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Recognizing the Right to Petition for Victims of Domestic Violence

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ARTICLES

RECOGNIZING THE RIGHT TO PETITION FOR VICTIMS OF DOMESTIC VIOLENCE

*Tamara L. Kuennen**

Like any citizen, a victim of domestic violence (DV) may call the police for help when she needs it. And yet, when a victim calls the police, she not only seeks law enforcement assistance but also invokes her constitutional right to seek one of the most fundamental services the government can provide—protection from harm. That right, recently described by the Supreme Court as “essential to freedom,” is the right “to petition the Government for a redress of grievances” guaranteed by the First Amendment.

This Article argues that a combination of law and policy initiatives produces negative collateral consequences for DV victims that flow directly from calling the police, thereby creating an impediment to the right of victims to petition. The vast majority of DV victims do not report the violence to the police. Feminist legal scholars and policymakers widely acknowledge that this underreporting is a major roadblock to the justice system’s ability to effectively address DV.

The underreporting problem is most severe with battered mothers. In many jurisdictions across the country, police report battered mothers to Child Protective Services (CPS) as a matter of course, without any investigation of actual risk to the child. The practice serves a well-intentioned goal: by referring all DV cases to CPS, the police bring to the attention of the state at-risk children who might otherwise fall under the radar. However, given the notorious treatment of DV victims and their children by CPS, a significant number of victims choose not to call the police at all, for fear of having their children taken away.

In addition to the chilling effect on victims’ calls for help, a sweeping practice of reporting all DV calls to CPS inundates the agency with reports it must, by law, investigate. In the last decade, 60 percent of the reports

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made each year were unsubstantiated. While an across-the-board, “report-all” policy may be motivated by a praiseworthy goal, a reporting practice that produces fewer, but more accurate, referrals to CPS would provide greater protection to children. The Petition Clause requires as much.

This Article lays out the claim that these systemic barriers to reporting DV create such a significant impediment to calling the police that they violate the right to petition. It first defines the right to petition, reviews its history and purpose, and demonstrates that it has been overshadowed by, and confused with, the right to speech. Building on the growing body of scholarly literature suggesting that this should not be so, the Article shows that, while the rights of speech and petition overlap, they are not coextensive. Judicial analysis of the right to petition should not be identical to that of speech. Rather, in evaluating petition claims by DV victims, the courts should apply strict scrutiny analysis: only by proving a compelling state interest and the use of the least restrictive means for achieving that interest should government policies that infringe upon a victim’s right to call the police survive. Furthermore, even under a less-than-strict level of scrutiny, the report-all practice should be unconstitutional. The Article concludes by identifying other government practices that deter victims’ reports that might implicate the Petition Clause. It then discusses the broader, political implications of viewing a call to the police as an invocation of a constitutional right to petition and makes the case that the right to petition has as of yet untapped potential for feminist legal scholars and policymakers addressing DV.

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INTRODUCTION

Like any citizen, a victim of domestic violence (DV) may call the police for help when she needs it. And yet, when a victim calls the police she not only seeks law enforcement assistance, but also invokes her constitutional right to seek one of the most fundamental services the government can provide—protection from harm. That right, recently described by the Supreme Court as “essential to freedom,”¹ is the right “to petition the Government for a redress of grievances” guaranteed by the First Amendment.²

The vast majority of DV victims do not report the violence to the police.³ As I have written elsewhere, many victims are reluctant to report for myriad personal and relational reasons.⁴ These reasons do not implicate the Petition Clause. But when the government—via law, policy, or practice—deters victims from reporting, the government’s actions raise constitutional concerns. This Article argues that a combination of law and policy initiatives produces negative collateral consequences on DV victims that flow directly from calling the police, thereby creating an impediment to the right of victims to petition.

The Article focuses on a specific police practice to explore in depth how a victim’s right to petition is unconstitutionally burdened. In numerous jurisdictions across the country, when police respond to the scene of DV,

1. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2491 (2011).

2. U.S. CONST. amend. I. This Article refers to this clause as the Petition Clause.

3. See KERRY MURPHY HEALEY & CHRISTINE SMITH, U.S. DEP’T OF JUSTICE, BATTERER PROGRAMS: WHAT CRIMINAL JUSTICE AGENCIES NEED TO KNOW 2 (1998), available at <https://www.ncjrs.gov/pdffiles/171683.pdf> (“[A]s many as six in seven domestic assaults go unreported.”); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 49–50 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (finding that 17.2 percent of women raped by an intimate partner reported the most recent incident to the police and 26.7 percent of women physically assaulted by an intimate partner reported the most recent incident to the police).

4. See Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 BYU L. REV. 515, 531–32 (reporting that many victims wish to preserve, rather than sever, their relationships for a variety of personal reasons well-documented in the scholarly literature, including love for the partner, dependence on him for economic security, and fear of losing custody of children, to name but a few, and arguing that because the justice system views separation as the only solution to DV, women who are not willing or able to separate choose not to report or otherwise seek the assistance of the state to redress the violence).

they reflexively report the presence of a child to Child Protective Services (CPS); this report is made as a matter of course, without an investigation of the actual risk to the child.⁵ In some instances, police make reports to CPS even if the children are not present in the home, and even if the perpetrator does not live in the home.⁶

5. See Telephone Interview with Gerard Asselin, Sergeant, Anchorage Police Dep't (Nov. 29, 2010) (notes on file with author for all calls cited herein) ("Our policy is, if parties involved in a DV call have children, whether or not children are directly involved, the officers must make notification to OCS—to clarify, either party involved can have a child—they need not necessarily have children together. Basically, if either party involved in a DV call has a child, OCS must be notified."); Email from Becky Buttram, Detective, Indianapolis Metro. Police Dep't (Dec. 14, 2010) (on file with author) ("I know personally, that in the time that MCSO had a DV unit, all DV cases were referred to Child Protective Services for follow up that involved children present."); Telephone Interview with Don Ciardella, Inspector, S.F. Police Dep't (Dec. 29, 2010) ("More often than not, officers will report if the child was present at the incident . . ."); Telephone Interview with Carol Horowitz, Santa Fe Police Dep't (Jan. 5, 2011) ("By protocol, officers are always supposed to notify our Child Youth and Family Department if there is a child at the scene of domestic violence."); Telephone Interview with Tina Jones, Sergeant, Domestic Violence Unit, Portland, Or. Police Dep't (Dec. 29, 2010) ("I can tell you that all of our domestic violence reports where children are listed are cross-reported to human services."); Telephone Interview with Mike Kellog, Detective, Denver Police Dep't (Dec. 22, 2010) ("If there is a child present, Human Services will definitely know about it because officers have to note it on the report. . . . [T]he number one goal is safety for the kids, and Human Services will probably find out about it and decide what to do."); Email from Coleen Kohtz, Dep't of Family & Children's Servs. Law Enforcement Liaison, San Jose Police Dep't Family Violence Unit (Feb. 11, 2010) (on file with author) ("Currently SJPD cross reports all Domestic Violence where children are present to Santa Clara County DFCS."); Telephone Interview with Amy Lutz, Officer, Research & Planning Unit, Phila. Police Dep't (Apr. 20, 2010) ("When we get a call to the scene and are told children are there we refer to DHS."); Email from Michelle L. Robinson, Lieutenant, D.C. Metro. Police Dep't (Dec. 8, 2010) (on file with author) ("I recently received information that the department is currently working with our Child and Family Services Agency in drafting directives that require officers to make notification to CFSA."); Telephone Interview with Ashley Spinney, Victims' Assistance Intern, Detroit Police Dep't (Dec. 15, 2010) ("If there was a child involved in any way we see if it was already reported by looking at that file number, and if not, we will report it ourselves. . . . If an officer didn't see the child himself, but knew the parties have a child in common, they would note that. . . . This is the same if only one of the parties has a child, whether the child was present or not."); Telephone Interview with Sylvia Vella, Detective, San Diego Police Dep't (Dec. 7, 2010) ("These situations are cross-reported with CPS—if we get a call, say you and your husband are fighting and you have a four year old, that report will get cross-reported with CPS. . . . There is mandatory reporting to CPS even if only one party to the incident had a child, and that child was not in the home. Because statistically, the danger to a child that is not the perpetrator's goes up—so if there is an incident in the home and say the child was staying with his biological dad that night—it will be reported to CPS and added that the child was not there—but CPS will interview the kid to see if maybe the child was present at other incidents when the police were not called—so CPS will investigate and build a case. We're actually seeing now in San Diego, where CPS is demanding that the victim, male or female, seek a restraining order to keep perpetrator out of home or else CPS will take the kids."); See also Minneapolis Police Dep't, MPD Policy & Procedure Manual, MinneapolisMN.com, § 7-314 (Mar. 14, 2012), http://www.minneapolismn.gov/policy/policy/mpdpolicy_7-300_7-300 ("In all cases of domestic violence or alleged acts of domestic abuse, a CAPRS report and supplement shall be completed immediately.");

6. In addition to the comments of Detective Sylvia Vella of the San Diego Police Department and Victims' Assistance Intern Ashley Spinney of the Detroit Police Department, *supra* note 5, perhaps the most widely publicized example of this police

Given the notorious treatment of DV victims and their children by CPS, a significant number of victims choose not to call the police for help, for fear of having their children taken away. As one woman stated:

It does more damage to call the police The call to the police opened up so many doors. Then I had three different services watching me and with the kids. Child protective put me at risk for losing my children; they said, next time they'll take the kids! I always thought the police were there to help me. I would never call them again.⁷

I argue that the sweeping practice of reporting *all* DV calls to CPS, rather than a more discerning policy that would require assessment of actual risk to a child, violates the victim's First Amendment right to petition because it substantially deters victims from contacting the police at all. The petition right guarantees citizens access to their government; as such, it is fundamental to self-governance and democracy. In the context of DV, it is fundamental to life itself.

After defining the right to petition and reviewing its history and purpose, I explain in Part I why the right is the "unknown soldier" of the First Amendment,⁸ focusing particularly on how it has been overshadowed by and frequently confused with the right of free speech. Building on the growing body of scholarly literature suggesting that this should not be so, I argue that while the rights of speech and petition overlap, they are not coextensive.

In Part II, I argue that for this reason the right to petition, a separately enumerated right in the text of the First Amendment with a distinct history and purpose, deserves a distinct judicial analysis. And that the level of judicial scrutiny applied to the right should be strict: only by proving a compelling state interest and the least restrictive method for achieving that interest should the government be permitted to infringe upon a citizen's right to petition. Applying this analysis to the police's "report-all" policy, I conclude that the policy clearly violates the Petition Clause. I also conclude that even if the Supreme Court were to misapply a more deferential less-than-strict scrutiny analysis using a more open-ended balancing test, a sweeping "report-all" policy is unconstitutional.

Finally, in Part III, I discuss the broader implications of viewing a victim's call to the police as an invocation of a constitutional and political right, deserving of the same respect as other First Amendment rights. Implicitly, the federal Violence Against Women Act⁹ (VAWA) has

practice occurred in the case of Shawline Nicholson, named plaintiff in the class action on behalf of battered mothers in New York City. *See* Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2002); *infra* Part II.B. One of Shawline's two children was not at home when the father of her child assaulted her; nonetheless, the police reported to the local CPS office, who immediately removed the child from her care. *Id.* at 169–70.

7. Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 834 & n.128 (2001).

8. *See infra* note 12 and accompanying text.

9. Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of the U.S. Code). VAWA has been reauthorized twice, most recently in 2005. *See*

addressed burdens on victims' right to petition in the contexts of housing and immigration laws. The Act amended federal housing law that once allowed landlords to evict victims of DV who called the police for help; similarly, it amended immigration laws that deterred undocumented immigrant victims from calling the police for fear of being deported.¹⁰ This section argues that numerous other government practices that deter victims from accessing the government fall within the ambit of the Petition Clause. Indeed, the Petition Clause has the untapped potential to protect against even the day-to-day, hostile treatment of victims by police, court clerks, and other state actors—a remarkably powerful deterrent to reporting, but one that has proven difficult to prevent or redress.

While viewing a DV victim's request for assistance from the government as invoking a constitutional and political right has the potential to command the same respect and deference as that of other First Amendment rights, the Article concludes with a cautionary note. Bolstering a DV victim's right to access the justice system, and particularly to call the police, could have the unintended consequence of diminishing her ability to privately order her intimate relationships and life. Victims of DV should not be forced to call the police; rather, victims of DV should be able to petition the government for redress, if they so choose, in the same way that victims of stranger-violence may do and in the same way that any ordinary citizen may do.

I. THE RIGHT TO PETITION

The First Amendment of the U.S. Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹¹

Despite the fact that the right to petition is, on the face of the First Amendment, a separately enumerated right, it has been described as the "unknown soldier" of the First Amendment guarantees.¹² This is largely attributable to the Supreme Court's blurring of the right to petition with the right to free speech in its First Amendment jurisprudence.¹³

Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006).

10. See *infra* Part III.

11. U.S. CONST. amend. I.

12. See GEORGE W. PRING & PENELOPE CANAN, SLAPPS GETTING SUED FOR SPEAKING OUT 16, 18 (1996) (describing the right to petition as the "unknown soldier" of the Bill of Rights" and positing that it is "seldom thought of or relied on by the politically active . . . perhaps because 'the right to petition appears so much a part of everyman's constitutional instinct that he is hardly aware of its existence at the time he is most involved in an exercise of the right'" (quoting D. Smith, *The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations* 151 (1971) (unpublished dissertation, Texas Tech University))).

13. See *infra* Part I.D.

In this section I define the right and explain its significance in the context of DV. I then make the case that while the rights of petition and speech overlap, they are not coextensive, as the history and purpose of the Petition Clause illustrate. The Supreme Court has not clearly articulated what level of judicial scrutiny applies to government infringements on an individual's right to petition. Indeed, as illustrated by its most recent Petition Clause decision, the Court sometimes treats the right identically to the right to speech, while other times it does not. I argue that as a distinct, explicitly enumerated right, the right to petition deserves separate judicial analysis.

A. *The Right to Petition in the Context of DV*

The Petition Clause provides citizens¹⁴ with the fundamental right to ask the government to redress wrongs.¹⁵ “Petitioning is the act of presenting a communication” to any branch of government to seek redress of a grievance¹⁶—which could either be a dispute between individuals or a dispute with the government¹⁷—and encompasses any attempt of an individual to seek the government's assistance or action.¹⁸ Lobbying the legislature for a change in law and writing a letter to the governor to request relief are clear examples of petitioning activity.¹⁹ So too is reporting a crime to the police.²⁰

14. Noncitizens also arguably hold this right. See Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003).

15. See Carol Rice Andrews, *After BE & K: The “Difficult Constitutional Question” of Defining the First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 1299 (2003) [hereinafter Andrews, *After BE & K*]; Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999) [hereinafter Andrews, *A Right of Access*]; Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986); Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998); Wishnie, *supra* note 14.

16. Wishnie, *supra* note 14, at 668.

17. See Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 28 (1993) (describing the history of petitioning and its particular inclusion of private disputes between individual parties as grievances for which redress could be sought).

18. See PRING & CANAN, *supra* note 12, at 16 (“Today, [the right] covers any peaceful, legal attempt to promote or discourage government action at any level (federal, state, or local) and in any branch (legislative, executive, judicial, and the electorate).”).

19. See, e.g., *McDonald v. Smith*, 472 U.S. 479, 484 (1985) (holding a letter to a governor is a petition); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (holding legislative lobbying falls squarely within petitioning activity).

20. See, e.g., *Meyer v. Bd. of Cnty. Comm'rs*, 482 F.3d 1232, 1243 (10th Cir. 2007) (concluding that filing a criminal complaint is an exercise of the First Amendment right to petition); *Gable v. Lewis*, 201 F.3d 769, 771 (6th Cir. 2000) (“[S]ubmission of complaints and criticisms to nonlegislative and nonjudicial public agencies like a police department constitutes petitioning activity protected by the petition clause”); *Seamons v. Snow*, 84 F.3d 1226, 1238 (10th Cir. 1996) (stating that denying the ability to report physical assaults is an infringement of protected speech); *Estate of Morris v. Dapolito*, 297 F. Supp. 2d 680, 692 (S.D.N.Y. 2004) (concluding that swearing out a criminal complaint against a high school teacher for assault and seeking his arrest were protected First Amendment petitioning activities); *Lott v. Andrews Ctr.*, 259 F. Supp. 2d 564, 568 (E.D. Tex. 2003) (“There is no

When a victim of DV calls the police for help, she invokes her right to petition the government for one of the most fundamental services it can provide: protection from bodily harm. Two scholars have examined a DV victim's call to the police as a petition to the government for redress.²¹ Both focused on the specific context of housing laws and policies that infringe the right. Lenora Lapidus documented the phenomenon of landlords and housing authorities evicting victims of DV for calling the police to their homes.²² She argued: "If a battered woman is evicted after the housing authority learns of the abuse as a result of police activity . . . she is essentially being punished for exercising her right to petition . . ." ²³ The result is that battered women are more likely to hide rather than report abuse,²⁴ jeopardizing the "gains made over the last three decades in creating opportunities for women to obtain governmental protection through arrest laws."²⁵ Cari Fais extended Lapidus's argument to nuisance abatement ordinances that similarly require landlords to evict tenants who repeatedly call the police to their homes.²⁶

Both scholars concluded that a Petition Clause claim would be novel, and worthy of exploration in the context of DV. While Lapidus and Fais advanced a creative idea, they did not analyze the right, and more importantly, they did not theorize what level of judicial scrutiny should apply.²⁷ This Article seeks to fill that gap, building upon a more generalized body of First Amendment right of petition scholarship.

doubt that filing a legitimate criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right"); *United States v. Hylton*, 558 F. Supp. 872, 874 (S.D. Tex. 1982) ("[T]he filing of a legitimate criminal complaint with local law enforcement officials constitutes an exercise of the [F]irst [A]mendment right."); *Curry v. Florida*, 811 So. 2d 736, 743 (Fla. Dist. Ct. App. 2002) (finding that complaints, even though numerous, made to law enforcement agencies are protected First Amendment activity regardless of the "unsavory motivation" of petitioner); *Arim v. Gen. Motors Corp.*, 520 N.W.2d 695 (Mich. Ct. App. 1994) (per curiam) (granting summary judgment to individuals who were sued for their participation in a criminal sting operation run based on the First Amendment).

21. See Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 377 (2003); Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181 (2008).

22. See Lapidus, *supra* note 21, at 384 (arguing that discrimination is not limited to eviction, but occurs "in a variety of other ways and at various stages of the housing process," including the application process, the terms and conditions of tenancy, and transfer from one public housing complex to another).

23. *Id.* at 383 ("In turn, other battered women may be wary of seeking assistance from law enforcement and the legal system for fear of similar reprisal, thus effecting a chill of the exercise of their First Amendment rights.").

24. *Id.* at 378.

25. *Id.* at 384.

26. See Fais, *supra* note 21.

27. I note, however, that Lapidus implies that some tier of intermediate scrutiny applies, for she characterized the housing authority's interest as a "substantial interest" and argued that the government practice at issue "restricts more petitioning activity than necessary to achieve the government's objectives." Lapidus, *supra* note 21, at 384. These terms, in accordance with modern right-to-speech doctrine, are synonymous with some tier of

B. Text and History of the Right to Petition

The Petition Clause has been characterized as oft-forgotten,²⁸ a constitutional footnote,²⁹ and the poor stepchild of the First Amendment.³⁰ Yet over the years a number of scholars have extensively traced its history,³¹ and recently there is movement afoot to revive it.³² These scholars argue that the text, history, and purpose of the Petition Clause illustrate the distinct and separate status that the right to petition deserves, but has not been given.³³

The text of the First Amendment is unambiguous: it sets forth a right, in a separate clause, which extends beyond the right of free speech. It promises “that a particular audience—‘the government’—is forever open to hear a specialized kind of expression—‘a petition . . . for a redress of grievances.’”³⁴ Though the right of free speech has taken center stage in First Amendment jurisprudence, scholars argue that there is no reason that this should be so: “Just as each and every part of the Fifth Amendment and the Fourteenth Amendment enjoys individualized exegeses, independent

intermediate scrutiny. Lapidus likely means something akin to what is applied to content-neutral regulations of speech. In short, Lapidus assumes that something-less-than-strict judicial scrutiny applies. *See id.* at 384. Fais, on the other hand, argued that the term “abridge” in the Petition Clause “is ‘to reduce in scope’ or ‘diminish,’” and thus any diminishment of a victim’s ability to report her victimization to the police is unconstitutional. *See Fais, supra* note 21, at 1222 (“Those defending against a right to petition theory might say that the burden is slight compared with the governmental objectives of conserving resources to make sure that police service are available to all people in need However, the plain meaning of the word abridge is ‘to reduce in scope’ . . .”).

28. *See* Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1239 (2008).

29. *See id.* at 1304.

30. *See* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 980 (2011).

31. For detailed histories, see generally RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE (2012); Andrews, *A Right of Access*, *supra* note 15; Higginson, *supra* note 15; Mark, *supra* note 15; Spanbauer, *supra* note 17.

32. *See* KROTOSZYNSKI, *supra* note 31 (application of the right to alternative dispute resolution); Krotoszynski & Carpenter, *supra* note 28 (arguing for Petition Clause application to political protests); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997); Spanbauer, *supra* note 17 (arguing that the Supreme Court has not given the Petition Clause the distinct status it deserves among other First Amendment guarantees); Wishnie, *supra* note 14 (arguing for its application to undocumented immigrants’ reports to law enforcement); Anita Hodgkiss, Note, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569 (1987) (suggesting that lawyers might use the right to petition to empower disadvantaged clients); *see also* Bhagwat, *supra* note 30, at 981 (“[E]ven today, assembly, petition, and association are at least as central to the process of self-governance as is free speech.”); Adam Eckstein, *The Petition Clause and Alternative Dispute Resolution: Constitutional and Consistency Arguments for Providing Noerr-Penington Immunity to ADR*, 75 U. CIN. L. REV. 1683, 1703 (2007) (arguing for the application of the right to alternative dispute resolution).

33. *See, e.g.,* Bhagwat, *supra* note 30, at 980 (“[F]ree speech has been the central focus of First Amendment law and scholarship. In fact, however, the text of the First Amendment is not limited to, or even particularly focused on, speech.”).

34. Wishnie, *supra* note 14, at 725–26 (quoting U.S. CONST. amend. I).

clauses of the First Amendment, including the Petition Clause, should command the same respect.”³⁵

The decision of the drafters to memorialize the right in a separate clause reflected an appreciation of its unique role. So too does its history. In a growing body of literature, discussed briefly below, Petition Clause scholars persuasively argue: (1) the right to petition predates and (some suggest) gave rise to the right to speech; (2) the Framers intended for the right to be given special status; (3) the right was central to American politics and self-governance both before and after the ratification of the Bill of Rights; and (4) the right encompassed both individual, private grievances and those that were of community-wide concern.

The right to petition is ancient.³⁶ It dates back to the tenth century in England,³⁷ though scholars agree that it did not take significance until Magna Carta in 1215. “Later, the Petition of Right of 1628 drew upon centuries of tradition and Magna Carta as a model for the Parliament to issue a plea, or even a demand, that the Crown refrain from certain actions.”³⁸ The right was made almost absolute for all British subjects when it was codified in the English Bill of Rights of 1689.³⁹ Because the right of speech did not fully emerge until the late eighteenth or early nineteenth centuries, some scholars have argued that the right to speech was a progeny to the right to petition,⁴⁰ and that petitioning is more fundamental than speech to a politically functional society.⁴¹

By the time of the American Revolution, petitioning was extremely popular and widespread in England. It was not checked or penalized, as

35. Krotoszynski & Carpenter, *supra* note 28, at 1246. It should be noted, however, that some scholars have suggested that the Privileges and Immunities Clause of the Fourteenth Amendment was effectively “rob[bed] . . . of all meaning” in the *Slaughter-House Cases*, 83 U.S. 36 (1873). See ERWIN CHERMERINSKEY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 494–97. See generally Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

36. See *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2499 (2011); PRING & CANAAN, *supra* note 12, at 15 (tracing the roots of the right to petition to “earl[y] English law[] of more than 1,000 years ago” and giving “birth to the Magna Carta”); Andrews, *A Right of Access*, *supra* note 15, at 596–603 (describing early English petitioning from the Magna Carta to the mid-eighteenth century); Norman B. Smith, “*Shall Make No Law Abridging . . .*”: *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1154 (1986).

37. See Krotoszynski & Carpenter, *supra* note 28, at 1299.

38. *Guarnieri*, 131 S. Ct. at 2499. From the Magna Carta to the English Bill of Rights of 1689, several English documents recognized the right to petition the King and Parliament for both public and private grievances. See Wishnie, *supra* note 14, at 685 n.93 (citing Mark, *supra* note 15, at 2165–66; Smith, *supra* note 36, at 1156).

39. See Krotoszynski & Carpenter, *supra* note 28, at 1298.

40. See *id.* at 1299.

41. See Bhagwat, *supra* note 30, at 981, 994 (arguing that the right to petition was antecedent to, and as central as, speech in the process of self-government, and observing that petitioning is an older form of political participation, surviving from a pre-democratic era).

was the right of speech,⁴² and was frequently successful in achieving results.⁴³ Several colonial governments explicitly recognized petitioning as a right, and all of the colonies implicitly recognized petitioning as a primary means by which individuals participated in government.⁴⁴ Colonists, including colonial assemblies, not only secured the right to petition for themselves in colonial government, but frequently petitioned the British government, and were increasingly frustrated in the years before the Revolution by the Crown's failure to respond.⁴⁵ Indeed, this was a major source of outcry in the Declaration of Independence.⁴⁶ In short, the "Framing generation was fully aware of the importance of . . . petitioning in a system of democratic government, as opposed to the system from which the Framers had broken."⁴⁷

Thus an explicit declaration of the right to petition, amongst other rights of the people against their government

was in the forefront of the national conscience as the first Congress took up the task of building a nation. Responding to this widely felt desire, James Madison proposed amendments to the Constitution that would eventually become the Bill of Rights—including the right to petition—to the House of Representatives on June 8, 1789. The right to petition, as framed in Madison's proposal, was in a clause separate from the freedoms of speech and press, and stated that "[t]he people shall not be restrained . . . from applying to the Legislature by petitions, or remonstrances, for redress of their grievances."⁴⁸

The right was exercised on a mass scale, in both colonial times and in the first years of the nation. It encompassed both private, individualized grievances, and matters of community-wide concern. The primary responsibility of colonial assemblies was settlement of private disputes raised by petitions.⁴⁹ The First Congress never once refused to accept a

42. See Spanbauer, *supra* note 17, at 19–20 (describing how in both England and the American colonies, it was in the beginning of the eighteenth century that petitioners were, as a practice, not punished for the content of their petitions).

43. See Wishnie, *supra* note 14, at 685 n.94 (citing Smith, *supra* note 36, at 1166; Mark, *supra* note 15, at 2163).

44. See Spanbauer, *supra* note 17, at 28 ("By the time of the American Revolution, Delaware, New Hampshire, North Carolina, Pennsylvania, and Vermont . . . provided explicit protection for the right of colonists to petition local governing bodies for redress of both individual and collective grievances. Thus, the early colonial governments recognized petitioning as a tangible right. All colonies, including those which did not provide explicit protection for petitioning activity, recognized petitioning as a method by which individuals participated in government and voiced their views to the local governing bodies."); Wishnie, *supra* note 14, at 693 n.146.

45. See Spanbauer, *supra* note 17, at 32–33.

46. See Krotoszynski & Carpenter, *supra* note 28, at 1302.

47. Bhagwat, *supra* note 30, at 991–92 (arguing further that the Framers "understood that the rights of speech, press, assembly, association, and petition are all at heart political freedoms that are essential to democratic self-governance").

48. Krotoszynski & Carpenter, *supra* note 28, at 1302–03 (alternation in original).

49. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2498 (2011) (citing Higginson, *supra* note 15, at 146).

petition.⁵⁰ The private grievances that were redressed by the government included divorces, property disputes, and individual tax withholdings.⁵¹

In sum, petitioning was a widespread practice both before and after the ratification of the Bill of Rights and was considered central to political life. Later, controversial laws like the Alien Act (allowing the President to deport noncitizens who were considered dangerous), the Sedition Act (criminalizing unlawful assembly and publication of false or malicious writing against the government), and the Naturalization Act at the turn of the 19th century brought on floods of petitions.⁵²

Petitioning fell from its exalted position, however, when pro-slavery representatives in Congress imposed the gag rule on anti-slavery petitioners in the 1830s.⁵³ During this time, Congress's infringement on the right was not challenged in the Supreme Court, and popular petitioning fell largely into disuse.⁵⁴

Not so for the politically active, however. Legislative petitioning was a central strategy utilized by both the women's suffrage and anti-Prohibitionist movements.⁵⁵ Impact litigation, another form of petitioning, has been successfully utilized for decades—particularly during and since the civil rights movement—by a wide variety of organizations, from the Sierra Club to the Center for Reproductive Rights to the NAACP.

Notably, the Supreme Court has explicitly recognized this form of petitioning as political expression, and importantly, characterized it as the only avenue by which minority groups may be able to petition the government.⁵⁶ And popular petitioning—in the form of mass signature gathering to support a request for redress—flourished in the twentieth century.⁵⁷

C. Purpose of the Right to Petition

Petitioning was considered a formal mechanism by which people participated in English and American colonial political life.⁵⁸ It was

50. *Wishnie*, *supra* note 14, at 699 (citing 8 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, at xvi (Kenneth R. Bowling et al. eds., 1998)).

51. *See* Higginson, *supra* note 15, at 146.

52. *See* *Wishnie*, *supra* note 14, at 710–11 (describing this anti-immigrant legislation at the turn of the nineteenth century).

53. *See* Krotoszynski & Carpenter, *supra* note 31, at 1304.

54. *See id.* at 1305.

55. Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 33–34 (2011).

56. *See* NAACP v. Button, 371 U.S. 415, 430 (1963).

57. Abu El-Haj, *supra* note 55, at 30–34 (documenting the history of petitioning and noting that the nature of petitioning has changed qualitatively in the twentieth century).

58. Spanbauer, *supra* note 17, at 20–28 (describing the individual's right of petition in England as having matured by the 1700s and stating that “[a]ll colonies . . . recognized petitioning as a method by which individuals participated in government”); *Wishnie*, *supra* note 14, at 685–86 (describing the centrality of petitioning in England prior to the American

exercised by noncitizens, disenfranchised white males (prisoners and those without property), women, free Blacks, Native Americans, and even slaves.⁵⁹ The purposes petitioning serve are many, and some of these purposes overlap with speech. As the Supreme Court recently noted, both speech and petitioning advance individual self-expression.⁶⁰ Both are integral to democracy,

[a]lthough not necessarily in the same way. The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs. . . . [A]lthough the right to petition is generally concerned with expression directed to the government seeking redress of a grievance.⁶¹

The Court's final point bears emphasis, more so than the Court gave it. The right to petition is not merely "generally" concerned with expression directed to government seeking redress; rather, by definition, the right involves two requisite elements that the right to speech does not: a particular audience, and a particular purpose. Speech, as it is protected by the First Amendment, may or may not be directed to government, and it may or may not be made for the purpose of redress. While speech and petitioning overlap, they are not coextensive.⁶²

As I will discuss later, this point is critical when determining how the courts should analyze Petition Clause claims. The guarantee provided by the Petition Clause is not concerned with protecting the content of the communication, as is the guarantee provided by the Speech Clause. "The right [to petition] does not hinge on whether the citizen is right or wrong, wise or foolish, well intentioned or mean spirited. That way lies government censorship."⁶³ Rather, the Petition Clause guarantees access to the government, and specifically, access to present a certain kind of communication—a request for redress—regardless of what is asked for.

Revolution and arguing that "[r]obust petitioning was also a central feature of political life in the American colonies.").

59. Wishnie, *supra* note 14, at 688–89 ("[P]etitioning was a right exercised by all members of colonial society without regard to a petitioner's formal membership in 'a national community or . . . otherwise [having] developed sufficient connection with this country.' Disenfranchised white males, such as prisoners and those without property, as well as women, free blacks, Native Americans, and even slaves, exercised their right to petition the government for redress of grievances." (citations omitted)).

60. See *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011).

61. *Id.* at 2495.

62. Justice Scalia made precisely this point in his dissent in *Guarnieri*: "The Court correctly holds that the Speech Clause and Petition Clause are not co-extensive." *Id.* at 2504 (Scalia, J., dissenting); see also KROTOSZYNSKI, *supra* note 31, at 155 (arguing that the Petition Clause, "properly construed and applied, should guarantee would-be petitioners a right, exclusive of their speech and assembly freedoms, to seek redress of their grievances within both sight and hearing of those capable of giving redress.").

63. PRING & CANAN, *supra* note 12, at 16. As will be discussed below, there is one qualification based on content: the petition may not be a sham.

This distinction, when applied to a call to the police for help, is quite clear. A DV victim's call to the police for help is a form of communication that is indeed expressive. But its purpose is not merely expression. Rather, its purpose is to communicate a specific request, and to make this request to the only audience that can provide redress.

Compare a DV victim's call to the police with a DV victim's personal or political decision to speak publicly about the violence in her home. Speaking to other women in grassroots, "consciousness-raising" groups was a critical step identified by battered women's activists in the 1960s and 1970s. "By claiming that what happened between men and women in the privacy of their home was deeply political, the women's liberation movement set the stage for the battered women's movement."⁶⁴ The right to engage in consciousness-raising is protected by the right to free speech. It embodies the core values of the right to speech: expression for the purposes of self-realization, truth-seeking, and public debate.⁶⁵

The right to access the police for help is another matter.⁶⁶ It is the right to seek immediate, critical and perhaps life-saving assistance. This form of expression is protected by the right to petition. That right guarantees that the doors of government remain open to the governed.

But the Petition Clause serves not merely the governed; it also serves the governors.⁶⁷ It is a two-sided coin.⁶⁸ Petitions provide "an important stream of information about the views and concerns of the people, informing government decisions about individual cases and the need for generalized policymaking."⁶⁹ Petitioning is therefore central to self-governance:

[C]ommunications to national, state, and local legislators continue to serve vital purposes. They inform representatives of . . . the operation of laws and agencies on residents of their districts; prompt inquiries by legislative office to executive branch agencies that eventually yield individual redress; and illuminate broader statutory, regulatory, or budgetary deficiencies.⁷⁰

64. SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE, THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 31 (1982).

65. For a recent, short summary of the core values of the right of free speech, see Bhagwat, *supra* note 30, at 993-94 (describing three distinct theories of the right to speech that have gained prominence, including ensuring that the truth shall emerge in the marketplace of ideas, promoting the self-fulfillment of individuals through expression, and enablement of self-governance through political debate).

66. This is of course not to say that calling the police, or taking any legal action, cannot be a political act or expression.

67. See Wishnie, *supra* note 14, at 726.

68. See PRING & CANAN, *supra* note 12, at 17 ("The justification for the petition right lies in the fact that it is a two-sided coin. On the one hand, it protects individuals and groups who communicate with government; on the other, it also protects government, providing an 'early warning system' or 'safety valve' against voter dissatisfaction, civil unrest, and revolt.").

69. Wishnie, *supra* note 14, at 726.

70. *Id.* at 726.

In the past thirty years, it has been the petitioning of activists on behalf of battered women that changed the way the government—at national, state and local levels—responds to DV.⁷¹ It was because of the aggressive lobbying of these activists that the state now views DV as a crime, rather than a private matter to be dealt with in the home.⁷² Whereas once the police responded to DV calls with counseling, mediation, and walking the perpetrator around the block to “cool off,” they are now statutorily mandated to arrest abusive husbands and boyfriends for committing the crime of DV.⁷³

Petitioning activity creates factual sources of information that enable government bodies to better allocate resources, target enforcement, and identify gaps in statutory or regulatory coverage.⁷⁴ This is particularly true with regard to crime victims’ calls to the police for help. When police do not have accurate information about the frequency of criminal activity and the location (or specific jurisdiction) in which criminal activity occurs, they cannot adequately enforce the law in those areas, for they do not allocate resources to law enforcement for those purposes.

Resource decisions are policy decisions, and the accurate reporting of crime from citizens directly influences government public policy. Nowhere could this be truer than in the context of the police response to DV. Since the passage of VAWA in 1994, millions upon millions of dollars have been allocated to the states for the purpose of enforcing criminal laws that prevent DV.⁷⁵ The Act provides increased funding to those states that statutorily mandate (or strongly encourage) the arrest of perpetrators of DV, as well as increased funding to police agencies that can show improved rates of arrests of perpetrators of DV.⁷⁶

With regard to law enforcement generally, courts have explicitly acknowledged that it “would be difficult indeed for law enforcement

71. For recent, thorough descriptions of the legislative and policy changes lobbied for by feminist activists over the last thirty years, see LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN 71–74 (Am. Psychological Ass’n 2008) and LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 16–22 (N.Y. Univ. Press 2012).

72. See Kuennen, *supra* note 4, at 521–23.

73. See *id.*

74. See Wishnie, *supra* note 14, at 727.

75. For a discussion of the federal dollars that have flowed to states for the purpose of combating DV, particularly in the area of criminal justice and the arrest and prosecution of perpetrators of DV, see GOODMARK, *supra* note 71, at 18–22.

76. The Services for Training Officers and Prosecutors Grant, the single largest pool of money appropriated under VAWA, was designed to strengthen the law enforcement response to violence against women by enabling states and localities to hire and train personnel, receive technical assistance, collect data, and purchase equipment. . . . [T]he grant is specifically intended to “increase the apprehension, prosecution, and adjudication of persons committing violent crimes against women.”

GOODMARK, *supra* note 71, at 19 (quoting GARRINE P. LANEY, CONG. RESEARCH. SERV., RL 30871, VIOLENCE AGAINST WOMEN ACT: HISTORY AND FEDERAL FUNDING 2 (2010), available at http://assets.opencrs.com/rpts/RL30871_20100226.pdf).

authorities to discharge their duties if citizens were in any way discouraged from providing information”⁷⁷ and that any “chilling effect” on providing information to the police would render the police “handicapped in protecting the public.”⁷⁸

The Petition Clause assures citizens’ access to their government, and government’s access to its citizens.⁷⁹ As one court succinctly summarized,

Citizen access to the institutions of government constitutes one of the foundations upon which our republican form of government is premised. In a representative democracy government acts on behalf of the people, and effective representation depends to a large extent upon the ability of the people to make their wishes known to governmental officials acting on their behalf.⁸⁰

In this way, the right to petition—more so than the right to speech, protects a value lying at the core of the First Amendment: self-governance.⁸¹ Petitioning is, according to the Supreme Court: “the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign.”⁸²

D. Supreme Court Doctrine Blurs the Rights of Petition and Speech

If the right to petition is essential to political life (as its history shows), and to the effective functioning of government (as its application in the context of calling the police shows), why is the right the unknown soldier of the First Amendment guarantees?

One reason is that few litigants have pressed claims under it.⁸³ Another reason, noted by virtually every scholar who has written about the right, is that the Supreme Court has not sufficiently distinguished it from the other

77. *Forro Precision, Inc. v. Int’l Bus. Machs. Corp.*, 673 F.2d 1045, 1060 (9th Cir. 1982).

78. *Ottensmeyer v. Chesapeake & Potomac Tel. Co. of Md.*, 756 F.2d 986, 994 (4th Cir. 1985).

79. See KROTOSZYNSKI, *supra* note 31, at 153 (“For government to address successfully the wants and desires of We the People, it must listen and engage popular concerns on a timely basis.”).

80. *Protect Our Mountain Env’t, Inc. v. Dist. Court*, 677 P.2d 1361, 1364 (Colo. 1984).

81. See KROTOSZYNSKI, *supra* note 31, at 153 (“The ability to access and engage government, in a meaningful way, remains central to the success of the project of democratic self-government.”).

82. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2500 (2011). Similarly, the Court has characterized the right as “implied by [t]he very idea of a government, republican in form.” *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524–25 (2002) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)). Some scholars argue that the Petition Clause is the source of the other First Amendment rights themselves. See Smith, *supra* note 36, at 1153 (“Petitioning is the likely source of the other expressive rights—speech, press, and assembly” included in the First Amendment.); see also Krotoszynski & Carpenter, *supra* note 28, at 1299 n.269 (describing rights of speech, press, and assembly as progeny of the right to petition).

83. See Wishnie, *supra* note 14, at 715.

First Amendment rights.⁸⁴ In some cases, it has treated Petition Clause claims as separate, and analytically distinct, from Speech Clause claims;⁸⁵ in others, it has treated the right of petition as subsumed within the right of speech.⁸⁶

An example of the former is illustrated by the Court's two foundational Petition Clause decisions, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*⁸⁷ and *United Mine Workers of America v. Pennington*,⁸⁸ both antitrust cases. In these cases the Court permitted companies to lobby for measures in restraint of trade because, it reasoned, antitrust laws cannot be read to limit or invade the constitutional right to petition the government.⁸⁹ No matter how aggressive or illegal (from an

84. See, e.g., Krotoszynski & Carpenter, *supra* note 28, at 1305–08; Spanbauer, *supra* note 17, at 17–18 (arguing that the Court's interpretation of the right to petition is that it deserves no greater constitutional protection than the right to speech); Wishnie, *supra* note 14, at 713 (describing that the current doctrine treats petitioning as subsumed within speech).

85. For example, in *BE & K Construction Co. v. NLRB*, the Court considers and rejects these analogies to speech doctrine. 536 U.S. at 530–31. First, the idea that false statements are not immunized by the right to freedom of speech could be transposed onto petitioning claims to say that baseless litigation is not immunized by the right to petition. The majority concluded that while this analogy is helpful it does not suggest that the class of baseless litigation is completely unprotected. *Id.* at 531. Second, with regard to prior restraints on speech, the Court stated,

By analogy to other areas of First Amendment law, one might assume that any concerns related to the right to petition must be greater when enjoining ongoing litigation than when penalizing completed litigation. After all, the First Amendment historically provides greater protections from prior restraints than after-the-fact penalties, and enjoining a lawsuit could be characterized as a prior restraint, whereas declaring a completed lawsuit unlawful could be characterized as an after-the-fact penalty on petitioning. But this analogy at most suggests that injunctions may raise greater First Amendment concerns, not that after-the-fact penalties raise no concerns.

Id. at 530 (citations omitted).

86. See *Guarnieri*, 131 S. Ct. 2488. As a point of clarification, when I refer to the Court's decisions regarding petitioning, I refer to the following line of cases, most often discussed in the scholarly literature regarding petitioning: *BE & K Constr. Co.*, 536 U.S. 516; *Christopher v. Harbury*, 536 U.S. 403 (2002); *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Bhd. of R.R. Trainmen v. Virginia ex rel Va. State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Some scholars argue that "court access" cases might also be included on this list, though they acknowledge that the Court has not clearly recognized the court access cases as governed by the Petition Clause. See, e.g., Andrews, *A Right of Access*, *supra* note 15, at 570–71; Spanbauer, *supra* note 17, at 44.

87. 365 U.S. 127 (1961).

88. 381 U.S. 657 (1965). *Noerr* and *Pennington* together are referred to as the *Noerr-Pennington Doctrine*.

89. See *Noerr*, 365 U.S. at 137–38 ("To hold that . . . the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act. Secondly, and of at least equal significance, such a

antitrust context) the tactics used,⁹⁰ individuals (and companies) have the right, as set forth in the Petition Clause, to influence the government, with only one exception: if the lobbying or other petitioning activity is a mere “sham” to cover up what is really only an attempt to interfere with or retaliate against another.⁹¹

Based on *Noerr* and *Pennington*, and a few cases that followed, it appeared that for a time the Court recognized petitioning as analytically distinct from speech and deserving of almost absolute protection, but for the sham exception.⁹² There was no balancing of the individual’s interest and the government’s, as the Court does with the majority of Speech Clause cases.⁹³ Instead, the Court protected petitioning almost absolutely.⁹⁴

This was not so in *McDonald v. Smith*.⁹⁵ A North Carolina citizen wrote a letter to President Reagan, voicing his opposition to a particular candidate for U.S. Attorney.⁹⁶ When the candidate filed a libel suit, McDonald argued that he had absolute immunity for the contents of the letter, based on the protection provided by the Petition Clause.⁹⁷ The Court unanimously rejected the argument and held that the Clause does not confer an absolute immunity for petitioning, but only a qualified right.⁹⁸ “The right to petition is cut from the same cloth as the other guarantees”⁹⁹ of the First Amendment; thus the Court found no reason to “elevate the Petition Clause to special First Amendment status.”¹⁰⁰

construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.”); *see also Pennington*, 381 U.S. at 670 (holding that joint efforts by large coal companies accused of conspiring to drive small mines out of business by attempting to influence public officials do not violate the antitrust laws, even though they were intended to eliminate competition).

90. *See Noerr*, 365 U.S. at 144 (noting Third Circuit Chief Judge Biggs’s characterization of the campaign as a “no-holds-barred fight” (quoting *Noerr Motor Freight, Inc., v. E. R.R. Presidents Conference*, 273 F.2d 218 (3d Cir. 1959) (Biggs, C.J., dissenting)); PRING & CANAN, *supra* note 12, at 24 (describing the tactics of the railroaders in *Noerr* as “a vicious, deceptive, no-holds-barred lobbying and publicity campaign to block deregulation of their chief competition, the trucking industry”).

91. *See Noerr*, 365 U.S. at 144.

92. For a particularly accessible summary of this doctrine, see PRING & CANAN, *supra* note 12, at 19–29.

93. Wishnie, *supra* note 14, at 746 (describing an absolute right to petition as “incompatible with a preference for balancing tests in modern constitutional jurisprudence” and “not consistent with . . . the Court’s speech, association, and court access decisions”).

94. *See, e.g.,* PRING & CANAN, *supra* note 12, at 25 (“At that point, *Noerr-Pennington* made the right to petition look absolute, except for the ticking time bomb of the as yet unapplied ‘sham exception.’”).

95. 472 U.S. 479 (1985).

96. *See id.* at 480–81.

97. *See id.* at 481–82.

98. *Id.* at 484 (“[W]e are not prepared to conclude . . . that the Framers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in exercise of that right.”).

99. *Id.* at 482.

100. *Id.* at 485.

In its most recent decision, *Borough of Duryea v. Guarnieri*,¹⁰¹ the Court indicated that *McDonald* should be read more narrowly than it sometimes has been: “*McDonald* held only that speech contained within a petition is subject to the same standards for defamation and libel as speech outside a petition.”¹⁰² Herein lays another illustration of how the rights overlap, but are not coextensive: all petitions contain speech, but not all speech contains a petition. As the Court elaborated, “There may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights might differ in emphasis and formulation.”¹⁰³ I argue below that a DV victim who calls the police for protection presents such a case.

Charles Guarnieri’s case did not. But note: he was a government employee, not an ordinary citizen—and a public employee’s speech is scrutinized differently than an ordinary citizen’s speech. The government—acting as employer—has far greater leeway to restrain an employee’s speech than the government—acting as sovereign—has to restrain a citizen’s speech.¹⁰⁴ For as employer, the government has “substantial interests” in promoting the effective and efficient provision of services to the public that must be balanced with the employee’s right to speech; as sovereign, it does not have such interests.¹⁰⁵ Thus the Court reasoned that a public employee does not have the “right to transform everyday employment disputes into matters for constitutional litigation in the federal courts.”¹⁰⁶

If the Court was truly concerned that public employees would open the floodgates of litigation with everyday employment issues in the federal courts, why not simply adopt the test that Justice Scalia proposed in his dissent: when a public employee’s petition for redress is to his employer, such as a wage dispute or denial of a benefit, subject it to the same analysis as if it was speech?¹⁰⁷ That is to say, expect him to prove that his petitioning was a “matter of public concern,” a requisite element in a public employee right to speech claim.¹⁰⁸ But if the public employee’s petition for redress is to his sovereign—such as to the local tax board, disputing taxes owed—subject the petition to a different analysis because it is a different right.

101. 131 S. Ct. 2488 (2011).

102. *Id.* at 2495.

103. *Id.*

104. *See id.* at 2496–97.

105. This is a bit of an overstatement, for there are circumstances in which the sovereign does have special regulatory interests, such as when the speech occurs on public property. These interests will be discussed in greater detail *infra*, Part II.B.

106. *Guarnieri*, 131 S. Ct. at 2501.

107. *See id.* at 2506 (Scalia, J., dissenting).

108. To be clear, I am not advocating such a position in public employment cases. To the contrary, I am a strong supporter of Helen Norton’s critiques. *See* Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1 (2009) (criticizing the vast control by government of on-the-job expression of its employees).

Instead, to reach the result it wanted, the majority read into the history of the Petition Clause a requirement that simply is not there: that a petition must be about a matter of community wide, public concern, and not about a private dispute. For this reason, it was defensible, in the majority's view, to graft a public concern test into Petition Clause analysis. To its credit, the Court explicitly limited its holding to the public employee context: "Outside the public employment context, constitutional protection for petitions does not necessarily turn on whether those petitions relate to a matter of public concern."¹⁰⁹ The question left unaddressed: What *does* the constitutional analysis of the Petition Clause turn upon?

II. ANALYZING WHAT LEVEL OF SCRUTINY OUGHT TO APPLY TO A VICTIM'S RIGHT TO PETITION

The Supreme Court's Petition Clause jurisprudence has produced a range of responses from scholars. Some argue that the right to petition deserves absolute protection.¹¹⁰ Others argue that an absolute standard is both unnecessary and unrealistic, given the Court's affinity in First Amendment jurisprudence to balancing tests. These scholars argue that a heightened, but not absolute, level of judicial scrutiny should apply to government burdens on petitioning.¹¹¹

Before analyzing whether a government policy is "unduly" burdensome, one must establish that the policy burdens the right at all.¹¹² It is to this task I turn first, in the context of battered mothers' willingness and ability to call the police, in light of the police "report-all" practice at issue. Then I address what level, or "tier," of judicial scrutiny should apply to the burden. I join those scholars who argue that strict scrutiny should apply: only a compelling state interest can justify infringement on the right, and this interest must be accomplished by the "least restrictive means" available.¹¹³ I conclude that, even under a less-than-strict (though still heightened) level

109. *Guarnieri*, 131 S. Ct. at 2498.

110. See Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960) ("The phrase 'Congress shall make no law' is composed of plain words, easily understood. . . . [The language is not] anything less than absolute."); Fais, *supra* note 21, at 1221–22 (arguing that the term "abridge" in the Petition Clause "is 'to reduce in scope' or 'diminish,'" and thus any diminishment of a victim's ability to report her victimization to the police is unconstitutional); see also Smith, *supra* note 36, at 1183 ("An absolute right of petition must be preserved to fulfill adequately the purposes and interests of petitioning.").

111. See, e.g., Wishnie, *supra* note 14, at 727–28 (discussing a number of judicial tools that would give petitioning heightened, though not absolute, protection); see also Krotoszynski & Carpenter, *supra* note 28, at 1288–89.

112. See *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 529 (2002) (arguing that the Court "must first isolate those burdens" before determining whether it raises First Amendment concerns).

113. See, e.g., Krotoszynski & Carpenter, *supra* note 28, at 1297–98 (arguing that the proper test for a restriction on political protesting should be strict: "By treating regulations that would remove protestors from the sight or hearing of government officials as presumptively invalid, the government is robbed of its broad brush; it is forced to justify its interest in security with more than mere speculation and to carry out that interest with the means that least restrict petitioning protestors' right to be seen and heard.").

of scrutiny, the reflexive “report-all” policy at issue herein is unconstitutional.

A. *Establishing the Burden*

While the level of scrutiny that the Supreme Court might apply to an ordinary citizen’s petition remains elusive in its jurisprudence, one may pluck from the doctrine examples of potentially impermissible “burdens.” These include financial costs, such as the imposition of attorneys’ fees; administrative costs, such as a requirement to post notices; prohibitions on future petitioning, such as an injunction against similar suits in the future; and other chilling effects, such as “the threat of reputational harm.”¹¹⁴

Victims of DV may fear that by calling the police, they will put themselves in jeopardy of losing their children.¹¹⁵ While social scientists have yet to conduct a rigorous exploration of how significant of a role this particular fear plays in battered mothers’ reluctance to report DV to the police, there is a growing body of empirical data suggesting that it is a serious deterrent.¹¹⁶ In addition to this data, there is widespread

114. See Wishnie, *supra* note 14, at 718 (citing *BE & K Constr.*, 536 U.S. at 530); see also Eckstein, *supra* note 32, at 1683–84 (arguing that the *Noerr-Pennington* doctrine “prevents laws from infringing not only petitioning the courts to resolve grievances but also acts incidental to petitioning the courts to resolve grievances” such as settlement agreements, pre-litigation threat letters, and other acts clearly incidental to petitioning).

115. See *Nicholson v. Williams*, 203 F. Supp. 2d 153, 204 (E.D.N.Y. 2002) (quoting expert witness Dr. Evan Stark, on whose testimony the court relied, who stated, “[W]hen a mother believes that if she reports domestic violence her children’s well-being will be endangered because they will be removed from the home and put in foster care, then she is unlikely to report the violence until it reaches an extreme level where public notice is unavoidable”); Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1111 (1995) (arguing that mothers and children understand the negative implications to reporting domestic violence); Pamela Whitney & Lonna Davis, *Child Abuse and Domestic Violence: Can Practice Be Integrated in a Public Setting?*, 4 CHILD MALTREATMENT 158, 163–64 (1999) (arguing strenuously against incorporating children’s exposure to domestic violence in child abuse statutes because battered women may be deterred from seeking help for fear of losing their children); Zandra D’Ambrosio, Note, *Advocating for Comprehensive Assessments in Domestic Violence Cases*, 46 FAM. CT. REV. 654, 665 (2008) (arguing that removal of children based on a parent’s victimization deters reporting of DV); Karlyn Barker, *Policy Turns the Abused into Suspects*, WASH. POST, Dec. 26, 2001, at B1 (discussing the potential backfire women face when they report domestic violence).

116. See, e.g., Ellen R. DeVoe & Erica L. Smith, *Don’t Take My Kids: Barriers to Service Delivery for Battered Mothers and Their Young Children*, 3 J. EMOTIONAL ABUSE 277, 280, 286–87 (2003) (battered mothers reported reluctance to call police for fear of removal of children by child protective services); Ruth E. Fleury et al., “*Why Don’t They Just Call the Cops?*”: *Reasons for Differential Police Contact Among Women with Abusive Partners*, 13 VIOLENCE & VICTIMS 333, 339–40 (1998) (victims reported fear of police taking the children as a reason for reluctance to call the police); Michelle Fugate et al., *Barriers to Domestic Violence Help Seeking*, 11 VIOLENCE AGAINST WOMEN 290, 303–04 (2005) (reasons victims surveyed did not call the police include fear of losing children to child protective services); Sandra Wachholz & Bauke Miedema, *Risk, Fear, Harm: Immigrant Women’s Perceptions of the ‘Policing Solution’ to Woman Abuse*, 34 CRIME, LAW & SOC. CHANGE 301, 310–11 (2000) (study of immigrant women in Canada showing

acknowledgment among legal scholars, bolstered by a host of individual victims' experiences, that a mother's report of DV to the police poses a substantial risk to maintaining custody of her children.¹¹⁷

Police are "mandatory reporters" of child abuse. All states have statutes requiring that certain enumerated professionals report the suspected abuse of a child to CPS.¹¹⁸ When these statutes were promulgated in the 1960s, they required only physicians to make reports, and only in circumstances in which they suspected the physical abuse of a child.¹¹⁹ Over the years, the statutes have greatly expanded to include other professionals who work with children and to include much broader definitions of what constitutes a

police assistance was seen as holding potential to involve various forms of state surveillance and control over themselves and their families, including the removal of children).

117. See Coker, *supra* note 7, at 834 (quoting a victim who "would never call" the police again, given that CPS was notified); see also GOODMARK, *supra* note 71, at 156 (quoting a victim: "[I]f I had called the police on him, they would have taken both of us to jail, they would have taken my children to CPS, and in foster care, and it would've turned into a nightmare"); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 35 (1999) ("If battered women learn that seeking protection from their abusive partner increases the risk that their children may be taken away, they will be greatly deterred from coming forward."); Leigh Goodmark, *Law is the Answer? Do We Know That for Sure? Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 27 n.115 (2004) ("In one community actively working on these issues, I met a battered mother whose three-day old child was removed from her care. Her act that constituted neglect, calling her abusive boyfriend to take her home from the hospital when no one else was available to help her.").

118. See ALA. CODE § 26-14-3 (2009); ALASKA STAT. § 47.17.020 (2008); ARIZ. REV. STAT. ANN. § 13-3620 (2009); ARK. CODE ANN. § 12-18-402 (2009); CAL. PENAL CODE § 11166 (West 2010); COLO. REV. STAT. ANN. § 19-3-304 (West 2009); CONN. GEN. STAT. ANN. § 17a-101a (West 2006); DEL. CODE ANN. tit. 16, § 903 (2003); D.C. CODE § 4-1321.02 (LexisNexis 2009); FLA. STAT. ANN. § 39.201 (West 2010); GA. CODE ANN. § 19-7-5 (2009); HAW. REV. STAT. § 350-1.1 (2008); IDAHO CODE ANN. § 16-1605 (2009); 325 ILL. COMP. STAT. ANN. 5/4 (West 2009); IND. CODE ANN. § 31-33-5-1 (LexisNexis 2007); IOWA CODE ANN. § 232.69 (West 2009); KAN. STAT. ANN. § 38-1522 (2000); KY. REV. STAT. ANN. § 620.030 (LexisNexis 2009); LA. CHILD. CODE ANN. art. 609 (2004); ME. REV. STAT. ANN. tit. 22, § 4011-A (2009); MD. CODE ANN. FAM. LAW § 5-704 (LexisNexis 2009); MASS. GEN. LAWS ch. 119, § 51A (2009); MICH. COMP. LAWS ANN. § 722.623 (West 2009); MINN. STAT. ANN. § 626.556 (West 2010); MISS. CODE ANN. § 43-21-353 (2009); MO. ANN. STAT. § 210.115 (West 2010); MONT. CODE ANN. § 41-3-201 (2008); NEB. REV. STAT. § 28-713 (2008); NEV. REV. STAT. ANN. § 432B.220 (LexisNexis 2007); N.H. REV. STAT. ANN. § 169-C:29 (2009); N.J. STAT. ANN. § 9:6-8.10 (West 2009); N.M. STAT. ANN. § 32A-4-3 (West 2006); N.Y. SOC. SERV. LAW § 413 (McKinney 2010); N.C. GEN. STAT. ANN. § 7B-301 (West 2009); N.D. CENT. CODE § 50-25.1-03 (2009); OHIO REV. CODE ANN. § 2151.421 (LexisNexis 2009); OKLA. STAT. ANN. tit. 10A, § 1-2-101 (West 2009); OR. REV. STAT. § 419B.010 (2009); 23 PA. CONS. STAT. § 6311 (2009); R.I. GEN. LAWS § 40-11-3 (2006); S.C. CODE ANN. § 20-7-510 (1985); S.D. CODIFIED LAWS § 26-8A-3 (2009); TENN. CODE ANN. § 37-1-403 (2009); TEX. FAM. CODE ANN. § 261.101 (West 2009); UTAH CODE ANN. § 62A-4a-403 (West 2009); VT. STAT. ANN. tit. 33, § 4913 (2009); VA. CODE ANN. § 63.2-1509 (2009); WASH. REV. CODE ANN. § 26.44.030 (West 2010); W. VA. CODE ANN. § 49-6A-2 (LexisNexis 2009); WIS. STAT. ANN. § 48.981 (West 2009); WYO. STAT. ANN. § 14-3-205 (2009).

119. See Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 57 (2001).

reportable act.¹²⁰ Now, not just physical injury, but mental and emotional injuries are reportable acts.

What constitutes emotional or mental injury has proven difficult to define. Many states' statutes are vague, or simply do not define the terms.¹²¹ In addition to vague statutory definitions, many statutes do not delineate the circumstances that create a duty to report.¹²² For example, many require a report when there is a "reasonable suspicion" to believe that a child is at risk of harm. A "reasonableness" standard confuses reporters.¹²³ And in all states, failure to report to CPS carries criminal penalties, while making a good faith report provides immunity.¹²⁴

Consequently, many reporters err on the side of caution; rather than ascertain a "reasonable suspicion," they report when there is *any* suspicion.¹²⁵ Indeed, there is evidence that police report to CPS when children are present but asleep during the incident,¹²⁶ and even when children are away from the home during the incident.¹²⁷ Most troubling—and hence the focal point of this Article—is the "report all" policy adopted in several jurisdictions. In jurisdictions across the country, the police report *every* DV call in which a child is present—and in some, every DV call in which one of the parties has a child, whether the child was present or not—as a matter of policy.¹²⁸

120. *Id.* at 57.

121. *See, e.g.*, CAL. PENAL CODE § 11165.6.

122. *See* Steven J. Singley, *Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters*, 19 J. JUV. L. 236, 243–46 (1998) (arguing that vague reporting statutes that do not clearly state the conditions under which reporters must report cause over-reporting). As one example, California requires police to report when it is objectively reasonable "to entertain a suspicion" of child abuse or neglect. CAL. PENAL CODE § 11166(a)(1).

123. *See* Singley, *supra* note 122, at 246.

124. *See id.*; Brooke Albrandt, Note, *Turning in the Client: Mandatory Child Abuse Reporting Requirements and the Criminal Defense of Battered Women*, 81 TEX. L. REV. 655, 658 (2002).

125. *See* Singley, *supra* note 122, at 242–43.

126. *See* DeVoe & Smith, *supra* note 116, at 286 (statement of victim whose baby was asleep when the police responded to her call to report domestic violence). Also, "present" may mean not just asleep, but in another room. *See* Telephone Interview with Stephanie Jackson, Sergeant, Supervisor of Family Violence Unit, Tulsa, Okla. Police Dep't (Nov. 29, 2010) ("If a child is in any way involved or present at the scene, then child services is always called. Being present at the scene includes if a child was not in the room where the assault took place.").

127. For example, when the police took the report of Shawline Nicholson, named plaintiff in *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002), discussed *infra* Part III.B.3.a, the police contacted the state's CPS to report the DV, resulting in the removal by that agency of Shawline's two children. *See id.* at 169. One of the children was at school when the assault occurred. *See id.* The other was in another room, in her crib. *See id.*; *see also* Telephone Interview with Bartley, Detective, Jacksonville Police Dep't (Dec. 30, 2010) ("In most—to almost all—circumstances, if an officer responds to a domestic violence call and children are in the home, and also if kids live in the home but are not there at the time, we do usually route the reports to CPS.").

128. *See supra* note 5; *see also* Coker, *supra* note 7, at 833 ("Some police departments have developed policies that require officers to report to child protection services every case in which a child is present at a domestic violence call." (citing Telephone Interview with

Victims of DV, and those who advocate for them, view the intervention of CPS as a highly negative occurrence. As advocates for victims have argued, CPS

[t]ypically: blames mothers who are domestic violence victims for their own victimization; blames these women for any negative ramifications of their abuse for their children; removes children from their mothers' custody when doing so is not necessary for the child's protection; fails to hold the abuser accountable for his conduct; and fails to provide any services that contribute to the short- or long-term well-being of the child or the nonabusive parents.¹²⁹

Thus even if CPS responses to DV victims begin to change, as DV activists and policymakers are urging, it will be quite some time before battered mothers are comfortable accepting the risks associated with calling the police.¹³⁰

In conclusion, there is empirical data, and widespread consensus among DV scholars, advocates in the community who work with DV victims, and DV victims themselves, that victims who are mothers tend to underreport DV at least in part due to their fear of being investigated by CPS. A report-all DV policy therefore has a tangible chilling effect.¹³¹ The question then is how to balance the state's objective of identifying a child who is at-risk against an adult victim's First Amendment right to petition.¹³²

Drew Kirkland, Captain, Portland, Or. Police Dep't (June 6, 2000)). In addition, "Captain Kirkland explained that officers are required to report the presence of children at any domestic violence call. The police department's records division forwards the officer's domestic violence reports in which children were present to the state child and family protection agency." *Id.* at 833 n.125.

129. Weithorn, *supra* note 119, at 29 (reviewing the complaints of DV advocates and concluding, "There is evidence that many child protective systems have operated in this manner, as well as for the ineffectiveness of the traditional child protection interventions for adult domestic violence victims and their children.").

130. *See* DeVoe & Smith, *supra* note 116, at 290 ("Even if actual system responses begin to change to become more supportive of preserving the mother-child unit, battered women's perceptions of negative consequences for reporting domestic violence may remain a significant barrier to seeking help for themselves or their children.").

131. *See* Weithorn, *supra* note 119, at 29 ("[R]eporting requirements will only have . . . a chilling effect if reports to child protective services are viewed negatively by battered mothers. Unfortunately, at present, the history and 'reputation' of child protective services involvement in domestic violence cases is anything but positive.").

132. One point of clarification must be made before addressing this question. When a police officer has probable cause to believe that a crime has occurred, such as that a mother intentionally exposed her child to DV—a crime in a handful of states—she could properly be arrested and charged. The right to petition is not a defense to criminal conduct. *See, e.g., Richardson v. N.Y.C. Health and Hosps. Corp.*, No. 05 Civ. 6278(RJS), 2009 WL 804096, at *9 (S.D.N.Y. Mar. 25, 2009) (finding that when the police have probable cause to arrest a plaintiff, she cannot recover on the theory that she was arrested in retaliation for engaging in protected speech; once probable cause is determined, an inquiry into the underlying motive for the arrest need not be undertaken). That circumstance, however, is not the focus of this Article. Instead, I examine the circumstance in which the police, as a matter of policy, refer battered mothers to CPS without any investigation of whether a crime such as exposure to DV has occurred. Here, the infringement on the right to petition is the reflexive reporting policy. As implemented, this policy regulates petitioning, not child endangerment.

B. Analyzing the Burden

For the reasons articulated in Part II.A, the right to petition, as a separately enumerated right in the text of the First Amendment with a distinct history and underlying purpose, deserves a separate doctrinal analysis than the right to free speech. I join those scholars (and Justice Scalia)¹³³ who argue that there is no principled justification for treating the rights identically. A direct application of the analytical tests used to protect speech—such as the public concern test in public employee speech, or the content-based/content-neutral test, discussed below—is neither practical nor desirable in Petition Clause analysis.

I do, however, argue that the report-all policy described above should be subjected to the same rigor of scrutiny—strict—that the Court affords the most suspect government restrictions on the right of speech. Less-than-strict scrutiny is indefensible in the context of a battered mother’s call to the police for the same reason it is indefensible when a government restriction on speech leaves “no alternative avenue” for an individual to effectively communicate her message, as discussed below. After demonstrating why this is so, I apply strict scrutiny to the police practice at issue. I also argue that even if a less-than-strict standard were applied, the reflexive, report-all policy as applied to a battered mother violates her right to petition.

1. Rationales for Heightened Scrutiny in Speech Cases

The right to free speech is not absolute.¹³⁴ The government may infringe on an individual’s free speech right, though there is a continuum of protection, or “tiers of scrutiny,”¹³⁵ that courts apply to test whether the infringement violates the First Amendment.

The level of judicial scrutiny that applies to a government restriction of speech requires an examination of how it regulates speech.¹³⁶ If it restricts the content of the speech, the law or policy is presumptively invalid¹³⁷ and subjected to strict judicial scrutiny.¹³⁸ If it restricts the means or mode of

133. See *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2504–06 (2011) (Scalia, J., dissenting).

134. See *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961).

135. See Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 784.

136. See Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 37 (2003) (“Contemporary First Amendment doctrine establishes a bifurcated analytical framework that focuses initially on how a particular law regulates expression.”); see also, e.g., *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (“As *Perry* makes clear, the appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content.” (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983))); Krotoszynski & Carpenter, *supra* note 28, at 1261 (“The strictness with which the Court polices this rule is vital to the protection of speech activity because the presence or absence of content neutrality determines the level of scrutiny to which a speech restriction will be subjected.”).

137. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

138. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653 (1994).

speech, leaving available other avenues of communication, it is subject to a variety of less rigorous, open-ended balancing tests, depending upon the specific type of restriction and the place where the speech occurs.¹³⁹ In these balancing tests, the court weighs the government's interest in restricting the speech against the speaker's interest in expression; the greater the government interferes with speech, the greater the burden on the government to justify the interference.¹⁴⁰

The same framework may not easily be translated to right-to-petition claims. Application of the content-based versus content-neutral distinction to a battered mother's call to the police is both unworkable on a practical level and undesirable on a theoretical level. Practically, a policy that on its face directs the police to report the presence of a child at the scene of *domestic* violence, but not other types of violence, such as stranger violence or community violence, may constitute a subject-matter (content-based) restriction,¹⁴¹ for it discourages, and sometimes punishes, communication to the police about an entire subject—*domestic* violence.¹⁴² On the other hand, the speech contained in the petitions of some victims of DV—those who are not mothers—is not infringed, for the policy of contacting CPS does not apply to this group of DV victims. It simply does not make sense, nor does it advance the analysis, to apply the content-based versus content-neutral distinction.

The content-based, neutral distinction is also undesirable as a theoretical matter in Petition Clause cases. As discussed in Part I.C, at the heart of petitioning is access to a particular audience—the government—for the

139. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983) (“The Supreme Court tests the constitutionality of content-neutral restrictions with an essentially open-ended form of balancing. That is, in each case the Court considers the extent to which the restriction limits communication, ‘the substantiality of the government interests’ served by the restriction, and ‘whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment.’” (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 70 (1981))).

140. See *Id.* at 190 (“The greater the interference with effective communication, the greater the burden on government to justify the restriction.”).

141. To be subject matter neutral, a government policy cannot restrict communication of or about an entire subject. “Such restrictions are directed, not at particular ideas, viewpoints, or items of information, but at entire subjects of expression.” *Id.* at 239.

142. A central purpose of the content distinction is to prevent government restrictions against particular viewpoints. Note, *The Content Distinction in Free Speech Analysis After Renton*, 102 HARV. L. REV. 1904 (1989). I do not here discuss viewpoint discrimination, which restricts speech not based on its subject, but on its speaker's view, because this type of discrimination does not seem to me to apply to the police policy at issue. That is to say, the policy does not plausibly appear to favor the particular view of a mother over the particular view of someone who is not a mother. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (“In the realm of private speech . . . government regulation may not favor one speaker over another” and “[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”). Attempting even to conceptualize whether a battered mother's call to the police might be a viewpoint, at all, highlights the difficulty of a direct application of a right to speech analytical tools to the right to petition.

purpose of presenting a particular type of communication—a request for redress. Beyond a threshold assessment of whether a petition is merely a “sham,”¹⁴³ the content of the communication should be analytically irrelevant.¹⁴⁴ The right to petition protects one’s access to the government. Thus, the proper judicial inquiry should be focused on how greatly the individual’s access is infringed.

It is the underlying rationale for, rather than direct application of, the content-based versus neutral distinction that is applicable to petitioning. Content-neutral restraints on speech generally leave the speaker free to shift to other modes of expression and do not distort public debate.¹⁴⁵ Less than strict scrutiny is defensible because these kinds of restrictions leave the speaker ample alternative opportunities for expression. Without these alternatives, the values that lie at the very core of the right to free speech are threatened: public debate is skewed, truth-seeking is thwarted, self-realization through expression is diminished, and the process of self-governance is jeopardized.¹⁴⁶

When a DV victim calls the police for help, there quite simply is no alternative avenue for communicating the message. She has nowhere else to turn. The police have a monopoly—exclusive, complete, and total control—over the provision of protection from immediate physical harm.¹⁴⁷ Applying less-than-strict judicial scrutiny to a government infringement of the right, in this context, is not justifiable.

Nonetheless, should the Court determine that a less-than-strict level of judicial scrutiny applies (though still something more than “intermediate” level scrutiny), it is clear that the Court shows great concern for the availability of alternative avenues of expression. Indeed, as Geoffrey Stone first articulated in 1987, the Court applies a much more rigorous standard to content-neutral restrictions when they leave no alternative avenues for effective communication.¹⁴⁸ Stone compared a half-dozen Supreme Court cases to make this point, all of which involved analysis of content-neutral restrictions.¹⁴⁹ In three of the cases, the Court upheld the government

143. Wishnie, *supra* note 14, at 718 (“The threshold . . . for treating a petition as an unprotected sham is reasonably high.” (citing *BE & K Constr. Co. v. NLRB*, 536 U.S. at 516, 531–32 (2002))).

144. As discussed in Part I.C, the right to petition is the right to communicate to the government, regardless of the content of the communication.

145. Stone, *supra* note 139, at 200.

146. Scholars disagree about core First Amendment values. Regardless of which value one might prefer, the above comprise a list of the most discussed First Amendment values. See Bhagwat, *supra* note 30, at 993–94.

147. See Wishnie, *supra* note 14, at 731 (“The clearest instance of exclusive government control may be criminal law: A victim who cannot petition the police has nowhere else to turn, and thus special protection for petitioning on criminal matters would cohere strongly with the court access doctrines.”).

148. See Stone, *supra* note 139, at 190 n.5.

149. *Id.*

restrictions;¹⁵⁰ in the other three the Court struck them down.¹⁵¹ The linchpin was whether there were meaningful alternative avenues for communication.¹⁵² More than twenty years later, Ashutosh Bhagwat reached a similar conclusion about the Court's treatment of content-neutral restrictions of speech:

The commonality appears to be that the Court will uphold regulations of speech so long as, in its view, the regulation keeps open *for that speaker* ample alternative, and effective, channels of communication. If, however, the Court concludes that the regulation effectively forecloses a speaker from communicating her message, it is struck down.¹⁵³

The argument that alternative and effective avenues of communication are as important to Petition Clause analysis as to Speech Clause analysis is bolstered by the Court's own reasoning in its most recent Petition Clause decision, *Guarnieri*. There the Court observed that the government, when acting as employer, provided multiple avenues of redress to protect public employees' rights, including filing a grievance with the union, filing an administrative complaint, and filing a lawsuit under a host of state and federal laws.¹⁵⁴ Although the Court treated *Guarnieri*'s claim as speech, rather than as a petition, it did so (as discussed above) in the context of the government's special regulatory interests in the efficient and effective operation of government.

In speech cases such as public employment, where the government has a special regulatory interest—and indeed similarly in public forum cases,

150. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981); *United States v. O'Brien*, 391 U.S. 367 (1968).

151. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *NAACP v. Button*, 371 U.S. 415 (1963); *Schneider v. State*, 308 U.S. 147 (1939).

152. Indeed, Stone expresses this repeatedly. See Stone, *supra* note 139 at 190–92 n.5.

153. Bhagwat, *supra* note 135, at 790. To the list of cases Stone analyzed, Bhagwat added these in the category of government restrictions the Court upheld, for providing alternative avenues of communication: *Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002); *Hill v. Colorado*, 530 U.S. 703 (2000); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984). To the category of those struck down, for failing to provide alternative avenues of communication, Bhagwat added: *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992), and *United States v. Grace*, 461 U.S. 171 (1983). For a similar discussion, see RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 3-71–3-74 (1994) (describing the Court's content-neutral restriction analysis as having an “accordion-like” quality that the Court at times implements rigidly and at other times weakly).

154. The Court explained:

The government can and often does adopt statutory and regulatory mechanisms to protect the rights of employees against improper retaliation or discipline, while preserving important government interests. Employees who sue under federal and state employment laws often benefit from generous and quite detailed antiretaliation provisions. These statutory protections are subject to legislative revision and can be designed for the unique needs of State, local, or Federal Governments, as well as the special circumstances of particular governmental offices and agencies.

Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2497 (2011) (citations omitted).

where the government has a special proprietary interest—the Court will put a brake on the rigor with which it scrutinizes the government restriction at issue, in deference to the government’s special interests.¹⁵⁵ However, when the government has no special interests, such as when the speech occurs in an ordinary citizen’s home,¹⁵⁶ the Court has applied extra stringency both because of the “long constitutional tradition of respecting ‘individual liberty in the home’ . . . and because of the absence of regulatory needs that exist when the government is managing its own property.”¹⁵⁷

The courts of appeals have indeed applied these Speech Clause principles to their Petition Clause analyses. In *Thaddeus-X v. Blatter*,¹⁵⁸ the court was presented with the question of whether the public concern test should apply to prisoners’ Petition Clause claims.¹⁵⁹ The court, like other circuit courts of appeals, held that it could not be imported into the prison setting.¹⁶⁰ In reaching its conclusion, the court observed that First Amendment claims must be analyzed in context. It sketched out a continuum of situations:

Standing in a city park (the classic “public forum”) at a rally, a citizen is free to say almost anything without interference from the government; any restriction on his speech must be “narrowly tailored to serve a significant government interest.” Standing in his office at a state agency, an employee is free to speak up about matters of public concern; his government employer “enjoy[s] wide latitude” in limiting other speech to enable the office to function properly and efficiently. Standing in his cell in a prison, an inmate is quite limited in what he can say; his government

155. See Bhagwat, *supra* note 135, at 789–90 (arguing that the Court’s decisions in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), and *Bartnicki v. Vopper*, 532 U.S. 514 (2001), raise serious doubts about whether the Court intends the relatively deferential *Ward* test to be a general test for content-neutral regulations).

156. See *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (the Court struck down an ordinance on signs posted on private homes, though there was no government proprietary interest at stake); see also *Bartnicki v. Vopper*, 532 U.S. 514 (2001). Bhagwat relied on *Bartnicki* when he reached the conclusion that there are “serious doubts about whether the Court intends the relatively deferential *Ward* test to be a general test for content-neutral regulations.” Bhagwat, *supra* note 135, at 791.

157. Bhagwat, *supra* note 135, at 790 (quoting the Court’s rationale in *Ladue*).

158. 175 F.3d 378 (6th Cir. 1999).

159. *Id.*

160. *Id.* at 393 (“Given the distinctive rights of the two types of plaintiffs, the separate interests of the two types of government entities, and the dissimilar nature of the relationship between the plaintiff and the government in these two settings, any honest attempt to perform the balancing prescribed by the Supreme Court in *Pickering* cannot unhesitatingly import reasoning from the public employment setting into the prison setting.”); see also *Bridges v. Gilbert*, 557 F.3d 541, 551 (7th Cir. 2009) (citing the Fifth and Eighth Circuits, and holding that the public concern test is not applicable in the prison context); *Friedl v. City of New York*, 210 F.3d 79, 87 (2d Cir. 2000) (“[W]e reject the contention . . . that where the [prisoner] alleges retaliation for . . . a petition to the government, he must ‘establish that the speech contained in his petition . . . was a matter of public concern.’”); *Cornell v. Woods*, 69 F.3d 1383, 1388 (8th Cir. 1995) (applying *Turner* without mention of the public concern test for prisoners’ claims); *Jackson v. Cain*, 864 F.2d 1235, 1248 (5th Cir. 1989) (applying *Turner*’s “legitimate penological interests” test without mention of the public concern test for prisoners’ claims).

jailor can impose speech-limiting regulations that are “reasonably related to legitimate penological interests.”¹⁶¹

Thus there is a continuum of settings within which the First Amendment protects petitioning. When the setting changes, so too does conduct deemed protected in the given setting.¹⁶² Neither prisoners nor public employees enjoy the same right of petition as do ordinary citizens. By virtue of their conviction and incarceration, prisoners’ constitutional rights are limited. Their right to petition guarantees them access to courts to attack their sentences and conditions of confinement; it does not, however, guarantee the ability to file “everything from shareholder derivative actions to slip-and-fall claims.”¹⁶³ Public employees’ right to petition is also distinct from that of ordinary citizens. A citizen who accepts an offer of employment from the government “must accept certain limitations on his or her freedom.”¹⁶⁴ The right to petition—when petitioning as employee, and not as citizen—is limited to matters of public concern, by virtue of “the consensual nature of the employment relationship and by the unique nature of the government’s interest.”¹⁶⁵ In short, prisoners may be required to tolerate greater infringement of their right than public employees, who may be required to tolerate greater infringement of their right than ordinary citizens.

A DV victim who calls the police for protection from bodily harm is communicating as a private citizen to her sovereign. The government has no special regulatory interest. The victim has no—not one—alternative avenue for expression. She is communicating about a fundamental right—that of bodily integrity.¹⁶⁶ A government infringement on her right to call the police should be afforded the strictest scrutiny.

2. Application of Strict Scrutiny

Strict scrutiny requires that a restriction on speech is necessary to serve a compelling interest and that there are no less speech-restrictive alternatives.¹⁶⁷ This test establishes a very high burden for the

161. *Thaddeus-X*, 175 F.3d at 388–89 (citations omitted).

162. *See id.*

163. *Lewis v. Casey*, 518 U.S. 343, 355 (1996).

164. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

165. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011).

166. I have not heretofore discussed the significance of the fact that a DV victim’s petition pertains to a fundamental right. Compare a DV victim’s call to the police with a call to the police to complain of a neighbor’s loud music. The Petition Clause does not discern what might be described as “high value” petitioning, as might the Court’s interpretation of the Speech Clause as protecting “high value” speech. *See Stone*, *supra* note 139, at 196 (discussing the notion of high value speech, as embodied in free speech jurisprudence). Yet the court access doctrine does, as discussed *infra* note 231—and given this doctrine’s close affiliation, indeed grounding in the right to petition, it seems worth mentioning here.

167. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

government—not a general balancing test, but rather something approaching absolute protection.¹⁶⁸

The protection of children from the risk of physical and emotional injury is well-established in First Amendment jurisprudence as a compelling state interest.¹⁶⁹ The question is whether the report-all policy is necessary and is the least petitioning-restrictive means of identifying children at risk.¹⁷⁰ This is a factual, common-sense inquiry.¹⁷¹

There are unquestionably less restrictive means for identifying children at risk. Any investigation whatsoever on the part of the police would be a less restrictive alternative. Police could, for example, as mandatory reporters of child abuse, make the inquiry required of them by the mandatory reporting statute in their state.¹⁷² This would entail a “reasonable suspicion” or “probable cause” inquiry. As discussed previously, the primary criticism of these statutes is that they are vague, causing many professionals who are mandated to report to be unnecessarily confused and, in an effort to avoid liability, to over-report. Even if police, like other professionals, merely over-reported, rather than reported-all, this would be a less petitioning-restrictive means of identifying children at risk.

But police—unlike other professionals who are required to report—have particularized expertise, training, and experience in analyzing reasonable suspicion and probable cause. Of professionals who are required to report

168. See Stone, *supra* note 139, at 196 (observing that the “Court has invalidated almost every content-based restriction that it has considered in the past quarter-century” to support the characterization of judicial review of content-based analysis as a standard that approaches absolute protection); see also SMOLLA, *supra* note 153, at 3–69 (characterizing “least restrictive means” as a standard that is extremely difficult to satisfy); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2439 n.95 (1996) (finding only one recent case in which the Supreme Court used a balancing test in evaluating a content based restriction, and describing this as an aberration).

169. This point is widely accepted, and has been for some time. See *Prince v. Massachusetts*, 321 U.S. 158 (1944) (declining to recognize a religious exemption to a law prohibiting underage employment). In the specific context of right to speech, particularly in the strand of cases covering indecent speech, the Court has concluded that the state has a compelling interest in protecting the physical and psychological well-being of children, see e.g., *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989), though whether this is an independent state interest or one in which the state has a secondary interest only to parents’ ability to do so is unclear. See generally Ashutosh Bhagwat, *What if I Want My Kids to Watch Pornography?: Protecting Children from “Indecent” Speech*, 11 WM. & MARY BILL RTS. J. 671 (2003).

170. See *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990); *Sable Commc’ns*, 492 U.S. at 126; *Fla. Star v. B.J.F.*, 491 U.S. 524, 538 (1989); *Boos v. Berry*, 485 U.S. 312, 329 (1988); *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 586 (1983).

171. For an argument that empirical data, not common sense, should be the government’s burden in proving “least restrictive means,” see Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 611–12 (2005) (arguing that only in the *absence*, but not *ambiguity* of social science data should the Court choose not to rely upon data; otherwise, it must discern which data is reliable).

172. See *supra* note 118 and accompanying text (citing the states’ mandatory reporting statutes).

their reasonable suspicion that children are at risk of injury, police should be the most well-equipped to make appropriate referrals. In fact, of all mandated reporters, police should be making the most discerning—rather than the most reflexive—reports.

In my inquiries to police departments across the nation, I found two examples of policies that bridge the gap between the arguably vague requirements of mandatory reporter statutes and the need for more precise and effective police reporting practices. In Charleston, South Carolina, when police respond to DV calls, they maintain significant discretion about whether to report to CPS.¹⁷³ Within the ambit of possible referrals, there is a presumption that, if a child witnessed the violence, a report will be made. But the inquiry does not end there; these officers are trained to be discerning. As one detective explained: “There is a difference between a one year old hearing loud voices or argument and a three year old hearing a parent threatening to kill the other parent or screams for help.”¹⁷⁴ Using their discretion after investigation, the ultimate goal is for officers to have “articulable knowledge” about whether a child actually might be in harm’s way before reporting.¹⁷⁵

Another example is Atlanta’s policy. There the responding officer submits to her supervisor a set of facts that includes the relationship of the parties; the time, place, and date of the incident; whether children “were involved or whether the act of family violence was committed in the presence of children”; the type and extent of the alleged abuse; the existence of substance abuse; the number and types of weapons involved; the existence of any prior court orders; the number of complaints involving persons who have filed previous complaints; the type of police action taken; and “any other information that may be pertinent.”¹⁷⁶ Based on this more discerning set of facts, the police in Atlanta make an informed, rather than reflexive, decision with regard to reporting.

3. Application of a Balancing Test

If the report-all practice were analyzed under a less-than-strict level of scrutiny, how much less scrutiny does it deserve? Given the absence of clear guidance from the Supreme Court, I return to the less-than-strict line of speech cases identified by Stone and Bhagwat,¹⁷⁷ in which the Court struck down content-neutral restrictions on speech. Of these cases, *NAACP v. Button*¹⁷⁸ provides the most valuable precedent for determining the appropriate standard of judicial review. This is because *Button*, although in

173. Email from Mike Lyczany, Detective, Charleston Police Dep’t (Dec. 6, 2010) (on file with author).

174. *Id.*

175. *Id.*

176. Email from N. Towns, Atlanta Public Affairs/Open Records Officer (Dec. 1, 2010) (on file with author).

177. *See supra* notes 138, 153 and accompanying text.

178. 371 U.S. 415 (1963).

name a right-to-speech case, was in actuality a case about the rights of association and petition.¹⁷⁹

In the 1960s, the NAACP filed a lawsuit challenging a Virginia statute that prohibited lawyers from soliciting legal business. As a matter of practice, the NAACP routinely sought out potential plaintiffs for civil rights litigation.¹⁸⁰ The Virginia statute restricted this practice. The Court, in holding that the statute was unconstitutional, explained that “under the conditions of modern government, litigation may well be the sole practicable avenue” to effect political change.¹⁸¹ Only a compelling state interest could justify limiting such a First Amendment freedom.¹⁸² The mere existence of the law “could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.”¹⁸³ Clearly, this was a case centered around petitioning.

The Court found that “however valid [the State’s] interest” may be, “that interest does not justify the prohibition of NAACP’s activities disclosed by this record.”¹⁸⁴ The Court’s holding rested on the government’s failure to show that the law was tailored narrowly enough to prevent the harms the State identified. In effect, the Court explained, the law “proscribe[d] any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys,” not just the evils (profit and the misuse of the legal process for oppression) that the government intended to prevent.¹⁸⁵ Important in this discussion was the Court’s explicit reluctance to presume that the law curtailed “constitutionally protected activity as little as possible” but rather its rigor in taking into account the numerous potentially chilling applications of the law.¹⁸⁶

The Court concluded: “Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”¹⁸⁷ The police report-all policy is exactly the type of broad prophylactic rule that the *Button* court condemned. There are several reasons the government might offer for the policy, none of which justify its broad sweep.

179. See *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2500 (2011) (“Petitions to the courts . . . can likewise address matters of great public import. In the context of the civil rights movement, litigation provided a means for ‘the distinctive contribution of a minority group to the ideas and beliefs of our society.’” (quoting *Button*, 371 U.S. at 431)); see also Bhagwat, *supra* note 30, at 986 (noting that the Court in *Button* “struggled to apply a free speech lens” to a case that “centered on litigation, a form of activity otherwise considered a form of petitioning”); Spanbauer, *supra* note 17, at 45 (characterizing *Button* as a right of petition case, though criticizing the Court for its conjunctive reading of the First Amendment expressive guarantees rather than resting its decision exclusively on the Petition Clause).

180. See *Button*, 371 U.S. at 422.

181. *Id.* at 430.

182. *Id.* at 438.

183. *Id.* at 436.

184. *Id.* at 439.

185. *Id.* at 433.

186. *Id.* at 432.

187. *Id.* at 438.

a. Co-occurrence of DV and Child Abuse

There can be no doubt that children exposed to DV are harmed: “Domestic violence against the mother is a common, and may be the single most common, context for child abuse or neglect.”¹⁸⁸ The government therefore might argue that it must cast its net widely to capture this particular group of children who are at heightened risk of abuse.¹⁸⁹

While it is now “commonly accepted” that children exposed to DV are harmed,¹⁹⁰ the data supporting this conclusion is wildly divergent. The most frequently cited statistics are: (1) that the number of children in the United States who live in homes in which DV occurs and who are themselves injured or abused ranges from 3.3 to 10 million; and (2) that the rate of overlap between child victimization and DV is anywhere between 6.5 percent and 82 percent.¹⁹¹

In addition to the extremely broad range in these estimates, the empirical work underlying this data has been criticized for its methodological weaknesses.¹⁹² The studies upon which these numbers are based rely on reports from adult victims who are asked either about their child’s exposure to DV, or about their own exposure to DV as children.¹⁹³ Both of these measures are problematic. First, parents tend to underestimate the frequency with which their children are exposed.¹⁹⁴ Second, there are serious limits on adult memory and the reliability of self-reports of child victimization, particularly if the victimization happened years in the past.¹⁹⁵

188. Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN’S RTS. L. REP. 107, 109 (2002).

189. See Weithorn, *supra* note 119, at 22 (“Arguably, one advantage of including children exposed to domestic violence within the ambit of reporting . . . statutes is the possibility that the millions of such children who are not known to law enforcement and helping professionals will be identified, so that the system can begin to assist them.”).

190. See Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 568 (2004) (noting the common acceptance of this fact in the literature).

191. Jeffrey L. Edleson et al., *Assessing Child Exposure to Adult Domestic Violence*, 29 CHILD & YOUTH SERVS. REV. 961, 962 (2007) (reviewing the empirical data regarding children’s exposure to adult DV, and noting that the two most widely cited estimates are 3.3 million and 10 million); see also Stark, *supra* note 188, at 109 n.10 (explaining the origins of the 6.5 percent and 82 percent). One need only type the phrase “3.3 million children” into a Westlaw search to obtain forty-three citations for this number.

192. See, e.g., EVE S. BUZAWA, CARL G. BUZAWA & EVAN STARK, RESPONDING TO DOMESTIC VIOLENCE 397 (4th ed. 2012); Edleson et al., *supra* note 191, at 963 (“Most of these are rough estimates of the number of children exposed to domestic violence and each relies on imprecise definitions, retrospective accounts or indirect measurement to arrive at a final number.”).

193. See Judy L. Postmus, *Domestic Violence and Children’s Well-Being*, in 2 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS 1, 2 (Evan Stark & Eve S. Buzawa eds., 2009).

194. See Evan Stark, *The Battered Mother’s Dilemma*, in 2 VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS, *supra* note 193, at 95, 111 (“Although an abused woman or a perpetrator may deny children have witnessed the abuse, children often provide detailed recollections of the very events they were not supposed to have witnessed.”).

195. See Postmus, *supra* note 193, at 2.

In addition, the studies' definitions of DV vary and are imprecise.¹⁹⁶ Finally, few studies detail the actual nature of the exposure; instead, the question presented is generally dichotomous, failing to capture the co-occurrence of exposure and actual injury to the child; the severity, type, or frequency of the violence to which the child is exposed; the developmental age of the child at the time of exposure; the child's reaction to the exposure; and the child's relationship to the violent adult.¹⁹⁷ The problems with this data have caused some scholars to conclude that they are "too discrepant to settle on a single number that can root a public policy or institutional response."¹⁹⁸

Putting aside momentarily what have been described as "notorious[]" methodological flaws with the data,¹⁹⁹ it cannot be argued—nor would I want to argue—that children who are exposed to DV are not harmed. Children are also harmed when they live in households in which they are exposed to community (rather than domestic) violence, parental substance abuse, homelessness, parental mental health illness, and a variety of other conditions,²⁰⁰ none of which trigger an automatic (i.e., without some investigation of actual risk) call to CPS.

The question, then, is whether the harms resulting from the co-occurrence of DV and child abuse are sufficiently widespread and serious to justify a generic, reflexive, report-all intervention. This is the question that renowned sociologist Evan Stark answered, as an expert witness in *Nicholson v. Williams*,²⁰¹ about the CPS policy of charging battered women with neglect and temporarily removing them from their homes when it was alleged that the children were exposed to DV.²⁰² As Stark explained, the "critical issue . . . is not whether domestic violence overlaps with child maltreatment—it clearly does—but whether this link creates an emergent risk to children and/or justifies an automatic finding of 'neglect' against the victimized mother and/or the selection of placement as a first-line option."²⁰³ To answer this question, he examined the two most frequently

196. See BUZAWA, BUZAWA & STARK, *supra* note 192, at 397 (noting that the different estimates are a reflection of the varying definitions of DV and the resulting harms to children); see also Postmus, *supra* note 193, at 2.

197. See Edleson et al., *supra* note 191, at 963 ("While these estimates give some insight into the extent to which adult domestic violence and children's exposure pervade society, they tell us little about what forms of violence to which children are being exposed, how often they are exposed to it and how they are involved in violent events."); Postmus, *supra* note 193, at 2–3.

198. BUZAWA, BUZAWA & STARK, *supra* note 192, at 397.

199. Stark, *supra* note 188, at 114.

200. See *id.* at 110–11.

201. 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

202. See Stark, *supra* note 188, at 109. Stark published his report in 2002, and he republished and updated many of his findings in 2012, drawing many of the same conclusions.

203. *Id.* at 113.

documented dangers associated with exposure: direct, physical injury, and indirect injury as a consequence of witnessing DV.²⁰⁴

b. Direct Physical Injury to a Child.

Children may be directly injured as an immediate consequence of an assault on them, or injured incidentally during an assault on their primary parent, such as when a mother is holding a child or when the child actively intervenes to try to stop the violence.²⁰⁵ Stark comprehensively reviewed the empirical data with regard to the seriousness and prevalence of physical injury to children who lived in households in which DV occurs.

With regard to the seriousness, he concluded that “[w]hile the seriousness of injury . . . cannot be determined with certainty, existing evidence suggests that [this type of injury] is minimal.”²⁰⁶ One way he demonstrated this was by reviewing a study of state police in Connecticut, where data showed children were involved in 17.6 percent of cases where at least one partner was arrested.²⁰⁷ Stark noted that only 3 percent of offenders were charged with risk of injury to a child, suggesting that relatively few cases rose to the level that might be considered “abuse.”²⁰⁸ Similarly, Stark found that in another study in New York, 12.7 percent of cases “involved medically significant injuries to victims, and an identical percentage of kids suffered injur[ies] as well,” but only three of seventy-one kids required outpatient medical treatment (an “only slightly higher” proportion than in the Connecticut study).²⁰⁹ “[T]he fact that children are not harmed in somewhere between eighty-seven and ninety-seven percent of the most serious domestic violence incidents, (i.e. where police or CPS are involved), underlines the wisdom of a case-specific assessment rather than a blanket approach that equates domestic violence with child abuse or neglect.”²¹⁰

With regard to the prevalence of injuries to children, Stark noted that a large, multi-city study found that children were involved directly in adult DV incidents from 9 percent to 27 percent of the time (depending on the city), and that younger children were disproportionately represented in

204. Stark examined a third alleged danger, that of the intergenerational effect of witnessing DV between adults when one is a child. He found that while it “is widely believed that exposure to violence in childhood predisposes children to subsequent misbehavior or violence as adults,” there was no sound empirical evidence to support this conclusion. *Id.* at 117–18. In 2012, Stark reiterated this conclusion. *Id.* at 408. I do not therefore address it here.

205. See BUZAWA, BUZAWA & STARK, *supra* note 192, at 401.

206. Stark, *supra* note 188, at 115; see also BUZAWA ET AL., *supra* note 192, at 401.

207. See Stark, *supra* note 188, at 115.

208. See *id.*

209. *Id.*

210. *Id.*

households where DV occurred.²¹¹ To contextualize the prevalence of injury to children in homes in which DV occurs, he compared these children to those in the general population (in New York, where *Nicholson* was tried), and to children in foster care (again, in New York).²¹² He found that the rate of harm to children that rises to the level of abuse in DV cases (between 3 percent and 4 percent) is only slightly higher than in the general population (2.5 percent) and less than the comparable risk factor in foster care (5 percent).²¹³ In his later work, Stark cites a comprehensive nationwide survey in which a nationally representative sample of 4,549 children aged seventeen or younger were asked about different types of violence to which they may have been exposed and/or of which they may have been direct victims;²¹⁴ 6.2 percent witnessed an assault between their parents²¹⁵ and 4.4 percent (of all children surveyed) reported an incident of physical abuse by an adult family member.²¹⁶ To consider these findings in context, note that 46.3 percent reported a physical assault within the past year, while 10.2 percent reported a victimization-related injury.²¹⁷

This data, like Stark's earlier data, demonstrates that childhood exposure to DV is not a proxy for child abuse, as the police report-all policy appears to treat it. Rather, a case by case investigation is required. Loose statistics and "common" perceptions will not do, pursuant to *Button*.

c. *The Harm of Witnessing DV*

In his book, *Children of Battered Women*, renowned psychologist Peter Jaffe linked witnessing DV to a range of physical, psychological, and behavioral problems, such as low self-esteem in girls; aggression and behavioral problems in boys and girls; reduced social competence; depression, anxiety; and feelings of helplessness and powerlessness.²¹⁸ In a more recent work, Jaffe clarified that the development of serious problems in children depends upon a host of factors, including the resilience of the particular child, the available support system, the child's developmental age, and the nature and extent of violence to which the child is exposed.²¹⁹

211. See John Fantuzzo et al., *Domestic Violence and Children: Prevalence and Risk in Five Major U.S. Cities*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 116, 119–20 (1997).

212. See Stark, *supra* note 188, at 115.

213. See *id.*

214. See David Finkelhor et al., *Violence, Abuse, and Crime Exposure in a National Sample of Children and Youth*, 124 PEDIATRICS 1411, 1412 (2009), available at <http://pediatrics.aappublications.org/content/124/5/1411.full.pdf>.

215. *Id.* at 1415.

216. *Id.* at 1414.

217. See *id.* at 1411.

218. See PETER JAFFE ET AL., *CHILDREN OF BATTERED WOMEN* 26–31, 40–41 (1985).

219. See generally C. Crooks et al., *Factoring in the Effects of Children's Exposure to Domestic Violence in Determining Appropriate Postseparation Parenting Plans*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 22.1–25 (2010).

As Stark noted, other studies suggest that the vast majority of kids who witness DV show no mental health or behavioral effects whatsoever or, conversely, that over 80 percent retain their overall psychological integrity.²²⁰ And he found that “several carefully designed studies have shown that children who witness violence are at no greater risk than children in distressed relationships where no violence occurs.”²²¹ Moreover, the effects of witnessing appear to dissipate over time.²²² He concluded that there is no evidence that serious problems are typical: he characterized the boldest claims to the contrary as “spurious” because they combined relatively infrequent acts of violence with widely accepted forms of punishment.²²³ The highest rates of behavioral problems uncovered by these claims were for temper tantrums, reported for 17 percent of exposed versus 10 percent of non-exposed children,²²⁴ whereas “the percentages of children experiencing the behavioral consequences that might concern CPS—drinking, drugs or arrests—ranged between .2% to 2.9%”²²⁵

Stark concluded,

The point, however, is that the rate of incidence neither justifies an assumption of imminent risk, nor a generic policy that considers exposure equivalent to abuse or neglect [A]lthough the literature abounds with broad claims to the contrary, the serious effects of witnessing parental violence that would merit a finding of maltreatment are limited to an extremely small portion of exposed children.²²⁶

Finally, Stark observed, “By generalizing from clinical samples that exaggerate . . . the populations likely to be harmed, researchers have unwittingly encouraged courts, state policy makers and CPS agencies to mistakenly conclude that exposure to domestic violence is virtually identical to maltreatment and therefore, requires emergent intervention.”²²⁷

This is why, pursuant to *Button*, a police report-all policy must be struck down. “Precision of regulation”—not “broad prophylactic rules”—is required.²²⁸ There simply is not sufficient evidence to support a blanket, report-all, without-any-investigation police policy of referring all children exposed to DV to CPS.

The government may counter that the police, as first-line responders, are not trained experts in the complex set of factors, discussed above, that more accurately predict risk to children living with DV. Thus, a better-safe-than-sorry policy, which allows CPS, rather than the police, to make this

220. See Stark, *supra* note 188, at 116 (citing Sullivan et al., *How Children's Adjustment Is Affected by Their Relationships to Their Mothers' Abusers*, 15 J. INTERPERSONAL VIOLENCE 587, 596 (2000) (over 80 percent reported a positive self-image)).

221. Stark, *supra* note 188, at 116.

222. See *id.* at 116.

223. *Id.* at 117.

224. *Id.*

225. *Id.* at 117.

226. *Id.*

227. *Id.* at 113.

228. *NAACP v. Button*, 371 U.S. 415, 438 (1963).

determination is justified. In other words, while the policy may produce false positives, this is tolerable in situations where children's lives may be in danger. That might arguably be the case if investigation by CPS did not chill mothers' calls to the police, and if CPS could effectively handle massive numbers of reports while simultaneously protecting those children most at risk. In the next section I demonstrate how neither of these assumptions is true.

d. Children Who Are Abused by Their Caretakers Are the Least Likely to Report the Abuse; Thus the State Must Cast Its Net Wide to Bring These Children to the Attention of CPS

This government justification for increased police reporting to CPS rests on another assumption: that battered mothers will continue to contact the police to report DV, despite the risks associated with CPS intervention. Often, the only witnesses of DV are the victims themselves and their children. If women stop calling the police, the stated goal of the policy—to increase CPS awareness of the “hidden” victims of DV, children—will be thwarted.²²⁹ As I have already demonstrated, the report-all policy has a chilling effect on battered mothers' calls to the police. To the extent that the government has not anticipated this chilling effect, it cannot justify the policy.²³⁰

There is ample evidence that victims of DV, and the front-line people who serve them—advocates at shelters, at courthouses, and in the community—are highly skeptical of CPS intervention. They understand the negative consequences of reporting DV and, as one scholar noted, “[T]he word is out.”²³¹ Victims' advocates widely argue that CPS misunderstands the dynamics of DV, and that it blames victims for their own victimization while simultaneously failing to hold the batterer accountable for his violent conduct.²³² Indeed, CPS is notorious for using overly intrusive, coercive sanctions against victims of DV.²³³ Among these is the removal of children from mothers who are physically assaulted by their partners or ex-partners

229. See Weithorn, *supra* note 119, at 29 (noting that commentators express concern that expanded reporting requirements will have a chilling effect on victims' willingness to seek help from law enforcement and others, and stating that “reporting requirements will only have such a chilling effect if reports to child protective services are viewed negatively by battered mothers. Unfortunately, at present, the history and ‘reputation’ of child protective services involvement in domestic violence cases is anything but positive.”).

230. See *id.*

231. Rabin, *supra* note 115, at 1111 (internal quotation marks omitted).

232. See Weithorn, *supra* note 119, at 29.

233. See Diana English et al., *Domestic Violence in One State's Child Protective Caseload: A Study of Differential Case Dispositions and Outcomes*, 27 CHILD. & YOUTH SERVS. REV. 1183, 1199 (2005) (describing the “popular mythology about the intrusive nature of CPS in cases where DV is identified as an issue”); Weithorn, *supra* note 119, at 29 (noting that DV advocates widely criticize CPS for its misunderstanding of DV and mishandling of cases, concluding that “[t]here is evidence that many child protective systems have operated in this manner, as well as for the ineffectiveness of the traditional child protection interventions for adult domestic violence victims and their children”).

on the grounds that the mothers have failed to protect their children from a risk of danger. In *Nicholson*, children were systematically removed from their mothers' custody when their mothers, but not the children, were assaulted by an intimate partner or former intimate partner.

Sweeping reporting statutes result in substantial overreporting to CPS. Statistics confirm that approximately 65 percent of the reports made to CPS over the past two decades have been unfounded.²³⁴ Nonetheless, CPS must by law investigate all reports of suspected abuse. The consequence is an extremely overburdened agency:

Sadly, modern child protective agencies are, to some extent, "driven" by their mandate to investigate reported cases, with the result that "investigation often seems to occur for its own sake, without any realistic hope of meaningful treatment to prevent the recurrence of maltreatment or to ameliorate its effects, even if the report of suspected maltreatment is validated."²³⁵

Critics have thus argued that statutes and policies that encourage the "reporting of any hint of abuse" are unwise in the long run: "When the emphasis is on promptness and the number of reports made instead of the quality of reports, the social service system collapses under the weight of this front-end policy. In the end, children suffer."²³⁶ Returning once again to Evan Stark's analysis, an approach such as this, "which tolerates the inclusion of 'false positives' in the population targeted for intervention, might be benign where the interventions selected [are] without negative

234. See Singley, *supra* note 122, at 240 n.17 (arguing that child protection agencies are inundated with unfounded reports of child abuse and neglect, and observing that in 1998, the year the article was published, the rate of unfounded reports was 69 percent). The most recent statistics published by the U.S. Department of Health & Human Services Administration for Children and Families are, for 2009, showing the rate of unsubstantiated reports as 64.3 percent. See CHILD MALTREATMENT 2009, U.S. DEP'T OF HEALTH & HUMAN SERVS. (2010), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf>. In 2008 the rate of unsubstantiated reports was 64.7 percent. See CHILD MALTREATMENT 2008, U.S. DEP'T OF HEALTH & HUMAN SERVS. (2009), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf>. In 2007, 61.3 percent. See CHILD MALTREATMENT 2007, U.S. DEP'T OF HEALTH & HUMAN SERVS. (2008), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm07/cm07.pdf>. In 2006, 60.4 percent. See CHILD MALTREATMENT 2006, U.S. DEP'T OF HEALTH & HUMAN SERVS. (2007), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm06/cm06.pdf>. In 2005, 60.3 percent. See CHILD MALTREATMENT 2005, U.S. DEP'T OF HEALTH & HUMAN SERVS. (2006), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm05/cm05.pdf>. In 2004, 60 percent. See CHILD MALTREATMENT 2004, U.S. DEP'T OF HEALTH & HUMAN SERVS. (2005), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm04/cm04.pdf>. In 2003, 58 percent. See CHILD MALTREATMENT 2003, U.S. DEP'T OF HEALTH & HUMAN SERVS. (2004), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm03/cm2003.pdf>. In 2002, 61 percent. See CHILD MALTREATMENT 2002, U.S. DEP'T OF HEALTH & HUMAN SERVS. (2003), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm02/cm02.pdf>. In 2001, 59.2 percent. See CHILD MALTREATMENT 2001, U.S. DEP'T OF HEALTH & HUMAN SERVS. (2002), available at <http://archive.acf.hhs.gov/programs/cb/pubs/cm01/cm01.pdf>.

235. Weithorn, *supra* note 119, at 58 n.243 (citing U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS., NEIGHBORS HELPING NEIGHBORS: A NEW NATIONAL STRATEGY FOR THE PROTECTION OF CHILDREN 9–10 (1993)).

236. Singley, *supra* note 122, at 250.

consequences for the parties involved.”²³⁷ Such is not the case, however, with the reporting of suspected child abuse to CPS.

In sum, none of the justifications for an automatic, report-all policy should survive the standard of review that the Court imposes on infringements that, like the statute at issue in *Button*, leave no “practicable avenue open . . . to petition for redress of grievances.”²³⁸

III. LARGER IMPLICATIONS FOR VIEWING A DV VICTIM’S CALL TO THE POLICE AS EXERCISING HER RIGHT TO PETITION

The conceptualization of a victim’s call to the police as an invocation of a constitutional right has larger implications for both victims (the governed) and policymakers and other state actors who respond to DV (the governors). Feminist legal scholars widely criticize the justice system’s response for providing a “one-size-fits-all” approach to DV.²³⁹ The Petition Clause provides legal justification, rather than policy grounds alone, for the argument that government responses to victims must be much more precise.²⁴⁰

As I have written before,²⁴¹ the legal system’s responses to DV are overwhelmingly premised on the notion that the victim can, and should, separate from her intimate partner.²⁴² This overarching “separation

237. Stark, *supra* note 188, at 114.

238. NAACP v. Button, 371 U.S. 415, 430 (1963).

239. See, e.g., G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 305 (2005) (describing the predominant, or “[p]rotagonist” ideology underlying the current criminal justice system approach as emphasizing the need for victims to leave their relationships as a deeply problematic one-size-fits-all approach); Nancy Ver Steegh & Clare Dalton, *Report From the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454, 456 (2008) (“In many jurisdictions domestic violence cases, identified principally by evidence of physical violence, are handled on a one-size-fits-all basis.”); Cheryl Hanna, *Because Breaking Up Is Hard To Do*, 116 YALE L.J. POCKET PART 92, 94 (2006), <http://yalelawjournal.org/images/pdfs/65.pdf> (“We should always rethink our strategies and avoid one-size-fits-all approaches. The criminalization of domestic violence is still in its infancy, and we have much to learn about what works best and for whom.”).

240. See *Button*, 371 U.S. at 438 (“Broad prophylactic rules” will not do; rather, “[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”).

241. See Kuennen, *supra* note 4, at 532–33.

242. See GOODMAN & EPSTEIN, *supra* note 71, at 5. The authors note:

[P]olice, prosecutors, and judges typically assume that the only acceptable choice for a survivor is to separate from her partner. However, recent data demonstrate that staying may be the safer option for some victims. Still, when a woman expresses a desire to be safe but also to remain in her relationship, system actors are increasingly likely to substitute their own judgment for hers, encouraging or even coercing her to leave. The result is that many women avoid shelters and the criminal justice system altogether, and the potential benefits of these resources are seriously undermined.

Id.; see also GOODMAN, *supra* note 71, at 96 (“By enacting and funding separation-based remedies to the exclusion of other responses, the state has made a normative choice about the value of relationships that involve abuse. As sociologist Phyllis Baker writes, ‘The overall goal of the cultural script for battered women is to leave and to stay away from their abuser.’

approach” as a means of ending DV underlies virtually every law and policy addressing DV.²⁴³ The reality is that many victims choose not to separate from their partners for a variety of reasons. One is the rational fear that doing so will put them in greater danger.²⁴⁴ Multiple other barriers to separation have been well documented, including dependence on the relationship for money, housing, and immigration status, to name just a few.²⁴⁵

Thus the notion that a victim can, should, or even desires to separate from her partner presents a number of challenges. When victims do not leave—or when they reconcile—with their partners, they are seen as pathological, incapacitated, weak, not credible, and annoying.²⁴⁶ Their petitions are routinely met with hostility and frustration by police, prosecutors, judges, and court personnel.²⁴⁷ Police have blamed victims for

The script for the legal system is the same.” (quoting Phyllis Baker, *And I Went Back: Battered Women’s Negotiation of Choice*,” 26 J. CONTEMPORARY ETHNOGRAPHY 58 (1997))).

243. For the most recent and thorough iteration of this argument, see GOODMARK, *supra* note 71, at 80–105.

244. See ANGELA BROWNE, WHEN BATTERED WOMEN KILL 61, 144 (1987) (discussing the high incidence of further abuse and the risk of homicide); Sarah M. Buel, *A Lawyer’s Understanding of Domestic Violence*, 62 TEX. B.J. 936, 937–38 (1999) (arguing that one of the reasons many women stay in violent relationships is their reasonable fear that their partners will follow through on threats to hurt the women or her children); 3 “Failure to Protect” Working Grp., *Charging Battered Mothers with “Failure to Protect”: Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 858–59 (2000) (describing how “during and after separation the batterer is most likely to stalk, harass and even kill the mother,” and thus why women should take batterers’ threats seriously in concluding that it is safer in the short term to stay in the relationship).

245. See generally Buel, *supra* note 244; Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993); Jinseok Kim & Karen A. Gray, *Leave or Stay?: Battered Women’s Decision After Intimate Partner Violence*, 23 J. INTERPERSONAL VIOLENCE 1465 (2008); Vera E. Mouradian, *Women’s Stay-Leave Decisions in Relationships Involving Intimate Partner Violence* (Wellesley Ctrs. for Women, Working Paper No. 415, 2004), available at <http://www.wcwoonline.org/Past-years/battered-women-what-goes-into-the-stay-leave-decision>.

246. See GOODMARK, *supra* note 71, at 76–77 n.61 (arguing that battered women who do not conform to stereotypical ideas about victims, such as that victims should desire to separate from their partners, are not believed in court and are viewed with skepticism by police, judges, and jurors); Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2488 (1993) (explaining the degree to which DV victims are judged for not leaving and the problem with this assessment in light of evidence that leaving is dangerous); Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the State but Divorcing the Victim*, 32 N.Y.U. REV. L & SOC. CHANGE 191, 240–41 (2008).

247. See Jane K. Stoeber, *Freedom From Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 336 n.158 (2011) (“I have witnessed clerks confronting petitioners with the affidavits they were attempting to file and demanding to know: ‘We were here three, seven, and ten years ago. Why didn’t you file sooner?’”); *id.* at 337 n.161 (“[R]eporting on the commonality with which judges believe that if the abuse was severe enough, the abuse survivor would have left, and their explicit expression of this belief from the bench.”).

post-reconciliation violence.²⁴⁸ Judges have been reluctant to issue restraining orders to women who they have previously seen dismiss their orders so that they may continue their relationships.²⁴⁹ Court clerks have discouraged victims from filing petitions for restraining orders.²⁵⁰ When a victim seeks to petition the government for help and is met with roadblocks, hostility, and anger, these actions violate the spirit of the Petition Clause.

This hostility exists on a continuum. When it moves from a discouraging remark into the realm of holding the victim accountable for the DV, it may violate not merely the spirit of the Clause, but the letter of the law. For example, in some jurisdictions, victims who are protected by restraining orders and who subsequently have contact with their restrained partners have been fined,²⁵¹ held in contempt of court,²⁵² or criminally charged with aiding and abetting the partner's violation of the order.²⁵³ Prosecutors have threatened to bring criminal charges against women who do not testify against their partners,²⁵⁴ threatened to have them jailed,²⁵⁵ and in fact have had women arrested and jailed.²⁵⁶ One victim who was jailed remarked,

248. As the court noted in *City of North Olmstead v. Burlington*, 744 N.E.2d 1225, 1229 (Ohio Ct. App. 2000), when the police found a victim of domestic violence together with a man against whom she had obtained a protection order, the police not only arrested her, but “attempted to make the victim responsible for the offender’s behavior.”

249. See Epstein, *supra* note 117, at 39–40 (documenting the openly hostile and discouraging remarks made by court clerks and judges to victims of domestic violence who petition the courts for civil protection orders); see also Alafair S. Burke, *Domestic Violence As a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 578–79 (2007) (stating that judges are preoccupied with the woman’s psyche, rather than focusing on the abuser’s actions).

250. See Epstein, *supra* note 117, at 26.

251. See, e.g., Francis X. Clines, *Judge’s Domestic Violence Ruling Creates an Outcry in Kentucky*, N.Y. TIMES, Jan. 8, 2002, at A14 (noting that a Kentucky judge fined two victims who contacted their abusers when a protection order was in effect, and said in court, “When these orders are entered, you don’t just do whatever you damn well please and ignore them”).

252. The Iowa Supreme Court has twice upheld such contempt charges. See *Henley v. Iowa Dist. Court*, 533 N.W.2d 199, 203 (Iowa 1995); *Hutchenson vs. Iowa Dist. Court*, 480 N.W.2d 260, 264 (Iowa 1992). See generally Marya Kathryn Lucas, *An Invitation to Liability?: Attempts at Holding Victims of Domestic Violence Liable As Accomplices When They Invite Violations of Their Own Protective Orders*, 5 GEO. J. GENDER & L. 763 (2004).

253. See, e.g., Stephanie Simon, *Judges Push for Abused to Follow the Law*, L.A. TIMES, Jan. 22, 2002, at A6 (noting that “[i]n Illinois, some judges hold women in contempt for disavowing their initial complaints of abuse after reconciling with their [abusers],” and, in North Carolina, “some judges . . . charge[] women a \$65 fee if they apply for a protective order then [later] decide to drop the matter”).

254. See GOODMAN & EPSTEIN, *supra* note 71, at 76 (describing prosecutors’ regular practice of issuing subpoenas to victims and forcing them to testify by threat of prosecution); GOODMARK, *supra* note 71, at 126–27 (describing similar coercive prosecutorial policies and documenting the experiences of four women: one of whom was jailed for failing to testify; two who were threatened with prosecution; and one who reluctantly testified but recanted, who was not jailed but was asked by the judge during trial: “We’re here trying this case because you are a liar. Is that correct?”).

255. See GOODMAN & EPSTEIN, *supra* note 71, at 76.

256. See *id.* (“As one example, in Albany, New York, a victim refused to testify for the prosecution because of her extreme fear of her former boyfriend and her previous experiences with the criminal justice system’s failure to offer her meaningful assistance. At

“I’m never calling the police again—even if I’m dying, I’m not going to call them.”²⁵⁷ Finally, prosecutors have threatened women that “their case would be referred to child protective services and they might lose their children.”²⁵⁸

When police, judges, and prosecutors act in a manner that deters the petitioning activity of a victim, and that deterrence can be causally linked to the victim’s attempt to exercise her right to petition, a victim may assert a § 1983 First Amendment retaliation claim.²⁵⁹ One court of appeals has decided such a case involving a victim of DV. In *Meyer v. Board of County Commissioners*,²⁶⁰ the plaintiff had been involved in an intimate relationship with a man who was close friends with police officers where she lived.²⁶¹ This man punched her in the face.²⁶² The victim attempted to

the prosecutor’s request, the judge held the woman in contempt of court and imprisoned her for an entire week.”); GOODMARK, *supra* note 71, at 126.

257. GOODMARK, *supra* note 71, at 126 (citing Michelle Henry, *Pregnant Woman “Never Calling the Police Again,”* TORONTO STAR (April 8, 2008), <http://www.thestar.com/printArticle/411222>).

258. GOODMAN & EPSTEIN, *supra* note 71, at 76; *see also* Epstein, *supra* note 117, at 34–35 (cautioning that one unintended risk posed by an integrated domestic violence court is that more battered mothers may be at risk of criminal liability for DV perpetrated by their battering partners on, or in front of, children). Using the specific example of Phyllis Ojokolo, a client represented by Epstein who reported her husband’s abuse of one of their children to a Washington, D.C., prosecutor, who then filed child abuse charges against the husband *and* failure to protect charges against Phyllis, stating that the charges were “a ‘carrot,’ telling Phyllis that if she followed through on her civil protection order case, the failure to protect charges would be dropped.” Epstein noted,

In communities and cities like Washington D.C., stories like this one spread rapidly. Several clients have subsequently shared similar stories with me and have asked whether they can seek protection without risking their relationships with their children. In light of my experience with Phyllis, it is a difficult question to answer.

Id. at 36.

259. 42 U.S.C. § 1983 (2006) (reading, in relevant part, “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”). While a victim may file a § 1983 claim arguing an infringement on her First Amendment right to petition, I am aware of the challenges to be overcome in seeking to develop substantive constitutional rights. Recently, scholars have persuasively argued that the federal courts are in the business of chipping away at, rather than bolstering or even affirming individuals’ constitutional rights. While beyond the scope of this Article, I note the following body of scholarship on this issue: Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537 (2003); Erwin Chemerinsky, *Closing the Courthouse Doors: Transcript of the 2010 Honorable James R. Browning Distinguished Lecture in Law*, 71 MONT. L. REV. 285 (2010); Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of Monroe v. Pape*, 78 UMKC L. REV. 889, 910 (2010); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999); Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875 (2010); Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931 (2010).

260. 482 F.3d 1232 (10th Cir. 2007).

261. *See id.* at 1235.

report the violence to the police on four occasions, who gave her the run-around.²⁶³ Upset, she confronted the ex-boyfriend in person.²⁶⁴ Though she never threatened him nor acted violently, when the police responded they arrested her and involuntarily committed her to a psychiatric hospital for the weekend.²⁶⁵ The Tenth Circuit ruled in favor of the victim.²⁶⁶

The police conduct at issue in *Meyer* is egregious; involuntarily committing a victim who tries to report DV presents an extreme and (one hopes) fringe case. Yet in its ruling in favor of the victim, the court focused less on the ultimate police act than on the resistance with which the victim was met when she attempted to file her report.²⁶⁷

The relatively low level, every day, commonly experienced hostility of state actors to victims of DV has been widely observed in the legal literature.²⁶⁸ A routinely hostile police officer may do just as much damage—or more—than the singular though egregious act of the police in *Meyer*, if he or she has developed a negative reputation among victims, or their advocates in the community. So too may a hostile court clerk.²⁶⁹ If a prima facie case of retaliation is built around what would chill an average person's willingness and ability to petition, even discouraging remarks

262. *See id.*

263. *See id.*

264. *See id.*

265. *See id.* at 1236.

266. *See id.*

267. *See id.* at 1243 (“We have held that denying the ability to report physical assaults is an infringement of protected speech. In this connection, we are persuaded by the unpublished opinion in *Rupp v. Phillips*. There we held that reporting a danger of commission of crimes was protected by the First Amendment. We thus conclude that ‘filing a criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right’ to petition the government for redress of grievances. Under these precedents we agree with plaintiff that her attempt to report an alleged criminal offense was conduct protected by the First Amendment.”) (citations omitted) (quoting *Estate of Morris v. Dapolito*, 297 F. Supp. 2d. 680, 692 (S.D.N.Y. 2004).

268. *See supra* notes 244–56 and accompanying text; *see also* Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1681–82 (1990) (describing the need for observers of DV to blame the victim); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 983 (1991) (“Instead of focusing on the batterer, [the law] focus[es] on the battered woman, scrutinize[s] her conduct, examine[s] her pathology and blame[s] her for not leaving the relationship, in order to maintain that denial and refuse to confront the issues of power. Focusing on the woman, not the man, perpetuates the power of patriarchy.”).

269. By way of explanation, I note here at the mention of court clerks that, though beyond the scope of this Article, the court access doctrine applies as well. For a discussion of this doctrine as it relates to the right to petition, see Wishnie, *supra* note 14, at 730–31 (“[C]ourt access cases challenging systemic government interference . . . instruct that even government rules which *indirectly* burden petitioning, such as filing fees, are suspect when the petitioning involves a fundamental right and the state exercises exclusive control of the means of resolution of the dispute Applying the guidance of the court access cases . . . an immigrant victim of domestic or other violence who seeks civil and criminal intervention is petitioning about a fundamental right to bodily integrity, and perhaps against slavery.”).

could quite predictably—and effectively—have a significant deterrent effect.²⁷⁰

Because the Petition Clause is designed to assure that “a particular audience—‘the government’—is forever open to hear a specialized kind of expression—a [request] for a redress of grievances”²⁷¹—feminist legal scholars and policymakers, lawyers for battered women, and lay advocates in the community should be encouraged by—and think carefully about—how far the Petition Clause could, and should, extend to protect the rights of victims of DV, who are among the most likely of crime victims to underreport to law enforcement.

Perhaps the most encouraging and significant way in which the underlying purpose of the right to petition, if not the right itself, has found expression in the context of DV is illustrated by two whistleblower exceptions for DV victims contained in the Violence Against Women Act. The first exception protects undocumented immigrant-victims’ reports to police. It allows the U.S. Attorney General to cancel deportation for battered spouses and children who report DV, while U-Visas provide immigration relief to any immigrants, whether victims of DV or stranger violence, for cooperating with the prosecution of the perpetrator.²⁷² Congressional findings support the conclusion that the VAWA was passed implicitly, if not explicitly, to protect DV victims’ ability to petition:

Domestic battery problems can become terribly exacerbated in marriages where one spouse is not a citizen, and the non-citizens [sic] legal status depends on his or her marriage to the abuser. Current law fosters domestic violence in such situations by placing full and complete control of the alien spouse’s ability to gain permanent legal status in the hands of the citizen or lawful permanent resident spouse Consequently, a battered spouse may be deterred from taking action to protect himself or herself, such as filing for a civil protection order, filing criminal charges, or calling the police, because of the threat or fear of deportation.²⁷³

Similarly, to address the problem that Lapidus and Fais identified,²⁷⁴ landlords’ ability to evict DV victims who call the police to their homes, the VAWA provided that reports to police of DV “shall not be good cause for

270. This is not to say that *any* act of a police officer or other government official will create a constitutionally cognizable § 1983 claim. The plaintiff must satisfy all of the elements of a claim, which vary across circuits but generally include that the plaintiff: (1) “was engaged in constitutionally protected activity [such as filing a police report]; [(2)] the defendant’s actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and [(3)] the defendant’s adverse action was substantially motivated as a response to the plaintiff’s exercise of constitutionally protected conduct.” *See, e.g., Van Deelan v. Johnson*, 497 F.3d 1151, 1155–56 (10th Cir. 2007).

271. *See* Wishnie, *supra* note 14, at 725–26.

272. For a recent, concise summary of the law as it pertains to immigrants, see Laura Carothers Graham, *Relief for Battered Immigrants Under the Violence Against Women Act*, 10 DEL. L. REV. 263 (2008).

273. H.R. REP. NO. 103-395, at 26 (1993).

274. *See supra* notes 24–25 and accompanying text.

terminating the assistance, tenancy, or occupancy rights of the victim of such violence” in federally subsidized housing.²⁷⁵ The law also provided protection for victims who share a household with an abusive partner:

Criminal activity directly relating to domestic violence, dating violence, or stalking . . . shall not be cause for termination of assistance, tenancy, or occupancy rights if the tenant or an immediate member of the tenant’s family is the victim or threatened victim of that domestic violence, dating violence, or stalking.²⁷⁶

Finally, the VAWA made clear that for public housing agencies to receive funding, their policies cannot “prohibit or limit a resident’s right to summon police or other emergency assistance in response to domestic violence.”²⁷⁷

The VAWA does not provide such whistleblower protections for battered mothers who are reported to CPS. A whistleblower protection would, of course, cohere strongly with the spirit of the Petition Clause. Could the addition of “battered mothers” within the classes of DV victims whose calls to the police are protected be a viable solution to the battered mother’s dilemma? Could not state actors—judges, police, clerks, to name but a few—who intentionally discourage and resist victims’ efforts to seek redress be held accountable? Filtering the barriers to reporting DV through a Petition Clause lens has tremendous, and as of yet, untapped legal potential.²⁷⁸

More broadly, viewing a DV victim’s call to the police as the exercise of a constitutional, political right has inherent appeal. It is consistent with the way that activists in the battered women’s movement of the 1960s and 1970s viewed it. They argued that DV hindered women’s ability “to move freely and confidently in the world,”²⁷⁹ to participate in the political process, and to fully develop as citizens.²⁸⁰ These concerns lie at the heart of the right to petition.

275. See Fais, *supra* note 21, at 1206 (quoting 42 U.S.C. § 1437f(c)(9)(B) (2000 & Supp. V 2005)).

276. 42 U.S.C. § 1437f(c)(9)(C)(i) (2006).

277. Violence Against Women and Department of Justice Reauthorization Act (VAWA) of 2005, Pub. L. No. 109-162, tit. VI, § 601, 119 Stat. 2960, 3036 (2006).

278. Attorneys for DV victims—particularly attorneys who devote their careers to thinking about how the legal system might better respond to the needs of DV victims—who want to develop the Petition Clause as a source of substantive constitutional rights should think broadly about the many factual and procedural contexts in which the right could be asserted. See Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 481 (2012) (arguing that rights made in multiple contexts are more balanced and more comprehensive, and we must thus “act intentionally to ensure that rights-making occurs in contexts likely to assure that judges take account of all the interests those rights serve to vindicate and protect”).

279. SCHECHTER, *supra* note 64, at 317 (describing the history of the battered women’s movement).

280. See ELIZABETH M. SCHNEIDER, *BATTERED WOMEN & FEMINIST LAWMAKING* 21–22 (2000).

The early movement was committed to women's self-determination and democratic participation.²⁸¹ Much of this has changed. For a variety of reasons, battered women's organizations and advocates act more as service providers to victims, less as political activists.²⁸² The resounding call by feminist legal scholars today is for the movement to return to its political roots.²⁸³ Conceptualizing the reporting of DV to the state as a fundamental, political right guaranteed by the First Amendment is one step in that direction.

A note of caution: Victims themselves may not view their reports to the police as political acts. Characterizing the justice system's response to DV as political, and hence a matter of public concern, has had many unintended consequences, including diminishing a victim's ability to privately order her life. "Privacy is something that most people appear to want in relationships. Accordingly, it may be unfair and counterproductive to expect battered women simply to relinquish their privacy in the name of politics."²⁸⁴ Battered mothers should not be forced to call the police in the name of feminist activism; rather, battered mothers should be able to petition the government for redress, if they so choose, in the same way that mothers who are victims of stranger violence may do and in the same way that any ordinary citizen may do.

CONCLUSION

In this Article, I examined the state's response to DV through a novel legal lens, the Petition Clause of the First Amendment, to demonstrate how a victim's call to the police to report violence in her home is an exercise of a fundamental, constitutional right. When the state—through a law, practice, or policy—deters a citizen from exercising her right to petition, the policy should be analyzed with the strictest of scrutiny. This is particularly true of DV victims' petitions to the police, given that protection from bodily harm is one of the most fundamental services that the government can provide, and that the police have exclusive control over its provision.

More broadly, viewing DV victims' requests to the state for assistance—whether made to the criminal or civil justice system—as First Amendment petitions shines constitutional light on the continuum of deterrents with which victims are met by the system and actors within it. As of yet,

281. *See id.*

282. *See id.* at 22–23.

283. *See, e.g.,* GOODMAN & EPSTEIN, *supra* note 71, at 94 (“[T]he battered women’s movement must revisit its roots; it must refocus on supporting and empowering women and incorporating individual responsiveness into government and community programs.”); SCHNEIDER, *supra* note 280, at 28 (“[T]he rallying cry for many feminists who continue to do trailblazing work on battering in the United States has been, as women’s international human rights scholar Rhonda Copelon has put it, to ‘bring Beijing home,’ to reshape domestic violence work in this country with the explicitly feminist political and expansive social vision that first inspired the issue’s advocates.”); Miccio, *supra* note 239, at 247–56.

284. Kathryn K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459, 1460 (2001).

scholars, policymakers, and advocates for victims have not sufficiently tapped the potential of the Petition Clause to expose and address government practices that chill victims' petitions.