SCHALLER, J., concurring and dissenting. I disagree with the majority that General Statutes §§ 54-63c (b),[1] and 46b-38c,[2] require that the trial court hold, upon a defendant's request during the hearing to which he is statutorily entitled at his arraignment, a second hearing at which the state must prove by a preponderance of the evidence the continued necessity of a criminal protective order issued pursuant to § 54-63c (b). Because I conclude that the defendant, Fernando A., has no statutory right to such a hearing, I also address the defendant's constitutional claim, and conclude that the defendant's right to procedural due process, as guaranteed by the fourteenth amendment to the United States constitution, is not violated by the current practice in the trial court, in accordance with §§ 54-63c (b) and 46b-38c, of issuing a protective order following a hearing at the time of the defendant's arraignment, at which the trial court has available to it the report prepared by the family violence intervention unit and at which the defendant has the right to present oral argument.[3]

In accordance with existing practice pursuant to §§ 54-63c (b) and 46b-38c, the defendant, who stands charged with a family violence crime, and against whom a protective order had issued, was provided with a hearing at the time of his arraignment. That hearing was sufficient to satisfy both the requirements of our state statutes and federal procedural due process. In my view, the majority's interpretation of §§ 54-63c (b) and 46b-38c to require an expanded, *second* hearing for the benefit of defendants in family violence cases is not grounded in existing state or federal law. While, upon close examination, this expanded hearing requirement does not appear to make any dramatic changes to the existing state of the law, pursuant to which trial courts presumably have discretion to do—or decline to do—everything authorized by the majority decision, I believe that the new procedure will cause more problems than it will solve. I write separately to emphasize several aspects of my disagreement with the majority.[4]

Because the nature of the newly created right to some extent guides my analysis, I begin by outlining the contours of the hearing to which the majority concludes the defendant is entitled. The majority concludes that a defendant charged with a family violence crime has a statutory right under § 54-63c (b) to what I would characterize as a qualified or *conditional evidentiary hearing*, at his request, after the arraignment stage.[5] As I understand it, the expanded, second hearing consists of the following steps: (1) the defendant must request the second hearing at the initial arraignment hearing that is provided for in § 54-63c (b); (2) the second hearing must be held within a reasonable time after the

request and is to be "more extensive" than the arraignment hearing; (3) the state bears the burden of proving the continued necessity of the original order by a fair preponderance of the evidence; (4) the "evidence" proffered by the state may include reliable hearsay and need not "comply with the rigors of the rules of evidence"; (5) the trial court "retains"—as it presently does—discretion to determine whether testimony from the "complainant or other witnesses" is "necessary" for the order to issue; (6) if the state is permitted to present witnesses, the defendant may cross-examine them; and (7) the defendant has no unconditional right to present evidence but may "proffer relevant evidence" challenging the continued necessity of the protective order.

Depending on the trial court's discretion, the defendant may be allowed to testify and present witnesses. The defendant's only unconditional right, aside from cross-examining state's witnesses, is to proffer relevant evidence, not to present it. In sum, under the new rule created by the majority, the defendant has no federal constitutional or state statutory right to an evidentiary hearing. In other words, according to the majority, neither due process nor the relevant statutes—§§ 54-63c (b) and 46b-38c—require more than the expanded hearing that I have set forth, which allows for complete discretion on the part of the trial court as to whether and to what extent evidence may be presented by either party. The hearing is evidentiary only as to the right of the parties to make proffers of evidence and to call witnesses or submit other evidence to the extent permitted by the trial court.

Assuming that my understanding of the majority opinion is correct, my disagreement is limited to the following points. The decision to create a special hearing, to which defendants who are charged with the commission of a family violence crime are entitled upon request, is: (1) inconsistent with the statutory scheme set forth in §§ 54-63c (b) and 46b-38c; (2) not mandated by the federal due process clause; and (3) unwise and unnecessary because of various prudential and policy concerns. Such concerns include my view that the decision is: (1) unfair to defendants in other criminal cases, because it singles out family violence defendants for special treatment; (2) unwise, because it does not take into account the special vulnerability of victims of family violence and undermines the efforts that the legislature has made to protect these victims; (3) unworkable, because it burdens already busy trial courts and provides only conflicting and confusing guidance; and (4) unnecessary, because trial courts already have the discretion to order, on a case-by-case basis, what the majority now holds is the defendant's right upon request.

I

The only question raised in the defendant's statutory

claim is the meaning of the word "hearing" as used in §§ 54-63c (b) and 46b-38c,[6] an issue that the majority acknowledges presents a question of statutory interpretation. The majority infers from the absence of express statutory language in §§ 54-63c (b) and 46b-38c specifying the nature and scope of the hearing to which the defendant is statutorily entitled that the statutes are ambiguous as to that issue. I disagree. The absence of express language, without more, is simply not sufficient to give rise to ambiguity. Instead, in interpreting the term "hearing" in the statutes, and determining whether the statutory language is ambiguous, our question, as always, is whether there exists more than one reasonable interpretation of the language. *Bender* v. *Bender*, 292 Conn. 696, 708–709, 975 A.2d 636 (2009) ("[t]he test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation" [internal quotation marks omitted]). We also must be mindful of the "basic tenet of statutory construction that [w]e construe a statute as a whole and read its subsections concurrently in order to reach a reasonable overall interpretation." (Internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, 280 Conn. 1, 9, 905 A.2d 55 (2006). Accordingly, the meaning of the word "hearing" properly must be understood by looking at the term in the context of the entire statutory scheme. I turn, therefore, to §§ 54-63 (b) and 46b-38c.

Section 54-63c (b) provides in relevant part that "[a]ny nonfinancial conditions of release imposed pursuant to this subsection shall remain in effect until the arrested person is presented before the Superior Court pursuant to subsection (a) of section 54-1g. On such date, *the court shall conduct a hearing pursuant to section 46b-38c at which the defendant is entitled to be heard with respect to the issuance of a protective order*." (Emphasis added.) What is clear from the face of the statute is that the hearing is intended to be held at the time of the defendant's arraignment; the nature of the hearing must be understood with reference to § 46b-38c; and, at the hearing, the defendant has the right "to be heard . . . ." General Statutes § 54-63c (b). Section 46b-38c establishes family violence response and intervention units to respond to complaints of family violence. In family violence cases, those units are responsible for "prepar[ing] written or oral reports on each case for the court by the next court date to be presented at any time during the court session on that date . . . ." General Statutes § 46b-38c (c) (2). These reports "shall be available to a judge at the first court date appearance to be presented at any time during the court session on that date," and upon considering the report at the hearing, the court may issue a protective order. General Statutes § 46b-38c (d). Section 46b-38c reveals that the hearing is intended to give the court the opportunity to review the report prepared by the

family violence intervention unit, and to determine, on the basis of that report, whether to issue a protective order.

Sections 54-63c (b) and 46b-38c, read together, further reveal that the hearing guaranteed to the defendant in the statutory scheme cannot have been intended to be a full evidentiary hearing. The single most significant piece of information that leads to this conclusion is that the legislature contemplated that the hearing would take place at the time of the arraignment; see General Statutes § 54-1g;[7] which the majority acknowledges occurs very shortly after the arrest. At that point in the defendant's criminal case, there will have been scarcely any time to begin an investigation into the evidence, let alone prepare for a full evidentiary hearing. In some cases, a defendant is initially assigned counsel at the time of arraignment. Moreover, arraignments commonly take place during the daily criminal session of short matters, during which the court deals with a wide variety of matters, including new arrests and arraignments, continued cases that have been assigned for plea, appointment of counsel, short motions and bail modifications, among others. In small geographical areas, one judge might handle the entire criminal docket, including these matters. In large geographical areas, one of several judges assigned to criminal matters may deal with the arraignment docket. At the opening of court, the arraignment judge advises the defendants who are scheduled to be arraigned that day of their rights and then arraigns each defendant individually. At some point during this busy session, which takes place so soon after the defendant's arrest, a defendant arrested on a family violence charge is given the hearing to which he is entitled under §§ 54-63c (b) and 46b-38c. These conditions hardly are conducive to holding a full evidentiary hearing. Rather, as the majority recognizes, the circumstances under which the legislature envisioned a hearing pursuant to §§ 54-63c (b) and 46b-38c to take place particularly require "the need for expeditious assumption of judicial control . . . . *State* v. *Doe*, [46 Conn. Sup. 598, 609, 765 A.2d 518 (2000)]." (Internal quotation marks omitted.) Surely, the legislature is aware of the nature of arraignment proceedings, and its provision of a right to a hearing *at arraignment* must be understood to provide the right to a hearing with an extent and scope appropriate for and possible in that context.

Moreover, as I have noted, the purpose of the hearing provided for in § 54-63c (b) is set forth in § 46b-38c. That purpose supports the conclusion that the hearing is intended to be fairly limited in scope. Specifically, the hearing provides the court an opportunity to review the report prepared by the family violence intervention unit and, following oral argument if the defendant exercises his statutory right to be heard, to determine whether to issue a protective order. The legislative

intent to provide a hearing of limited scope is further supported, as Justice Palmer points out in his dissent, by the provision in § 46b-38c (e) that such protective orders "shall be made a condition of the bail or release of the defendant . . . ." General Statutes § 46b-38c (e). I agree that this constitutes strong evidence that the legislature intended for hearings pursuant to § 54-63c (b) to have a similar scope and extent as a bail hearing.

The majority's own statutory analysis lends further support to this conclusion. The majority correctly points out that a defendant who wishes to challenge a protective order that is issued following a hearing pursuant to § 54-63c (b) is not without a remedy. Such a defendant is always free to seek a modification of the protective order pursuant to General Statutes § 54-69.[8] Additionally, even in the absence of any subsequent hearing on a motion for modification, the defendant will have the right to a full hearing if he elects to go to trial. It is appropriate to view § 54-63c (b) as what it is—a temporary measure intended to protect the victim until the ultimate resolution of the charges brought against the defendant.

The majority makes two additional points that support the conclusion that the plain and unambiguous meaning of §§ 54-63c (b) and 46b-38c is that the defendant is statutorily entitled only to a brief hearing to be held at arraignment, during which the defendant simply has the right to be heard, and not to present evidence. First, the majority relies on the principle that the legislature is presumed to be aware of a judicial interpretation that has been placed upon a statute. *Charles* v. *Charles*, 243 Conn. 255, 262, 701 A.2d 650 (1997), cert. denied, 523 U.S. 1136, 118 S. Ct. 1838, 140 L. Ed. 2d 1089 (1998). The majority acknowledges that the Superior Court, in *State* v. *Doe*, supra, 46 Conn. Sup. 598, "relied on *Gerstein* v. *Pugh*, 420 U.S. 103, 119, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), and concluded that a hearing held pursuant to § 46b-38c, at which the defendant did not have the opportunity to cross-examine the complainant prior to the issuance of a criminal protective order in a family violence case, did not violate the defendant's due process rights because it was a bail related hearing that required the need for expeditious assumption of judicial control . . . . *State* v. *Doe*, supra, 609." (Internal quotation marks omitted.) The majority reasons that the legislature presumably was aware of *Doe* when it amended § 54-63c (b) in 2007; Public Acts 2007, No. 07-123; yet the legislature did not amend the statute to require a full evidentiary hearing, or even an expanded hearing such as the majority now concludes is required.

Second, the majority points out that in other criminal statutes, when the legislature has intended to impose specific procedural requirements in the context of a pretrial hearing, it has done so explicitly. See, e.g., General Statutes § 54-82r (authorizing issuance of protec-

tive order prohibiting harassment of witness following hearing at which hearsay evidence is admissible; requiring finding of harassment and necessity of protective order supported by preponderance of evidence; and granting adverse party right to present evidence and cross-examine witnesses); General Statutes § 54-64f (upon finding of probable cause that defendant violated conditions of release, court may hold evidentiary hearing at which hearsay evidence is admissible; violation must be proven by clear and convincing evidence). The majority draws the proper inference from the comparison, reasoning that the lack of procedural requirements for the hearing provided for in § 54-63c (b) indicates that the legislature did not intend to impose such requirements. I agree. The majority's rational and thorough discussion of the statutory language and its ordered application of traditional statutory interpretation principles lead logically to the same conclusion that I arrive at—the legislature did not intend that the hearing provided for in § 54-63c (b) would be an evidentiary hearing. I emphasize that the majority does not state anywhere in its analysis that the legislature intended, through §§ 54-63c (b) and 46b-38c, to entitle family violence defendants to a second, expanded hearing. Nor does it state that the word "hearing" reasonably may be so interpreted. Indeed, the majority cannot, because it has acknowledged that the meaning of the word "hearing" in §§ 54-63c (b) and 46b-38c—which, as I stated earlier in this opinion, is the *only* issue presented by the defendant's statutory claim—is exactly as the trial court, *Bingham, J.*, interpreted it in denying the defendant's request for a full evidentiary hearing. That is, the word "hearing" in §§ 54-63c (b) and 46b-38c signifies a brief hearing held at the time of the defendant's arraignment, at which the court will review the report of the family violence intervention unit and hear oral argument from the defendant if he so desires, to assist the court in determining whether to issue a protective order. At this point, my analysis would end, as dictated by General Statutes § 1-2z, because the plain and unambiguous language of §§ 54-63c (b) and 46b-38c leads to the conclusion that the defendant was statutorily entitled to the hearing that he received—no more, no less.

The majority, despite the dictates of § 1-2z, relies on legislative history to support its decision to create a new rule entitling family violence defendants to a second, expanded hearing. At this point in the majority opinion, it is difficult to discern precisely how the majority grounds its analysis on principles of statutory interpretation. The first problem, of course, is that the majority engages in this part of its analysis after acknowledging that the intent of the legislature with regard to the scope of the hearing to which the defendant is entitled at his arraignment is clear. In fact, the majority begins this portion of its analysis by acknowledging that a full

evidentiary hearing would be impractical at the defendant's arraignment. As I have stated in this concurring and dissenting opinion, this impracticality leads to the conclusion that the legislature intended the hearing to be brief and nonevidentiary in nature. The majority, however, reasons that the necessary brevity of the hearing intended by the legislature "may well cause a defendant significant pretrial deprivations of family relations and/or property." The potential of these deprivations is what underlies the majority's "statutory" analysis.

Specifically, in support of this entirely new rule, purportedly arrived at through the process of statutory interpretation—a process that, by the majority's own admission, when applied to the statutory language itself, yields the conclusion that the legislature intended to impose no procedural requirements on the arraignment hearing guaranteed by §§ 54-63c (b) and 46b-38c—the majority points only to a vague statement, made on the floor of the House of Representatives, that the statute attempts to " 'strike a very delicate balance here between the legitimate interests of law enforcement, and the important constitutional and civil liberty concerns that we would have [as] citizens . . . .' 50 H.R. Proc. [Pt. 12, 2007 Sess., p. 3904], remarks of Representative [Michael P.] Lawlor." The majority asserts that this statement reflects a "legislative desire to comply with the dictates of due process . . . ." The legislature, however, is *always* assumed to desire, and to be obligated, to comply with due process. That statement, then, has no special significance in the sense that the majority relies on it.[9] In any case, the majority relies on the principle that a defendant's due process rights must be protected, and the fact that the statutes do not expressly define the parameters of the word hearing, to infer that the new rule creating the expanded, second hearing is justified. This reasoning requires that the reader completely ignore the majority's statutory analysis, which ably interpreted the plain language of the statutes to discern that the legislature made clear that the hearing at arraignment is intended to allow consideration of the report prepared by the family violence intervention unit and any oral argument the defendant may choose to offer. Those are the parameters of the hearing to which the defendant is entitled pursuant to §§ 54-63c (b) and 46b-38c. Nothing is unclear about the precise nature of this hearing. It is simply not the hearing that the majority believes the legislature should have provided.

Based on the majority's single justification for its statutory interpretation, I can conclude only that, without directly saying so, the majority, in actuality, grounds its conclusion not on a statutory analysis, but on an implicit determination that due process requires the creation of this new right to an expanded, second hearing. I therefore turn to the question of whether the defendant is entitled pursuant to his right to procedural

due process to more than is statutorily mandated by §§ 54-63c (b) and 46b-38c.

II

The United States Supreme Court, in determining whether an individual's right to procedural due process has been violated by a state action, employs two distinct tests, depending on whether the claim arises in the civil or criminal context. In the civil context, the court applies the three part balancing test that it first set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).[10] In the criminal context, as in the present case, a state rule of criminal procedure will be held to violate a defendant's right to due process *only if* the procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (Internal quotation marks omitted.) *Medina* v. *California*, 505 U.S. 437, 445, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). In order to meet his burden of showing a violation of the right to procedural due process in the criminal context, a defendant must show that there is a "historical basis"[11] for his claim that a state procedure violates a fundamental principle of justice. Id., 448.

Although this court has in the past unquestioningly applied the *Mathews* test in the criminal context; see, e.g., *State* v. *Patterson*, 236 Conn. 561, 572–76, 674 A.2d 416 (1996) (applying *Mathews* test to conclude that there is no federal due process right to presentence investigation report); *State* v. *Lopez*, 235 Conn. 487, 493–97, 668 A.2d 360 (1995) (applying *Mathews* factors in concluding no per se right to evidentiary hearing on state's motion to rectify transcript); *State* v. *Joyner*, 225 Conn. 450, 471, 625 A.2d 791 (1993) (*Mathews* test applicable to due process issues under state constitution); see also *State* v. *Kelly*, 256 Conn. 23, 85, 770 A.2d 908 (2001) (citing *Mathews*, but not applying balancing test to claim that trial court improperly denied defendant's parents and fiancée opportunity to speak at his sentencing in violation of his constitutional rights to due process and effective assistance of counsel); *State* v. *Misiorski*, 250 Conn. 280, 294–96, 738 A.2d 595 (1999) (*Berdon*, *J.*, dissenting) (applying *Mathews* factors in concluding that judicial hearing is required before probation officer may disclose defendant's criminal record to community pursuant to Megan's Law, General Statutes [Rev. to 1997] § 54-102s); I believe that this represents a mistaken application of federal constitutional law. To elucidate why *Medina* rather than *Mathews* governs the defendant's due process claim, it is helpful to review the applicable United States Supreme Court and federal court precedent. In *Medina* v. *California*, supra, 505 U.S. 442–43, the United States Supreme Court expressly disavowed the application of the balancing test it had set forth in *Mathews* to evaluate procedural due process claims in the criminal context, stating that

Mathews does not provide the "appropriate analytical framework"; id., 443; to address a criminal defendant's procedural due process claim. The court explained the reason for this departure from the *Mathews* test, which had, until that point, been understood to apply generally to all procedural due process claims: "In the field of criminal law, we have defined the category of infractions that violate fundamental fairness *very narrowly* based on the recognition that, [b]eyond the specific guarantees enumerated in the [b]ill of [r]ights, the [d]ue [p]rocess [c]lause has limited operation." (Emphasis added; internal quotation marks omitted.) Id. The court explained that "[t]he [b]ill of [r]ights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the [d]ue [p]rocess [c]lause [would invite] undue interference with both considered legislative judgments and the careful balance that the [c]onstitution strikes between liberty and order." Id. Moreover, the court recognized that its role in interpreting and upholding the due process clause does not "establish this [c]ourt as a rulemaking organ for the promulgation of state rules of criminal procedure." (Internal quotation marks omitted.) Id., 443–44. Additionally, the court was particularly aware of the fact that "because the [s]tates have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area." Id., 445–46. Instead, in the criminal context, the "proper analytical approach . . . is that set forth in *Patterson* v. *New York*, 432 U.S. 197 [97 S. Ct. 2319, 53 L. Ed. 2d 281] (1977)." *Medina* v. *California*, supra, 445.

In *Patterson* v. *New York*, supra, 432 U.S. 201, the United States Supreme Court had rejected the claim that allocating to the defendant, who had been charged with murder, the burden of proving the affirmative defense of extreme emotional disturbance by a preponderance of the evidence, violated the defendant's right to procedural due process as guaranteed by the fourteenth amendment. Id. In the arena of criminal law, the court observed, "[t]raditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch." Id., 210. In addressing the defendant's claim that the burden allocation violated his right to procedural due process, the court examined the historical origins and development of the rule, stating that a state's decision regarding how to "regulate procedures under which its laws are carried out . . . is not subject to proscription under the [d]ue [p]rocess [c]lause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[12] (Internal quotation marks omitted.)

Id., 201–202. Based on that analysis of the claimed historical basis of the defendant's asserted right, the court concluded that the state procedural rule did not offend a traditional, fundamental principle of justice. Id., 202–206.

Adopting the *Patterson* analytical framework in *Medina*, the court considered the defendant's claim that the allocation to him of the burden to prove his incompetence to stand trial, by a preponderance of the evidence, violated his right to due process. *Medina* v. *California*, supra, 505 U.S. 439. The court concluded, on the basis of its review of the "historical treatment of the burden of proof in competency proceedings," that the allocation of the burden to the defendant did not offend a fundamental principle of justice. Id., 446. In analyzing the historical basis of the claimed right, the court noted that there was, in fact, "no settled tradition on the proper allocation of the burden of proof in a proceeding to determine competence." Id.

The United States Supreme Court subsequently has reinforced its declaration in *Medina* that the applicable rule in the criminal context is not the *Mathews* balancing test, but rather the *Patterson* historical basis test. In *Montana* v. *Egelhoff*, 518 U.S. 37, 43, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) (plurality opinion), the United States Supreme Court considered the defendant's claim that his "right to have a jury consider evidence of his voluntary intoxication in determining whether he possesse[d] the requisite mental state is a fundamental principle of justice." (Internal quotation marks omitted.) The court explained that in applying the *Patterson* test: "Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice." Id. The court then looked to the historical roots of the asserted right, citing as far back as English common law. Id., 44. In the course of its analysis, the court clarified that "[i]t is not the [s]tate which bears the burden of demonstrating that its rule is deeply rooted, but rather [the] respondent who must show that the principle of procedure *violated* by the rule (and allegedly required by due process) is so rooted in the traditions and conscience of our people as to be ranked as fundamental." (Emphasis in original; internal quotation marks omitted.) Id., 47. The court considered the more modern permutation of the rule, which allows for an exception admitting evidence of intoxication with respect to an offense that requires a specific intent, but concluded, "[a]lthough the rule allowing a jury to consider evidence of a defendant's voluntary intoxication where relevant to mens rea has gained considerable acceptance, it is of too recent vintage, and has not received sufficiently uniform and permanent allegiance, to qualify as fundamental . . . ." Id., 51. Significantly, and consistent with *Medina* and *Patterson*, the court did not engage in *any* type of balancing inquiry in resolving the defendant's claim.

Federal courts consistently have applied the *Patterson* test to due process challenges of state rules of criminal procedure. See, e.g., *Bey* v. *Bagley*, 500 F.3d 514, 521–23 (6th Cir. 2007) (denying defendant's due process challenge to state's procedural rule allowing evidence of other crimes under identity exception; defendant failed to show that claimed violation fell under narrow category of procedural rules that offended deeply rooted principle of justice); *Lannert* v. *Jones*, 321 F.3d 747, 754 (8th Cir.) (concluding that asserted right to have battered spouse syndrome evidence considered by jury in connection with defense of self-defense was not " 'fundamental principle of justice' " and finding no violation of procedural due process), cert. denied, 540 U.S. 917, 124 S. Ct. 307, 157 L. Ed. 2d 212 (2003); *Hines* v. *Miller*, 318 F.3d 157, 161–62 (2d Cir.) (after noting that District Court improperly applied *Mathews* balancing test instead of *Patterson* test, finding no historical basis for claimed right to evidentiary hearing on motion to withdraw guilty plea, and, therefore, no constitutional right to evidentiary hearing), cert. denied, 538 U.S. 1040, 123 S. Ct. 2089, 155 L. Ed. 2d 1075 (2003). The more narrow recognition of rights in the criminal context is due to the fact that "[t]he [b]ill of [r]ights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the [d]ue [p]rocess [c]lause invites undue interference with both considered legislative judgments and *the careful balance that the* [c]*onstitution strikes between liberty and order*." (Emphasis added.) *Medina* v. *California*, supra, 505 U.S. 443.

The present statutory scheme challenged by the defendant, which entitles a family violence defendant only to notice and a hearing at the time of arraignment, at which the defendant has the right to be heard, reflects the very type of careful balancing of society's interests—in this context, the interest in protecting victims of family violence from further intimidation and abuse—against the rights of the accused that *Patterson* deemed to be appropriately the province of state legislatures. *Patterson* v. *New York*, supra, 432 U.S. 210. Section 46b-38c was passed as part of Public Acts 1986, No. 86-337, entitled, "An Act Concerning Family Violence Prevention and Response" (act).[13] The legislative history of the act makes clear that its primary purpose was to implement a comprehensive system that would most effectively intervene in instances of domestic violence to protect victims from further harm, but not at the expense of the rights of defendants. The act effected a significant change in the state's criminal law, creating many procedural safeguards and services, both for victims of family violence and offenders, that had not before been available in this state. Astrida Olds, the chair of the governor's task force on family violence, testified before the judiciary committee that the act

was "intended to create an environment for effective intervention in cases that clearly have become official public matters." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 1986 Sess., p. 509. The act mandated "uniform procedure[s] for every police department to govern their responses to family violence incidents," created family violence intervention units that "would immediately take on each case, assess it and provide recommendations to judges on prosecution and victim services," required that a defendant's court appearance take place at the next court date, and instituted, for the first time, "offender services in the form of a program of education for batterers." Id., p. 511, remarks of Astrida Olds. In his summary of the proposed legislation, Representative William L. Wollenberg stated succinctly that "it's an attempt to prevent family violence." 29 H.R. Proc., Pt. 14, 1986 Sess., p. 5254. Speaking in support of the bill, Representative Pauline R. Kezer stated that the law would make "a meaningful change in public policy that will reduce and prevent domestic violence. It has been shown that similar measures in other states that have been taken have indeed reduced the rate of return visits by policemen to the homes in terms of domestic violence." Id., p. 5259. Representative Patricia A. Dillon, also speaking in support of the bill, recognized that "[it is] a very, very delicate balance and I'm sure that we're doing this without endangering the rights of the defendant . . . ." Id., p. 5269. The statutory scheme constructed by the legislature is an example of careful and subtle balancing in response to the peculiar difficulties presented to the state criminal justice system by victims and offenders who often live together, are married and intimately involved with each other. The solution crafted by the state legislature evidences precisely the state expertise that persuaded the United States Supreme Court, in *Patterson* and *Medina*, that matters of criminal procedure, in the absence of a showing that those procedural rules offend some deeply rooted principle of justice, are properly the task of the state legislature, not the courts.

The defendant specifically seeks a full evidentiary hearing to allow him to challenge the imposition of nonfinancial conditions of release. The majority concludes that, although the defendant does not have a procedural due process right to a full evidentiary hearing, he is entitled to the newly defined, expanded, second hearing. The challenged procedural rule is the failure to require more than a brief hearing at which the defendant is not permitted to present evidence; the affected principle of justice is the right to pretrial release absent the imposition of nonfinancial conditions. The historical basis inquiry properly should examine whether the principle of justice that the defendant claims is "offended" by the state's procedural rule is so deeply rooted in our traditions that it is deemed a fundamental principle of justice. Not only does the

defendant fail to make *any* showing that the state procedural rules—which do not require the trial court to hold a full evidentiary hearing following the issuance of a protective order as a condition of his release—violate a fundamental principle of justice, the defendant does not even cite to *Medina* or *Patterson*. The defendant instead relies on the *Mathews* balancing test, a test that, as I already have noted, is not even applicable in this context. The defendant, therefore, fails to meet his burden of establishing that the asserted principle of justice that is implicated by the state's criminal procedural rules, namely, the right to pretrial release without the imposition of any nonfinancial conditions, is so deeply rooted in our traditions that it is deemed to be fundamental. Moreover, the majority's analysis fares no better than the defendant's. In my view, by incorrectly characterizing its constitutional analysis as statutory construction, the majority completely forgoes the opportunity to engage in *any* constitutional analysis of the defendant's claim, and precludes itself from providing any reasoning to support its conclusion that due process requires the creation of this new right. As a result, there has been no showing whatsoever that procedural due process requires that the defendant be granted the right to the new, expanded hearing.

III

Finally, I explain the various prudential and policy reasons that persuade me to conclude that the majority's decision is both imprudent and unnecessary. Specifically, the new rule announced by the majority today is: (1) unfair to defendants in other criminal cases, because it singles out family violence defendants for special treatment; (2) unwise, because it does not take into account the special vulnerability of victims of family violence and undermines the efforts that the legislature has made to protect these victims; (3) unworkable, because it burdens already busy trial courts and provides only conflicting and confusing guidance; and (4) unnecessary, because trial courts already have the discretion to order, on a case-by-case basis, what the majority now holds is the defendant's right upon request.

A

The majority's decision is unfair to other criminal defendants because no such procedure is extended to them in connection with bail, the denial of which is a more serious deprivation than that suffered by family violence defendants who are released subject to a protective order. Put another way, the effect of the majority's decision is to create a privileged status for family violence defendants, even though they may suffer deprivations far less severe than other criminal defendants. I cannot envision any reason why they should be given such privileged status. I see no reason, in fact, why all criminal defendants should not have the same right.

Neither § 54-63c (b) nor § 46b-38c contains special language to indicate that family violence defendants should be accorded greater rights than those accorded to other criminal defendants with respect to conditions of bail or release. All defendants are at risk of being deprived of liberty or other rights pending trial. There is no reason why all defendants should not have an expanded second hearing to determine the propriety of continuing bail.

B

The decision is unwise policy because the victims in these cases, who are recognized by our legislature as suffering a unique kind of vulnerability and as needing special protection, are now exposed to the likelihood of examination and cross-examination during an early stage of the proceedings, the net effect of which will be likely to intimidate them and even discourage prosecution of family violence cases.[14] In light of the particular context—one in which abusers traditionally have intimidated their victims to prevent them from pursuing criminal complaints against the abusers—the legislature's decision not to subject victims to cross-examination at such an early stage in the criminal proceedings strikes the proper balance between protecting the constitutional rights of *both* defendants *and* victims, and at the same time gives due weight to the state's interest in enforcing its laws.

The threat that this careful balance may be undermined is not an insignificant one. If the state believes that the order protecting the victim is in jeopardy, and opts to put the victim on the stand, the compelling policy reason for protecting family violence victims will be severely compromised. Defendants may cross-examine the victims but are likely to choose not to testify. The procedure would then become simultaneously a means by which defendants could intimidate victims with the aim of preventing them from proceeding with the prosecution, a real risk in family violence cases, and a "discovery vehicle" for the benefit of defendants. Defendants could, in fact, proffer highly damaging challenges to victims' stories, thereby virtually compelling the state to call victims in order to prove the necessity of continuing the order. Ironically, no other crime victims are placed at such a risk that they may be compelled to take the witness stand and face cross-examination by the accused at such an early stage of a criminal case.

C

The creation of the second, expanded hearing encumbers the criminal justice system by imposing burdensome and confusing duties on busy trial judges, yet provides only confusing guidance to assist the trial judges in complying with the new rule. Specifically, the framework created by the majority consists of a

combination of specific instructions and general, unspecific requirements. For example, a specific fair preponderance standard is prescribed, but it is to be applied to a mix of proffers. Such proffers include "reliable hearsay," an undefined term, other material that may be beyond the rules of evidence, and, presumably, argument. In short, for every instruction given, new questions arise. In my view, little if anything is gained by the process of attempting to give a few structural details for governing a vague and unspecified discretionary procedure.

I provide a few, brief examples of some of the difficulties that may arise as a result of this new rule. At arraignment, the court must comply with the initial hearing requirement, but also must respond to a request by the defendant for a second hearing by providing such a hearing within a reasonable time. It is unclear whether the court must inform the defendant, during the first hearing, of his right to a second hearing. Also unclear is what constitutes a reasonable time. Presumably, that determination is left to the discretion of the trial court. Suppose the state is ready to make "proffers" based on its file at the time of arraignment—would the trial court have discretion to hold the expanded hearing then and there, or may the defendant demand time to prepare for his "proffers?"

As for the applicable procedure during the second hearing, it is unclear from the majority opinion whether the "proffers" should be offers of proof, accompanied, or not, by any reports, statements or other material. "Reliable hearsay" also is unexplained and uncertain as well as the meaning of the term "rigors of . . . evidence." The court must make a finding as to whether the state has met its burden of proof by a fair preponderance of the evidence. How the trial court is to make a finding by a fair preponderance of the evidence based on nothing more than "proffers" of information of varying levels of reliability and value is not specified. Nor is it clear how this procedure, which may involve only "proffers," will create a record for purposes of appeal.

D

The decision is unnecessary because trial courts already have similar discretion in deciding whether to issue such orders. Under the new procedure, the trial court has complete discretion over reasonable scheduling, the scope of the expanded hearing, the information that may be submitted and the appropriate relief. This differs in small measure, if at all, from present procedure, except as to outlining some of the structural steps and areas of discretion. If the trial courts choose to apply this procedure in most cases based on no more than offers of proof, defendants will gain little that is not available with the present discretionary procedure, other than having a second hearing at which they can make proffers as well. In short, trial courts already

appear to have the discretion to do all that is provided by the new hearing procedure with no more uncertainty than presently exists.

In summary, the newly created procedure in my view accomplishes little, risks a great deal for victims, and may significantly burden already overcrowded dockets. It singles out a particular class of criminal defendants for a special procedure that establishes a right of uncertain dimension. My hope is that the trial courts will exercise their discretion cautiously and wisely in weighing the proffers of "evidence" and in protecting the victims in these cases in the course of determining whether an order should be issued. I believe that the United States Supreme Court wisely recognized in *Patterson* that, in the area of criminal law, the legislature is in the best position to engage in the "subtle balancing" of society's interests in safety against the rights of defendants. *Patterson* v. *New York*, supra, 432 U.S. 210. The majority's decision today changes the balance that the legislature deemed to be the appropriate one, and it is the duty of the trial courts—and I do not deem this to be an insurmountable task, by any means—to ensure that the delicate balance that had been arrived at by the legislature is not thereby disturbed.

For the foregoing reasons, I respectfully dissent.

[1] For the text of § 54-63c (b), see footnote 2 of the majority opinion.

[2] For the text of § 46b-38c, see footnote 4 of the majority opinion.

[3] As the majority explains in footnote 3 of its opinion, this appeal is the consolidation of two separate proceedings. The appeal in Docket No. SC 18103 challenges the order of the trial court, *Pavia*, *J.*, on the day of the defendant's arraignment, denying the defendant's request for an immediate evidentiary hearing and continuing the case for three days so that the defendant could then request an evidentiary hearing. The majority affirms the order of the trial court in Docket No. SC 18103, and I concur in that result.

The appeal in Docket No. SC 18045 challenges the subsequent order of the trial court, *Bingham*, *J.*, denying the defendant's request for an evidentiary hearing. For the reasons discussed in this concurring and dissenting opinion, I disagree with the majority's decision to reverse the order of the trial court in Docket No. SC 18045.

[4] I disagree with Justice Palmer's conclusions that the defendant failed to preserve his claim, that the trial judge should be affirmed rather than reversed, and that the majority is unfairly ambuscading the trial judge. *Rowe* v. *Superior Court*, 289 Conn. 649, 960 A.2d 256 (2008), is established law and I believe it is clear that the defendant preserved the claim that he pursues on appeal, which the majority resolves. I submit that the concept of preservation should be liberally interpreted to allow a claim to proceed to a decision on the merits. In the present case, the defendant notified the court and the state that he was seeking a second hearing—an expanded one, which he characterized as a "trial-like hearing . . . ." Although no one could foresee the precise procedure that the majority would announce today, the state and the trial court were on notice that the defendant sought an expanded second hearing. The trial court's ruling certainly was not incorrect under the circumstances but, because it did not grant the second hearing outlined today, a reversal is in order. The majority has acknowledged that the trial court was not mistaken because it did not have the benefit of this decision. Clearly, the majority's decision has changed the law to a degree. Trial judges—like all participants in court proceedings—deserve to be treated respectfully and fairly by appellate courts, but trial judges need not be *sheltered* from reversal, when warranted. I suggest that the concept of *ambuscade of the trial judge* is often overemphasized generally and, certainly, it is misplaced under these circumstances. A far greater concern is *ambush* of a *party* when that party is deprived of a fair chance to defend a claim at the trial level and create a record for appeal. That did not happen

in the present case.

[5] It is unclear whether and, if so, by what analysis, the majority concludes that the defendant has a procedural due process right to an evidentiary hearing after the arraignment stage. The majority suggests that it bases its conclusion that the defendant is entitled to a second, expanded hearing on state statutory grounds, and further suggests that it has not considered whether the defendant's right to procedural due process under the federal constitution requires the new rule. The majority's statutory analysis, however, is based entirely on its reliance on the notion that the legislature desired to protect the due process rights of family violence defendants. As I observe in part I of this concurring and dissenting opinion, by concluding, in the context of its statutory analysis, that due process *impliedly* requires the second, expanded hearing, the majority forgoes the opportunity to explain the precise reasoning that apparently has led it to conclude that procedural due process requires this result.

[6] Section 46b-38c (e) uses the word "hearing" with reference to the language that must be included in a protective order "made in accordance with [§ 46b-38c] after notice and hearing," and provides that such order must state: " 'This court had jurisdiction over the parties and the subject matter when it issued this protection order. Respondent was afforded both notice and opportunity to be heard in the hearing that gave rise to this order.' "

[7] General Statutes § 54-1g (a) provides: "Any arrested person who is not released sooner or who is charged with a family violence crime as defined in section 46b-38a or a violation of section 53a-181c, 53a-181d or 53a-181e shall be promptly presented before the superior court sitting next regularly for the geographical area where the offense is alleged to have been committed. If an arrested person is hospitalized, or has escaped or is otherwise incapacitated, the person shall be presented, if practicable, to the first regular sitting after return to police custody."

[8] General Statutes § 54-69 (a) provides: "Whenever in any criminal prosecution the state's attorney for any judicial district or the assistant state's attorney is of the opinion that the bond without or with surety given by any accused person is excessive or insufficient in amount or security, or that the written promise of such person to appear is inadequate, or whenever any accused person alleges that the amount or security of the bond given by such accused person is excessive, such state's attorney or assistant state's attorney *or the accused person* may bring an application to the court in which the prosecution is pending or to any judge thereof, alleging such excess, insufficiency, or inadequacy, and, after notice as hereinafter provided and hearing, such judge shall in bailable offenses *continue, modify or set conditions of release* upon the first of the following conditions of release found sufficient to provide reasonable assurance of the appearance of the accused in court: (1) Upon such person's execution of a written promise to appear, (2) upon such person's execution of a bond without surety in no greater amount than necessary, (3) upon such person's execution of a bond with surety in no greater amount than necessary." (Emphasis added.)

[9] Interestingly, the majority does not draw the more obvious inference from Lawlor's statement—that providing the defendant with the brief, nonevidentiary hearing to which he is entitled pursuant to §§ 54-63c (b) and 46b-38c at the time of his arraignment, strikes that "delicate balance . . . ." 50 H.R. Proc., supra, p. 3904. In other words, the logical inference to be drawn from Lawlor's words is that the statutes do not deprive the defendant of his right to due process and, on the contrary, properly balance those rights against the legitimate interests of law enforcement.

[10] In *Mathews* v. *Eldridge*, supra, 424 U.S. 334–35, the court adopted a three part balancing test for resolving procedural due process claims, explaining "that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." The court considered this balancing test to be particularly well adapted to the concept of due process, which, the court stated, "is flexible and calls for such procedural protections as the particular situation demands." (Internal quotation marks omitted.) Id., 334.

[11] See S. Brauerman, comment, "Balancing the Burden: The Constitutional Justification for Requiring the Government to Prove the Absence of Mental Retardation Before Imposing the Death Penalty," 54 Am. U. L. Rev. 401,

425–26 (2004) ("[o]nce the [c]ourt recognizes a due process right, it applies either the *Patterson* . . . 'historical basis' test *or* the *Mathews* . . . 'balancing test' " [emphasis added]).

[12] I note that the Supreme Court has not interpreted the concept of a fundamental principle of justice as synonymous with the concept of a fundamental right, a concept central to a substantive due process analysis. See, e.g., *Washington* v. *Glucksberg*, 521 U.S. 702, 719–21, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). Instead, the court has understood fundamental principles of justice to be confined to procedural rights. See *Montana* v. *Egelhoff*, 518 U.S. 37, 47, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) (defendant bears burden in procedural due process challenge to show that "the *principle of procedure* violated by the rule . . . is so rooted in the traditions and conscience of our people as to be ranked as fundamental" [emphasis altered; internal quotation marks omitted]). Thus, although the allegations of the defendant in the present case that the protective order affects rights that have been deemed to be fundamental would be relevant to a substantive due process inquiry, and would also be relevant to the consideration of a civil procedural due process claim—because the fundamental nature of the individual right would be relevant to the balancing test—the fact that the defendant's access to his home and children is affected by the criminal protective order is not relevant to the procedural due process inquiry under *Medina* and *Patterson*. It is the nature of the asserted procedural right that is determinative.

[13] The legislation was enacted following a successful civil rights action brought by Tracey Thurman and her son, Charles Thurman, Jr., against the defendants, the city of Torrington and police officers employed by the city. See *Thurman* v. *Torrington*, 595 F. Sup. 1521 (D. Conn. 1984). The District Court refused to dismiss Tracey Thurman's claim alleging that the defendants had violated her right to equal protection under the law by impermissibly providing police protection to "persons abused by someone with whom the victim has no domestic relationship," but affording lesser protection "when the victim is (1) a woman abused or assaulted by a spouse or boyfriend, or (2) a child abused by a father or stepfather." Id., 15–27. A jury later awarded Tracey Thurman $2.3 million in compensatory damages. M. Hoctor, comment, "Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California," 85 Calif. L. Rev. 643, 654 (1997). When the defendants challenged the award on appeal, Tracey Thurman settled out of court for $1.9 million in damages and her son was awarded an additional $300,000. Id., 654 n.83.

[14] Legislative recognition of that unique vulnerability is evidenced both in the express language of §§ 54-63c and 46b-38c, as well as in the text and legislative history of Public Acts 1986, No. 86-337, which is detailed in part II of this concurring and dissenting opinion.

The unique difficulties of protecting victims of family violence from their abusers recently has been the focus of a series in the Hartford Courant, entitled "Battered Lives." See http://www.courant.com/news/domestic-violence (last visited October 23, 2009). The series explores the severity of the problem of domestic violence in our society and examines the particular difficulties presented to law enforcement when victims and abusers are connected by complex familial ties. Id.