon its merits. The rules of the Appellate Court shall be as consistent as feasible with the rules of the Supreme Court to promote uniformity in the procedure for the taking of appeals and may dispense, so far as justice to the parties will permit while affording a fair review, with the necessity of printing of records and briefs. Such rules shall not abridge, enlarge or modify any substantive right or the jurisdiction of any of the courts. Subject to the provisions of subsection (b) of this section, such rules shall become effective on such date as the judges specify but not in any event until sixty days after such promulgation.

"(b) All statutes relating to pleading, practice and procedure in existence on July 1, 1957, shall be deemed to be rules of court and shall remain in effect as such only until modified, superseded or suspended by rules adopted and promulgated by the judges of the Supreme Court or the Superior Court pursuant to the provisions of this section. The Chief Justice shall report any such rules to the General Assembly for study at the beginning of each regular session. Such rules shall be referred by the speaker of the House or by the president of the Senate to the judiciary committee for its consideration and such committee shall schedule hearings thereon. Any rule or any part thereof disapproved by the General Assembly by resolution shall be void and of no effect and a copy of such resolution shall thereafter be published once in the Connecticut Law Journal.

"(c) The judges or a committee of their number shall hold public hearings, of which reasonable notice shall be given in the Connecticut Law Journal and otherwise as they deem proper, upon any proposed new rule or any change in an existing rule that is to come before said judges for action, and each such proposed new rule or change in an existing rule shall be published in the Connecticut Law Journal as a part of such notice. A public hearing shall be held at least once a year, of which reasonable notice shall likewise be given, at which any member of the bar or layman may bring to the attention of the judges any new rule or change in an existing rule that he deems desirable.

"(d) Upon the taking effect of such rules adopted and promulgated by the judges of the Supreme Court pursuant to the provisions of this section, all provisions of rules theretofore promulgated by the judges of the Superior Court shall be deemed to be repealed."

I note that minor technical changes, not relevant to this appeal, were

made to § 51-14 subsequent to the time the legislative committee submitted the code for consideration and adoption. For purposes of convenience, however, I refer to the present revision of the statute.

[5] See, e.g., *State* v. *Rinaldi*, 220 Conn. 345, 359, 599 A.2d 1 (1991) (citing to C. Tait & J. LaPlante, Handbook of Connecticut Evidence [2d Ed. 1988]); *State* v. *Jeffrey*, 220 Conn. 698, 710, 601 A.2d 993 (1991) (same), cert. denied, 505 U.S. 1224, 112 S. Ct. 3041, 120 L. Ed. 2d 909 (1992); *State* v. *Famiglietti*, 219 Conn. 605, 612, 595 A.2d 306 (1991) (same); *Dunham* v. *Dunham*, 217 Conn. 24, 32–33, 584 A.2d 445 (1991) (same); *State* v. *Alvarez*, 216 Conn. 301, 310–11, 579 A.2d 515 (1990) (same); *State* v. *Robinson*, 213 Conn. 243, 258, 567 A.2d 1173 (1989) (same), overruled on other grounds by *State* v. *Colon*, 257 Conn. 587, 778 A.2d 875 (2001); *State* v. *James*, 211 Conn. 555, 571–72, 560 A.2d 426 (1989) (same); *State* v. *Brown*, 22 Conn. App. 521, 523, 577 A.2d 1120, cert. denied, 216 Conn. 825, 582 A.2d 204 (1990) (same); *Streicher* v. *Resch*, 20 Conn. App. 714, 717, 570 A.2d 230 (1990) (same); *State* v. *Person*, 20 Conn. App. 115, 124, 564 A.2d 626 (1989) (same), aff'd, 215 Conn. 653, 577 A.2d 1036 (1990), cert. denied, 498 U.S. 1048, 111 S. Ct. 756, 112 L. Ed. 2d 776 (1991); *Schultz* v. *Barker*, 15 Conn. App. 696, 702, 546 A.2d 324 (1988) (same); *Zadroga* v. *Commissioner of Motor Vehicles*, 42 Conn. Sup. 1, 8, 597 A.2d 848 (1991) (same); *Blue Cross & Blue Shield of Connecticut, Inc.* v. *DiMartino*, Superior Court, judicial district of New Haven, Docket No. 300642 (July 2, 1991) (same); *Security Connecticut Life Ins. Co.* v. *Bajorski*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 387879 (June 26, 1991) (6 C.S.C.R. 682) (same).

[6] In that same regard, the formal process undertaken for the code's adoption, wherein the proposed code was submitted for approval to the rules committee of the judges of the Superior Court, subjected to a public hearing and thereafter submitted to a vote by judges of the Superior Court; see C. Tait & E. Prescott, supra, § 1.1.4; would seem entirely unnecessary if the intent was to create nothing more than a nonbinding restatement of the law in the form of a handbook.

[7] "Although the [c]ode follows the general format and sometimes the language of the Federal Rules of Evidence, the [c]ode does not adopt the Federal Rules of Evidence or cases interpreting those rules. Cf. *State* v. [*Vilalastra*], 207 Conn. 35, 39–40, 540 A.2d 42 (1988) (Federal Rules of Evidence influential in shaping Connecticut evidentiary rules, but not binding).

"Unlike the Federal Rules of Evidence, which govern both the admissibility of evidence at trial and issues concerning the court's role in administering and controlling the trial process, the [c]ode was developed with the intention that it would address issues concerning the admissibility of evidence and competency of witnesses, leaving trial management issues to common law, the Practice Book and the discretion of the court." Conn. Code Evid. § 1-2 (a), commentary.

[8] See, e.g., General Statutes § 22-203aa (addressing rule-making authority of Northeast Interstate Dairy Compact Commission); General Statutes § 46b-151h (addressing rule-making authority of Interstate Commission for Juveniles); General Statutes § 51-81c (addressing rule-making authority of judges of the Superior Court for use of interest earned on attorneys' clients' funds accounts); General Statutes § 54-133 (addressing rule-making authority of Interstate Commission for Adult Offender Supervision); see also *Hasselt* v. *Lufthansa German Airlines*, 262 Conn. 416, 432, 815 A.2d 94 (2003) ("[w]e previously have not determined whether a commissioner's policy directive, which contains an interpretation not adopted pursuant to formal rule-making or adjudicatory procedures, is entitled to deference"); *Furhman* v. *Dept. of Transportation*, 33 Conn. App. 775, 782 n.6, 638 A.2d 1091 (1994) (addressing "rule-making provisions of the Uniform Administrative Procedure Act" under General Statutes § 4-168); *Vincenzo* v. *Warden*, 26 Conn. App. 132, 143–44, 599 A.2d 31 (1991) (discussing parole board's failure to adhere to rule-making procedures).

[9] General Statutes § 53a-4 provides: "The provisions of this chapter shall not be construed as precluding any court from recognizing other principles of criminal liability or other defenses not inconsistent with such provisions." See also Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. (West 2007) § 53a-4, comments, p. 324 ("The purpose of this saving clause is to make clear that the provisions of [General Statutes §§] 53a-5 to 53a-23, which define the principles of criminal liability and defenses, are not necessarily exclusive. A court is not precluded by [§§] 53a-5 to 53a-23 from recognizing other such principles and defenses not inconsistent therewith.").

[10] The process by which rules of practice are adopted is identical to the process for rules of evidence, except that the latter process commences in the evidence code oversight committee. See *Rules Committee of the Superior Court* v. *Freedom of Information Commission*, supra, 192 Conn. 237 ("The [r]ules [c]ommittee is a body composed of judges of the Superior Court. Its function is to consider proposed changes in the rules of practice for the Superior Court, and to recommend amendments to the Practice Book, which may be adopted by vote of the Superior Court judges. Once proposed Practice Book amendments have been approved by the [r]ules [c]ommittee, they are published in the Connecticut Law Journal, and are subject to public comment before their adoption by the judges.").

[11] The majority in *Sawyer* questioned only whether the code constrains this court's ability to reconsider a "substantive" rule of evidence that this court had adopted in a case, but clearly conceded that such a constraint would operate if a rule was what it deemed "procedural." The majority's attempt in this case to distance itself from that acknowledgment by relegating it to dictum appears to be result oriented, given the fact that we had requested and received comprehensive supplemental briefs on this very issue and two justices on this court had written vigorous challenges to the majority opinion directed specifically at these statements. Thus, although the statement was dicta in the sense that it was not essential to the holding in that case, it is disingenuous to imply that the *Sawyer* majority's statement was made without deliberate reflection. Indeed, prior to *Sawyer*, two members of the majority in the present case had joined or written opinions stating that this court has no authority to change rules of practice, as such authority is vested exclusively in the judges of the Superior Court. See *Weinstein* v. *Weinstein*, supra, 275 Conn. 736 (*Zarella*, *J.*, dissenting); *Oakley* v. *Commission on Human Rights & Opportunities*, supra, 237 Conn. 30 (per curiam opinion that included *Norcott*, *J.*).

[12] The same conclusion was articulated by Professor Colin Tait of the University of Connecticut School of Law, who has served continuously as a member of the various committees responsible for the code, first as a member of the legislatively appointed drafting committee, then as a member of the committee formed by Chief Justice Callahan as head of the judicial branch to consider and review the proposed code, and finally as a member of the evidence oversight committee: "Development of evidentiary rules not contained in the [c]ode, viz. the common law, could be accomplished through judicial decisions, or by judicial rule-making. [Conn. Code Evid.] § 1-2 (a). If a judicial decision is subsequently codified in the [c]ode, the ensuing rule can be changed only by a change in [the] [c]ode itself by the rule-making process. Moreover, to promote the development of the law of evidence, the [c]ode can be amended to change the existing common law found in judicial decisions that are deemed archaic, obsolete, unwise, or not in accord with modern legal thinking or jurisprudence. To that end, the [c]ode could, by the rule-making process, effectively negate a Supreme Court decision that is deemed to impede the development of the law of evidence." C. Tait & E. Prescott, supra, § 1.3.1, p.17.

[13] Numerous courts have acknowledged that judicial rule making is essentially a legislative act. See, e.g., *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719, 731, 734, 100 S. Ct. 1967, 64 L. Ed. 2d 641 (1980) (concluding that, when Virginia Supreme Court adopted state bar code, it was acting in rule making, not adjudicatory capacity, and therefore was acting in legislative capacity that entitled it to legislative immunity); *Abick* v. *Michigan*, 803 F.2d 874, 877–78 (6th Cir. 1986) (holding that justices of Michigan Supreme Court "[act] in their legislative capacity" in promulgating court rules of practice and procedure); *State* v. *Cameron*, 113 P.3d 687, 694 (Alaska App. 2005) (characterizing Alaska Supreme Court's constitutional authority to adopt court rules as legislative function), rev'd on other grounds, 171 P.3d 1154 (Alaska 2007); *Pasqua* v. *Council*, 186 N.J. 127, 152, 892 A.2d 663 (2006) ("[t]he promulgation of a court rule is a legislative act").

[14] The letter from Justice Borden, dated January 26, 2000, provided: "As I indicated in our recent conversation, an intriguing suggestion was made to me by one of the [a]ssistant [s]tate's [a]ttorneys when I addressed their [a]ppellate [u]nit recently regarding the [code]. The suggestion is that the [c]ode be amended to provide that the Supreme Court be empowered, in the context of a specific case, to amend or overrule any specific provision in the [c]ode, in a kind of common law manner, if reason, experience and policy persuade the [c]ourt to do so.

"The principal argument for it is that it provides one more way to preserve

the kind of common law flexibility in advancing and modernizing the law of evidence that the [c]ode, by virtue of being a [c]ode, has reduced. It would also give parties the incentive, in the context of specific cases, to argue for a change in the law of evidence that they probably would not have under a [c]ode.

"I recognize that this would be an unusual provision, and can be viewed as inconsistent with the entire notion of having a [c]ode. Nonetheless, I think that it is at least [worth] exploring, and request that your committee (of which, as I understand it, you are the Czarina) consider it.

"Some of the questions that occur to me are: Are there any other judicially created evidence codes that have such a provision? Is it wise as a matter of policy? If the court were to do so, what mechanism would be employed to provide for subsequent amendment of the [c]ode to conform it to the Supreme Court decision—the [c]ourt itself formulating it, or the [e]vidence [c]ode [o]versight [c]ommittee suggesting a formulation for submission to the [r]ules [c]ommittee, and then to the [j]udges? These are just some of the questions—I'm sure your [c]ommittee will think of, and answer, others."

[15] This court previously has indicated that the legislature has the authority to enact statutes regulating the admission of evidence that would be binding on our courts, including the Supreme Court. See *Johnson County Savings Bank* v. *Walker*, 79 Conn. 348, 351–52, 65 A. 132 (1906) (Holding with regard to a provision of the Negotiable Instruments Act: "[It] introduces no evidence immaterial to the issue, and excludes none which is material. It simply regulates the manner of introducing relevant evidence, and its enactment was fully within the power of the legislative department, notwithstanding its application may, as in this case, vary the ordinary rule of procedure that it is for him who alleges a fact to prove it, and not for him who denies the allegation to disprove it."); see also *Cooper* v. *Cavallaro*, 2 Conn. App. 622, 627, 481 A.2d 101 (1984) ("Our legislature has passed more than a few statutes which create presumptions and affect the rules of evidence. A statute which generates a presumption, thereby shifting the burden of proof, is not an unconstitutional invasion of the legislature into the judicial sphere.").

Moreover, in light of the fact that the request to adopt a code of evidence was initiated by the judicial branch, this court could not thereafter complain that the binding effect of the code violates the separation of powers provision of the constitution. Conn. Const., amend. XVIII; see generally *State* v. *McCahill*, 261 Conn. 492, 505–506, 811 A.2d 667 (2002) (addressing separation of powers). Indeed, the majority's admission that "the rules of evidence . . . have never in this state been regarded as exclusively within the judicial domain"; *State* v. *James*, 211 Conn. 555, 560, 560 A.2d 426 (1989); belies their contention that only this court can be the final arbiter of rules of evidence.

[16] For example, one provision in the code that has its roots in the common law is the constancy of accusation rule in § 6-11 (c). See *State* v. *Troupe*, 237 Conn. 284, 297, 677 A.2d 917 (1996) ("This court expressly adopted the fresh complaint doctrine in *State* v. *De Wolf*, 8 Conn. 93, 100 [1830], in which we stated that 'on an indictment for rape . . . such evidence is received to shew constancy in the declarations of the witness. If a female testifies, that such an outrage has been committed on her person, an enquiry is, at once, suggested, why it was not communicated to her female friends.' "). The constancy of accusation rule has continued to generate controversy as to whether the policy considerations that led to the adoption of the rule still apply; indeed, the evidence code oversight committee currently is considering amendments to that rule. Had the legislature chosen to adopt the proposed code presented to it in 1997, which included the constancy of accusation rule, this court would not be free to disregard the statute and overrule our prior precedent, even if we viewed that rule to be outdated. Indeed, it was in recognition of the legislature's authority that § 1-2 (b) of the code provides in relevant part that "[w]here 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 General Statutes* . . . ." (Emphasis added.)

[17] See General Statutes § 45a-78 (probate court rules of practice and procedure); General Statutes § 46b-231 (rules of procedure for family support magistrate division); General Statutes § 47a-14h (rules for landlord-tenant summary process actions); General Statutes § 51-15 (rules of procedure for various civil actions and modification of rules of pleadings, practice and evidence for small claims actions); General Statutes § 52-191c (rules for precedence of actions involving terminally ill persons); General Statutes

§ 51-245a (rules concerning qualification of interpreters to assist jurors); General Statutes § 52-549n (rules for referring contract action to fact finder); General Statutes § 52-549u (rules for referring civil action to arbitrator); General Statutes §§ 54-82*l* and 54-82m (rules for speedy trial).

[18] See, e.g., Ala. Const., art. VI, § 150, amend. 328, § 6.11 ("[t]he supreme court shall make and promulgate rules governing the administration of all courts and rules governing practice and procedure in all courts"); *Schoenvogel* v. *Venator Group Retail, Inc.*, 895 So. 2d 225, 253 (Ala. 2004) (constitutional power to make rules of practice and procedure includes rules of evidence); Colo. Const., art. VI, § 21 ("[t]he supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil and criminal cases"); *Page* v. *Clark*, 197 Colo. 306, 318, 592 P.2d 792 (1979) (power to make rules of practice and procedure include procedural rules of evidence); Fla. Const., art. V, § 2 (a) ("[t]he supreme court shall adopt rules for the practice and procedure in all courts"); *In re Commitment of Cartwright*, 870 So. 2d 152, 159 (Fla. App. 2004) (constitutional authority to adopt rules of practice and procedure include procedural rules of evidence), cert. denied, 914 So. 2d 952 (Fla. 2005); Md. Const., art. IV, § 18 (a) ("[t]he Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this [s]tate"); Md. Code Ann., Cts. & Jud. Proc. § 1-201 (a) (LexisNexis 2006) (construing constitutional authority to adopt rules of practice and procedure to include "regulation of the form and method of taking and the admissibility of evidence in all cases"); N.D. Const., art. VI, § 3 ("[t]he supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state"); *In re Interest of L.B.B.*, 707 N.W.2d 469, 473 (N.D. 2005) (Sandstrom, J., concurring) (constitutional power to make rules of practice and procedure includes rules of evidence); Penn. Const., art. V, § 10 (c) ("Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts"); Penn. Rules of Evid. § 101 (b) (noting that rules of evidence are adopted by article five, § 10 [c], of Pennsylvania constitution); Utah Const., art. VIII, § 4 (expressly conferring authority to make rules of evidence); see also N.M. Const., art. VI, § 3 ("Supreme Court . . . shall have a superintending control over all inferior courts"); *Ammerman* v. *Hubbard Broadcasting, Inc.*, 89 N.M. 307, 312, 551 P.2d 1354 (1976) (constitutional grant of superintending authority confers power to make rules of practice and procedure, including rules of evidence).

[19] See, e.g., Alaska Const., art. IV, § 15; La. Const., art. V, § 5; Mo. Const., art. V, § 5; Mont. Const., art. VII, § 2 (3); Neb. Const., art. V, § 25; Ohio Const., art. IV, § 5 (B); Va. Const., art. VI, § 5.

[20] See, e.g., Iowa Const., art. VI, § 14; Iowa Code Ann. §§ 602.4201 and 602.4202 (West 1996); Me. Rev. Stat. Ann. tit. 4, § 8 (2007); Miss. Code Ann. § 9-3-61 (1972); N.Y. Const., art. VI, § 30; N.Y. Jud. Ct. Acts §§ 211 and 214-a; Wash. Rev. Code § 2.04.190 (West 2004); see also Mass. Gen. Laws c. 213, § 3 (LexisNexis 1999) (authorizing lower courts to adopts rules, but subjecting rules to approval by Supreme Judicial Court).

[21] As one eminent legal scholar in this field explained with respect to congressional delegation of authority under a federal constitutional scheme substantially similar to Connecticut's judicial provision: "If delegation [of Congress' rule-making power] is possible, to whom may the power of rule-making be delegated? The delegee must be chosen in a way that makes institutional sense, that seems [to] meet in an historical framework, and that does no violence to our conception of separation of power theory and practice. . . . [I]t is obvious that the Supreme Court and individual courts could properly be delegated the responsibility of rule-making. So, too, could an assembly of judges such as the United States Judicial Conference or a committee or commission appointed by judges and approved by Congress." J. Weinstein, Reform of Court Rule-Making Procedures (1977) pp. 95–96.

[22] Unlike many other states, our constitution does not confer on this court general supervisory authority over the lower courts. See D. Pugh, C. Korbakes & J. Alfini et al., Judicial Rulemaking: A Compendium (1984) p. 36 ("[t]he judicial article of the Connecticut constitution, unlike that of most other states, does not specifically delineate the jurisdiction and powers of the courts comprising the judicial department"); see, e.g., Del. Const., art. IV, § 13 ("[t]he Chief Justice of the Supreme Court, or in case of his or her absence from the [s]tate, disqualification, incapacity, or if there be a vacancy in that office, the next qualified and available Justice who by seniority is next in rank to the Chief Justice shall be administrative head of all the

courts in the [s]tate, and shall have general administrative and supervisory powers over all the courts"); La. Const., art. 5, § 5 (A) ("[t]he supreme court has general supervisory jurisdiction over all other courts"); Mo. Const., art. V., § 4 (1) ("[t]he supreme court shall have general superintending control over all courts and tribunals"); Mont. Const., art. VII, § 2 (2) ("[the supreme court] has general supervisory control over all other courts"); N.M. Const., art. VI, § 3 ("[t]he [s]upreme [c]ourt . . . shall have superintending control over all inferior courts"); Wis. Const., art. VII, § 3 (1) ("[t]he supreme court shall have superintending and administrative authority over all courts").

[23] The United States Supreme Court case law cited by Justice Palmer in his concurring opinion is not to the contrary. In *Dickerson* v. *United States*, 530 U.S. 428, 437, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000), the Supreme Court noted its primacy over lower courts in prescribing rules of evidence that are *constitutionally* mandated. The code does not limit this court's authority to enforce constitutional mandates and therefore does not conflict with this principle. To the extent that nonconstitutional rules of evidence are implicated, unlike under Connecticut law, the United States Supreme Court specifically is vested with authority to adopt rules of evidence by an act of Congress, subject to congressional approval. Id.; see generally J. Weinstein, Reform of Court Rule-Making Procedures (1977) c. II. D., pp. 55–61 (entitled "Historical Origins of the Rule-Making Power of Federal Courts"). In *McNabb* v. *United States*, 318 U.S. 332, 341, 63 S. Ct. 608, 87 L. Ed. 819 (1943), the Supreme Court simply addressed the proposition that is not in dispute here—that the highest court of a jurisdiction has supervisory authority to adopt rules that can bind lower courts.

[24] Indeed, some United States Supreme Court justices have raised such concerns with respect to that court's role in the approval of rules of procedure. See Order re Rules of Criminal Procedure, 323 U.S. 821, 821–22 (1944) (Frankfurter, J.) ("That the federal courts have power, or may be empowered, to make rules of procedure for the conduct of litigation has been settled for a century and a quarter . . . . And experience proves that justice profits if the responsibility for such rule-making be vested in a small, standing rule-making body rather than be left to legislation generated by particular controversies. . . . For the last fifty years the Justices have become necessarily removed from direct, day-to-day contact with trials in the district courts. To that extent they are largely denied the first-hand opportunities for realizing vividly what rules of procedure are best calculated to promote the largest measure of justice. These considerations are especially relevant to the formulation of rules for the conduct of criminal trials." [Citation omitted.]). Justices Black and Douglas suggested in their statement in opposition to the Supreme Court's submission of Rules of Civil Procedure to Congress for approval that Congress amend the law to substitute the Judicial Conference for the Supreme Court in the role of approving the rules. See Order re Rules of Civil Procedure, 374 U.S. 865 (1962). They noted that the court's participation was peripheral in that the conference and its committees did the actual drafting of the rules and complained that it was improper for that court to approve rules and then later preside over constitutional challenges to those rules in adjudications. Id., 869–70. A prominent legal scholar has voiced similar concerns. See J. Weinstein, Reform of Court Rule-Making Procedures (1977) p. 147 ("Suggested Changes in National Rule-Making Process . . . . The Supreme Court should not adopt rules for any court except itself. The lack of trial experience and the heavy work load of its members give it little expertise in most of the fields regulated by rule and prevent adequate study of the issues. Although its imprimatur has the advantage of bestowing prestige on the rules, it inhibits the Supreme Court and other courts from impartially construing the rules in accord with the Constitution, statutes, and appropriate federal-state relationships."). These statements further indicate that it would not violate some constitutional principle for the highest court of a jurisdiction to be limited to interpreting, and considering legal challenges to, a body of court rules promulgated by some other body than the highest court.

[25] I recognize that stare decisis concerns may not bear *directly* on whether to overrule *Sanseverino* because this court properly could take similar action in light of the state's timely motion for reconsideration that currently is pending before us. Such concerns do bear, however, on the *effect* of the majority's decision, which is to overrule sub silencio the framework set forth and applied in *Salamon*, because that case differs from *Sanseverino* only in that the application of the framework in *Salamon* yielded a result that the majority seeks in the present case—avoiding a judgment of acquittal. See *State* v. *Salamon*, supra, 287 Conn. 549–50 n.34 ("[In *Sanseverino*, we]

concluded that, because no reasonable juror could find that the restraint [the defendant] had imposed on [the victim] was not incidental to the commission of the sexual assault against [the victim], [the defendant] was entitled to a judgment of acquittal on the kidnapping charge. See [*State* v. *Sanseverino*, supra, 287 Conn. 625]. In the present case, by contrast, we cannot say that the evidence requires the conclusion that the defendant restrained the victim solely for the purpose of assaulting her; indeed, a juror reasonably could find that the assaultive conduct in which the defendant engaged was merely incidental to his restraint of the victim.").

[26] I recognize that a successful double jeopardy claim necessarily would result in a judgment of acquittal because the constitution mandates such a result, whereas we applied that framework in *Salamon* and *Sanseverino* due more to jurisprudential concerns.

[27] "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Martin*, 285 Conn. 135, 147, 939 A.2d 524 (2008).

[28] The correctness of this conclusion is supported by the fact that, when the state filed a postappeal motion in response to our statement that we would be willing to consider such a motion; *State* v. *Sanseverino*, supra, 287 Conn. 625 n.16; it has not represented that it has any additional evidence to proffer.

[29] Pursuant to our supervisory powers over the administration of justice and in the interests of judicial economy, appellate tribunals have discretion to construe the parties' claims and resolve issues in a way that is different from the formal heading or discussion that they are given in a brief. See, e.g., *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 191–92, 884 A.2d 981 (2005) ("Upon review of the record and the briefs of the parties, and after due consideration of the claims raised by the parties at oral argument, we conclude that the certified question is not an adequate statement of the multiple issues raised by this appeal. Consequently, it is necessary to reformulate and to expand the certified question to reflect more accurately the issues presented. See, e.g., *Stamford Hospital* v. *Vega*, 236 Conn. 646, 648 n.1, 674 A.2d 821 [1996] [this court may modify certified questions to render them more accurate in framing issues presented].").

[30] General Statutes § 54-56 provides: "All courts having jurisdiction of criminal cases shall at all times have jurisdiction and control over informations and criminal cases pending therein and may, at any time, upon motion by the defendant, dismiss any information and order such defendant discharged if, in the opinion of the court, there is not sufficient evidence or cause to justify the bringing or continuing of such information or the placing of the person accused therein on trial."

[31] The effect of the majority's conclusion that retrial in these cases is appropriate may, I fear, ultimately undermine one of the bases for our holding in *Salamon*, namely, that our previous interpretation of the kidnapping statute encouraged prosecutors "to include a kidnapping charge in any case involving a sexual assault or robbery." *State* v. *Salamon*, supra, 287 Conn. 544. If the evidence in *Sanseverino* and the present case is not expressly deemed to be insufficient, I foresee much of the same overcharging of the crime of kidnapping in the future.

[32] The victim wavered in her testimony as to whether the defendant had locked the door. Her testimony, however, indicated that she had left the room unimpeded and without the defendant's assistance. Therefore, assuming that the door was locked, the only reasonable inference that could be drawn from the victim's testimony is that the door was locked from the *inside*. Thus, the locked door no more restrained the victim from leaving than if it merely had been closed.

[33] Even if I were to speculate as to some theory that the state might advance on retrial, such as that the victim was deceived into going to the room where the assault occurred, that theory is not supported by the facts or by law. The victim's movement from the store office to the room where the assault occurred did not constitute a restraint, as there was no evidence that the defendant forced the victim to go there or used deception to trick her into going there. See General Statutes § 53a-91 (1). The victim testified that the defendant had told her to go to another room, which she could not identify despite the state's probing; she did not indicate that he had given her any reason as to why he wanted her to do so. The state adduced no

evidence as to what she believed his purpose to be in directing her there or even whether employees generally or she in particular would enter that room. Thus, there is no evidence that the defendant lied or created a ruse to get the victim to go to the room. Cf. *State* v. *Smith*, 198 Conn. 147, 152, 502 A.2d 874 (1985) (defendant lied to victim when stating that he needed her to show him entrance to highway but that he would return her home afterward in order to "lure the victim into his control" and "[deceive her] into remaining with him"). After the victim entered the room, there is no evidence that the defendant restricted her from leaving or from moving, other than when he removed her slacks and underwear. Cf. *State* v. *Sansevero*, supra, 287 Conn. 625 ("[t]he defendant released [the victim] immediately after he had ejaculated").

I note, however, that, even if the evidence had supported the conclusion that the defendant had "deceived" the victim into going to another room in the store and thereby established a restraint; General Statutes § 53a-91 (1) (A); that restraint still would not be of the substantial nature and character necessary to constitute an abduction. Because the defendant clearly could not sexually assault the victim out in the open aisle of the store in front of witnesses, to the extent that he restrained her by causing her to move to a room, the location of which the record reveals nothing about, this case is no different than if the defendant had ordered the victim into a nearby supply closet. Such restraint would have no independent criminal significance.

[34] I note that the information did not charge the defendant with the restraint of an incompetent or minor person. The jury also was not charged as to the portion of the restraint statute that takes into account the mental competence of the victim.

[35] "If we shadows have offended, Think but this, and all is mended, That you have but slumb'red here While these visions did appear. And this weak and idle theme, No more yielding but a dream, Gentles, do not reprehend. If you pardon, we will mend. And, as I am an honest Puck, If we have unearned luck Now to scape the serpent's tongue, We will make amends ere long; Else the Puck a liar call. So, good night unto you all. Give me your hands, if we be friends, And Robin shall restore amends." W. Shakespeare, A Midsummer Night's Dream, act 5, sc. 1.