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Calling the Police to Report Domestic Violence: Exercising the First Amendment Right to Petition

ABSTRACT

Calling the Police to Report Domestic Violence: Exercising the First Amendment Right to Petition

Prof. Tamara L. Kuennen

Like any citizen, a victim of domestic violence (DV) has the right to call the police for help when she needs it. The right, recently described by the Supreme Court as "essential to freedom," is guaranteed in the First Amendment's Petition Clause - the right "to petition the Government for a redress of grievances." When a victim calls the police, she not only seeks law enforcement assistance but invokes her right to petition the government for one of the most fundamental services the government can provide – protection from harm.

The vast majority of DV victims do not report the violence to the police. Feminist legal scholars and policy-makers widely acknowledge that this under-reporting is a major impediment to the justice system's ability to effectively address DV. This article examines the negative collateral consequences, imposed by law and policy, which flow directly from calling the police. Specifically, the article focuses on the dilemma that battered mothers face. In many jurisdictions across the country, police report battered mothers to child protection services ("CPS") as a matter of course, without any investigation of actual risk to the child. The practice serves a laudable goal: by referring *all* DV cases to CPS, the police bring to the attention of the state untold number of at-risk children who might otherwise fall below 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, about 60% of the reports 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 less, but more accurate, referrals to CPS would provide greater protection to children. I argue that the Petition Clause requires as much, and that the "report-all" policy at issue is unconstitutional.

The article proceeds in four parts. After an introduction, in Part II I define the right to petition and review its history and purpose. I show how 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, I demonstrate that while the rights of speech and petition overlap, they are not co-extensive. For this reason, in part III, I argue that judicial analysis of the right to petition need not be identical to that of speech, despite the Court's recent ruling. The level of judicial scrutiny applied to the right should be strict: only by proving a compelling state interest and the use of the least restrictive means for achieving that interest should the government be allowed to infringe upon a victim's right to call the police. I conclude that even under a less-than-strict level of scrutiny, the report-all practice is unconstitutional. In part IV, I identify other government practices that deter victims' reports to which the Petition Clause may apply. Finally, I discuss the broader, political implications of viewing a call to the police as an invocation of a constitutional and political right, to make the case that the right to petition has as of yet untapped potential for feminist legal scholars and policymakers addressing DV.

Calling the Police to Report Domestic Violence: Exercising the First Amendment Right to Petition

Prof. Tamara Kuennen ©*
University of Denver, Sturm College of Law

I. Introduction

Like any citizen, a victim of domestic violence ("DV") has the right to call the police for help when she needs it. The right, recently described by the Supreme Court as "essential to freedom,"[1] is guaranteed in the First Amendment's Petition Clause - the right "to petition the Government for a redress of grievances."[2] When a victim calls the police, she not only seeks law enforcement assistance but invokes her right to petition the government for one of the most fundamental services the government can provide – protection from harm.

The vast majority of DV victims do not report the violence to the police.[3] Feminist legal scholars and policy-makers widely acknowledge that this under-reporting is a major impediment to the justice system's ability to effectively address DV. There are myriad reasons, well-explored in the scholarly literature, explaining why victims choose not to report.[4] This article examines one deterrent in particular: the negative collateral consequences, imposed by law and

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[1] Burough of Duryea v. Guarnieri, 2011 WL 2437008 (U.S.) at *4.

[2] U.S. Const. amend. I.

[3] *See* 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 Study 49-50 (2000), http://www.ncjrs.gov/pdffiles1/nij/181867.pdf (nationally conducted telephone survey of 8,000 women and 8,000 men reporting prevalence and incidence of intimate partner violence in the United States, finding that 17.2% of women raped by an intimate reported the most recent incident to the police and that 26.7% of women physically assaulted by an intimate reported the most recent incident to the police); Kerry Murphy Healey & Christine Smith, Nat'l Inst. of Justice, U.S. Dep't of Justice, Research in Action, Batterer Programs: What Criminal Justice Agencies Need to Know 2 (1998) (noting that "as many as six in seven domestic assaults go unreported").

[4] These include, for example, the desire to deal with the problem privately, the fear that the perpetrator will retaliate, and the hope of preserving rather than ending the intimate relationship. *See* discussion *infra* part V.

policy, which flow directly from calling the police. Victims who rent rather than own their homes face the risk of eviction, as codified in housing law; undocumented immigrant victims face the risk of being detained and referred to Immigration and Citizen Enforcement, as codified in immigration law; and victims who are mothers – the focus of this article - risk being reported by police to local child protective services.[5] These state-created burdens on victims' access to the police have constitutional implications.

Only two scholars have examined these implications as they pertain to DV victims.[6] This article builds on their work, focusing on the dilemma that victims who are mothers face when they call the police for protection.[7] In many jurisdictions across the country, police report battered mothers to child protection services ("CPS") as a matter of course, without any investigation of actual risk to the child. In some instances, police make reports even if the children are not present in the home, and even if the perpetrator does not live in the home.[8] The practice serves a laudable goal: by referring *all* DV cases to CPS, the police bring to the attention of the state untold number of at-risk children who might otherwise fall below 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 for help, for fear of having their children taken away. As one woman stated:

> It does more damage than good to call the police. . . . The call to the police opened up so many doors. Then I had three different services watching me and my kids. Child

[5] *See* discussion *infra* part III.A.
[6] They are Lenore Lapidus and Cari Fais, who examine the potential Petition Clause violations of housing laws as they pertain to the context of domestic violence. *See* notes __ *infra*, and accompanying text.
[7] Evan Stark has coined the term "battered mother's dilemma" in his pathbreaking work. *See* Evan Stark, A Failure to Protect: Unravelling "The Battered Mother's Dilemma," 27 W. ST. U. L. REV. 29 (1999).
[8] Perhaps the most widely publicized example of this practice occurred in the case of Shawrline Nicholson, named plaintiff in the class action on behalf of battered mothers in New York City, *Nicholson v.Williams,* discussed *infra* part III.B.

> 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.[9]

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, about 60% of the reports made each year were unsubstantiated.[10] While an across-the-board, "report-all" policy may be motivated by a praiseworthy goal, a reporting practice that produces less, but more accurate, referrals to CPS would provide greater protection to children and their mothers in the long term. I argue that a battered mother's right to call the police, as guaranteed by the First Amendment Petition Clause, requires a much more discerning reporting policy.

In part II, after defining the right to petition and reviewing its history and purpose, I explain why the right is the "unknown soldier" of the First Amendment rights, 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 co-extensive. For this reason, in part III, I argue that the right to petition, as a separately enumerated right in the text of the First Amendment, with a distinct history and purpose, is deserving of distinct judicial analysis. 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 infringe upon a citizen's right to petition.

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[9]Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review,* 4 BUFF. CRIM. L. REV. 801, 834 & n.128 (citing Evaluation of the Mandatory Arrest Provisions, Third Interim Report to the Governor and the Legislature 55 (Oct. 2000)).

[10] *See infra* notes ___, and accompanying text.

I then analyze the police "report-all" policy at issue. I chose this particular infringement on a DV victim's right to call the police because I deem it to be the most difficult context in which a victim of DV could successfully raise a Petition Clause claim. I conclude that under strict scrutiny, the policy violates the Petition Clause. I also apply a less-than-strict scrutiny analysis, to show that even under a more open-ended balancing test, which the Supreme Court is apt to apply, a sweeping "report-all" policy is unconstitutional.

In part IV, I identify other government practices that deter victims' reports of DV. Victims who reconcile with their abusive partners are frequently met with hostile treatment by police, prosecutors and judges. Frustrated by the reconciliation, police are reluctant to respond to calls for help. In some jurisdictions, victims are held in contempt for having contact with their partners if a restraining order is in place. This is the case despite the fact that these orders enjoin only the respondent's, and not the victim's, conduct. I discuss the application of the Petition Clause in these contexts, as well as 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.

The article concludes with a cautionary note. Bolstering a DV victim's right to call the police has had, in many contexts within the justice system's response to DV, the unintended consequence of diminishing her ability to privately order her intimate relationships and life. Battered mothers should not be forced to call the police; 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.

II. The Right to Petition

> 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. 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.

In this section I define the right, and make the case that while the rights of petition and speech overlap, they are not co-extensive, as the history and purpose of the Petition Clause illustrate. I then turn to Supreme Court doctrine. The Court has not yet articulated what level of judicial scrutiny applies to government infringements on an individual's right to petition. To complicate matters, the Court sometimes analyzes the right identically to the right to speech, while at others it does not. I argue that as a distinct, explicitly enumerated right, the right to petition deserves separate judicial analysis.

A. Definition and Application in the Context of DV

The Petition Clause provides citizens[12] with the fundamental right to ask the government to redress wrongs.[13] Petitioning is "an act of presenting a communication to the legislative, executive, or judicial branch of government, orally or in writing, to seek redress of a

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[11] U.S. Const. amend. I.

[12] Not only citizens, but arguably non-citizens, hold the right. *See generally* Michael J. Wishnie, *Immigrants and the Right to Petition,* 78 N.Y.U. L. REV. 667 (2003).

[13] U.S. Const. amend. I. See generally 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 Vestigal Constitution: The History and Significance of the Right to Petition,* 66 FORDHAM L. REV. 2153 (1998); 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); Wishnie, *supra* note ___; 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).

grievance."[14] A grievance could be a dispute between individuals or a dispute with the government.[15] It includes any attempt of an individual to seek the government's assistance or action.[16] Lobbying the legislature for a change in law and writing a letter to the governor to request relief are clear examples of petitioning activity.[17] So too is reporting a crime to the police.[18]

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 victim's call to the police through the lens of the Petition Clause. Both focused on the specific context of housing laws and policies that infringe the right. Lenora Lapidus observed that landlords and housing authorities evict victims of DV for calling the police to their homes.[19] She argued: "If a battered woman is evicted after the housing

[14] Wishnie, *supra* note __ at 668.
[15] Julie 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).
[16] GEORGE W. PRING & PENELOPE CANAN, SLAPPS GETTING SUED FOR SPEAKING Out 16 (Temple University Press 1996) ("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).") (citations omitted).
[17] Eastern R. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (legislative lobbying falls squarely within petitioning activity); McDonald v. Smith, 472 U.S. 479 (1985) (letter to governor is a petition).
[18] Gable v. Lewis*,* 201 F.3d 769, 771 (6th Cir. 2000) (noting that "[s]ubmission of complaints and criticisms to non-legislative and non-judicial 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 the denying the ability to report physical assaults is an infringement of protected speech); Estate of Morris ex rel. 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) (noting that "[t]here is no doubt that filing a legitimate criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right"); Arim v. General Motors Corp., 520 N.W. 2d 695 (Mich. Ct. App. 1994) (granting summary judgment to individuals who were sued for their participation in a criminal sting operation run based on the First Amendment); United States v. Hylton*,* 558 F.Supp. 872, 874 (S.D. Tex. 1982) (noting that filing a legitimate criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right); Curry v. State, 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 "unsavory motivation" of petitioner); Meyer v. Board of County Commissioners of Harper Co., Okla., 482 F.3d 1232, 1243 (C.A.10 Okla. 2007) (concluding that filing a criminal complaint is an exercise of the First Amendment right to petition).
[19] Lenora M. Lapidus, *Doubly victimized: Hosing Discrimination Against Victims of Domestic Violence,* 11 AM. U. J. GENDER SOC. POL'Y & L. 377, 384 (2003) (arguing that discrimination is not limited to eviction, but occurs "in a

authority learns of the abuse as a result of police activity . . . she is essentially being punished for exercising her right to petition . . . ."[20] The result is that battered women are more likely to hide rather than report abuse,[21] jeopardizing the "gains made over the last three decades in creating opportunities for women to obtain governmental protection through arrest laws."[22]

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.[23] Both scholars concluded that a Petition Clause claim would be novel, and worthy of exploration in the context of DV. While Lapidus and Fais advance a creative idea, they do not analyze the right, and more importantly, they do not theorize what level of judicial scrutiny should apply.[24] This article seeks to fill that gap, building upon a more generalized body of First Amendment right of petition scholarship.

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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).

[20] Lapidus, *supra* note __ at 383 (arguing that "[i]n 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.").

[21] Lapidus, *supra* note __ at 378.

[22] *Id.* at 384.

[23] Cari Fais, *Note, Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence,* 108 COLUM. L. REV. 118 (2008).

[24] I note, however, that Lapidus implies that some tier of intermediate scrutiny applies, for she characterizes the housing authority's interest as a "substantial interest" and argues that the government practice at issue "restricts more petitioning activity than necessary to achieve the government's objectives." These terms, in accordance with modern right to speech doctrine, are synonymous with some tier of intermediate scrutiny, and it is likely that Lapidus means something akin to what is applied to content-neutral regulations. In other words, Lapidus assumes that something-less-than-strict judicial scrutiny applies. *See* Lapidus, *supra* note __ at 384. Fais, on the other hand, assumes an almost absolute standard of review. She argues 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 __ 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' . . . . ").

B. Text and History of the Petition Clause

In the most recent Petition Clause decision issued by the Supreme Court, *Borough of Duryea, PA, et al., v. Guarnieri,*[25] Justice Scalia was compelled to point out the obvious to the majority: those who ratified the First Amendment understood the text of the Amendment as including "*both* provisions [the Petition Clause and the Speech Clause] as *separate* constitutional rights."[26] Justice Scalia was correct in emphasizing the point. As has been recently observed, "even lawyers and judges steeped in First Amendment jurisprudence would be hard pressed to identify and describe the historic right of petition."[27]

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 traced extensively its history,[31] and recently there is movement afoot to revivify it.[32] These

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[25] 2011 WL 2437008 (U.S.).

[26] Guarnieri, 2011 WL 2437008 (U.S.) at *17 (Sarcastically, Justice Scalia wrote: "The complexity of treating the Petition Clause and Speech Clause separately is attributable to the inconsiderate disregard for judicial convenience displayed by those who ratified a First Amendment that included *both* provisions as *separate* constitutional rights. A plaintiff does not engage in pernicious 'circumvention' of our Speech Clause precedents when he brings a claim premised on a separate enumerated right to which those precedents are inapplicable.") (emphasis in original).

[27] Ronald J. Krotoszynski and Clint A. Carpenter, *The Return of Seditious Libel,* 55 UCLA L. REV. 1239, 1305 (2008).

[28] *Id.* at 1239.

[29] *Id.*

[30] Ashutosh Bhagwat, *Associational Speech*, 120 YALE L. J. 978, 980 (2011) ") [hereinafter Bhagwat, Associational Speech].

[31] For detailed histories, *see generally* Rice Andrews, *supra* note __; Higginson, *supra* note __; Mark, *supra* note __; Spanbauer, *supra* note __.

[32] *See generally* Bhagwat, *Associational Speech*, *supra* note __ at 981 (2011) (arguing that "even today, assembly, petition and association are at least as central to the process of self-governance as is free speech; Krotoszynski & Carpenter, *supra* note __ (arguing for its application to political protests); Adam Eckstein, *The Petition Clause and Alternative Dispute Resolution: Constitutional and Consistence Arguments for Providing Noerr-Pennington Immunicty to ADR,* 75 U. CIN. L. REV. 1683 (2007) (arguing for application of the right to alternative dispute resolution); Wishnie, *supra* note __ (arguing for its application to undocumented immigrants' reports to law enforcement); 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 __ (arguing that the Supreme Court has not given the Petition Clause the distinct status it deserves amongst other First Amendment guarantees); Anita Hodgkiss, *Note, Petitioning and the Empowerment Theory of Practice,* 96 YALE L.J. 569 (1987) (arguing how lawyers might use the right to petition to empower disadvantaged clients).

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, that extends beyond the right of free speech "to promise that a particular audience -- the government -- is forever open to hear a particular 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 individual exegeses, independent 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. Rather than re-tell this history, I cull from the growing body of Petition Clause scholarship some common themes: the right to petition pre-dates and (some suggest) gave rise to the right to speech; the Framers intended for the right to be given special status; the right was central to American politics and self-governance both before and after the ratification of the Bill of Rights; and the right encompassed both individual, private grievances and those that were of community-wide concern.

As noted by the Court in *Guarnieri,* the right to petition is ancient, pre-dating Magna Carta.[36] It dates back to the tenth century in England, in fact,[37] though scholars agree that it did

[33] *See, e.g.* Bhagwat, *Associational Speech, supra* note __ 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 __ at 725-726.
[35] Krotoszynski & Carpenter, *supra* note __ at 1246.
[36] Guarnieri, *supra* note __ at *11; Spanbauer, *supra* note __ at 20-27; PRING & CANAAN, *supra* note __ at 15 (tracing the roots of the right to petition to "early English law of more than 1,000 years ago" and giving "birth to the Magna Carta") ; Rice-Andrews, *supra* note __ at 596-603 (describing early English petitioning from the Magna

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 "near 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 "more fundamental to a politically functional society."[41]

Against this backdrop one may begin to understand the mindset of the American colonists – still British subjects – prior to the drafting of the Constitution and Bill of Rights. By the time of the American Revolution, petitioning was extremely popular and widespread in England. It was not checked or penalized, as was the right of speech,[42] and was frequently successful.[43] Several colonial governments explicitly recognized petitioning as a right, and all of the colonies implicitly recognized petitioning "as a method by which individuals participated in government and voiced their views to the local governing bodies."[44] Colonists, including

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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] Krotoszynski & Carpenter, *supra* note __ at 1299.

[38] *Id.* From 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. Wishnie, *supra* note __ at n.93, citing Mark, *supra* note __ at 2165-21-66 and Smith, *supra* note __ at 1156.

[39] Krotoszynski & Carpenter, *supra* note __ at 1298.

[40] Krotoszynski & Carpenter, *supra* note __ at 1299.

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

[42] Spanbauer, *supra* note __ 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] Wishnie, *supra* note __ at n.94, citing Smith, *supra* note __ at 1166 and Mark, *supra* note __ at 2163.

[44] Spanbauer, *supra* note __ 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 cloal 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.") (citations omitted); Wishnie, *supra* note __ at 693 & n.146.

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 its 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 the 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. As Justice Scalia pointed out in *Guanieri*, the primary responsibility of colonial assemblies was settlement of private disputes raised by petitions.[49] Indeed, the "First Congress never once refused to accept a petition."[50] The private grievances that were redressed by the government included divorces, property disputes, and individual tax withholdings.[51]

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[45] Spanbauer, *supra* note __ at 32-33.
[46] Krotoszynski & Carpenter, *supra* note __ at 1302.
[47] Bhagwat, *Associational Speech, supra* note __ at 991-992 (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 __ at 1302-1303.
[49] Guarnieri, *supra* note __ at 17; *citing* Higginson, *supra* note __ at 145.
[50] Documentary History of the First Federal Congress of the US of A, xvi, Kenneth R Bowling (1998).
[51] Higginson, *supra* note __ at 145.

In his dissent, Scalia rebuffed the *Guarnieri* majority: "It acknowledges . . . that the Petition Clause protects personal grievances addressed to the government. But that is an understatement – rather like acknowledging that the Speech Clause protects verbal expression."[52] Again, Justice Scalia got it right. As will be discussed *infra*, the majority in *Guarnieri* interpreted the Petition Clause as exalting petitions of public interest over petitions of private, individual interest.[53] This interpretation is supported neither by the history of the Clause, nor by the exercise of the right as the people practiced it. Just the opposite is true: the vast majority of petitioning in the Framing era concerned matters of private dispute.[54]

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.[55] However, petitioning "fell from its position as the most important of expressive freedoms" when pro-slavery representatives in Congress imposed the gag rule on anti-slavery petitioners in the 1830s.[56] During this time, Congress's infringement on the right was not challenged in the courts, and popular petitioning fell largely into disuse.[57]

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[52] Guarnieri, *supra* note __ at 17.
[53] "Petitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole." *Id.* at 10.
[54] *See* Higginson, *supra* note __ at 145-146 (describing the adjudicatory role of assemblies in resolving private disputes, explaining that most petitions were matters of private dispute and providing examples).
[55] Wishnie, *supra* note __ at 710-711 (describing this anti-immigrant legislation at the turn of the 19th century).
[56] Krotoszynski & Carpenter, *supra* note __ at 1304.
[57] Krotoszynski & Carpenter, *supra* note __ at 1305.

Not so for the politically active, however. Legislative petitioning was a central strategy utilized by both the women's suffrage and anti-Prohibitionist movements.[58] 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 N.A.A.C.P. Notably this form of petitioning has been explicitly recognized by the Supreme Court as political expression, and importantly, characterized as the only avenue by which minority groups could petition the government.[59] And of course popular petitioning, in the form of mass signature gathering to support a request for redress, has flourished in the twentieth century.[60]

C. Purpose of the Right to Petition

Petitioning was considered a mechanism – a formal mechanism – by which people participated in English and American colonial political life.[61] It was exercised by non-citizens, by (in colonial times) disenfranchised white males (prisoners and those without property), women, free Blacks, Native Americans, and even slaves.[62] The purposes petitioning serve are many, and some of these purposes overlap with speech. As noted by the *Guarnieri* majority: both speech and petition advance individual self-expression.[63] Both are integral to democracy,

[58] Tabitha Abu El-Jah, *Changing the People: Legal Regulation and American Democracy,* 86 N.Y.U. L. REV. 1, 34 (2011).
[59] N.A.A.C.P. v. Button, 371 U.S. 415, 430 (1963).
[60] Abu El-Jah, *supra* note __ at 30-34 (documenting the history of petitioning and noting that the nature of petitioning has changed qualitatively in the twentieth century).
[61] Spanbauer, *supra* note __ at 20-27 (describing the right of petition in England as ___ and *id.* at 28 ("All colonies recognized petitioning as a method by which individuals participated in government . . . ."); Wishnie, *supra* note __ at 685-86 (describing the centrality of petitioning in England prior to the American Revolution and arguing that "[r]obust petitioning was also a central feature of political life in the American colonies.")
[62] Wishnie, *supra* note __ 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 . . . 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).
[63] Guarnieri, *supra* note __ at *7.

> although 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. . . . although the right to petition is generally concerned with expression directed to the government seeking redress of grievance.[64]

The Court's final point bears emphasis, moreso 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 co-extensive.[65]

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."[66] 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.

Let us apply this distinction in the context of DV. 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 this with a DV victim's decision to speak

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[64] Guernieri, *supra* note __ at *7.
[65] 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." *Guarnieri, supra* note __ at *17.
[66] PRING & CANAN, *supra* note __ at 16. As will be discussed later, however, there is one qualification based on content: the petition may not be a sham.

publicly about the violence in her home. Speaking to other women, in grass roots, "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."[67] The right to engage in consciousness-raising is protected by the right to free speech. It goes directly to the core values of the right to speech: expression for the purposes of self-realization, truth-seeking, and public debate.[68] The right to access the police for help is protected by the right to petition. That right guarantees that the doors of government remain open to the governed.

The Petition Clause serves not merely the governed, but the governors.[69] It is a two-sided coin.[70] Petitions provide "an important stream of information about the views and concerns of the people, informing government decisions about individualized cases and the need for generalized policymaking."[71] Petitioning is therefore central to self-governance. "Communications to national, state and local legislators inform them 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."[72]

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[67] SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE, THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 31 (South End Press 1982).
[68] For a recent, short summary of the core values of the right of free speech, *see* Bhagwat, *Associational Speech, supra* note __ at 993-994 (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).
[69] Wishnie, *supra* note __ at 726.
[70] PRING & CANAN, *supra* note __ 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.").
[71] Wishnie, *supra* note __ at 726.
[72] Wishnie, *supra* note __ at 726-27.

In the past thirty years, it has been the petitioning activity of activists on behalf of battered women that changed the way the government – at national, state and local levels – responds to DV. As I have written elsewhere, 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.[73] 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.[74]

"Petitions also create an information stream that enables agencies better to allocate resources, target enforcement, and identify gaps in statutory or regulatory coverage."[75] 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 in those areas. Resource decisions are policy decisions; thus, the accurate reporting of crime from citizens directly influences government public policy. In the context of the police response to DV in particular, millions of dollars are allocated to the states for the purpose of enforcing criminal laws that prevent DV, under the federal Violence Against Women Act.[76] The Act provides increased funding to those states that statutorily mandate, or strongly encourage, the arrest of perpetrators of DV by the

[73] *See* Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Relational Contract Theory to Domestic Violence Cases,* 2010 B.Y.U. L. Rev. 515, 521-23.
[74] *Id.*
[75] Wishni, *supra* note __ at 727.
[76] VAWA was originally passed in 1994. Violent Crime Control and Law Enforcement Act of 1994; Title IV, Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (hereinafter "VAWA 1994"), and has been reauthorized twice, most recently in 2005: The Violence Against Women Act and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) (hereinafter VAWA 2005).

police. Of particular importance, the Act provides increased funding to states that can show increased arrest and prosecution rates for DV.[77]

With regard to law enforcement generally: it "would be difficult indeed for law enforcement authorities to discharge their duties if citizens were in any way discouraged from providing information"[78] and that any "chilling effect" on providing information to the police would render the police "handicapped in protecting the public."[79]

The Petition Clause protects this right. 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 – moreso than the right to speech, protects a value lying at the core First Amendment: self-governance. 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."[81] Some argue that the Petition Clause is the source of the other First Amendment rights.[82] It is a right is "implied in the very notion of a government, republican in form."[83]

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[77] *Id.* "We promised America's women real help, not just talk. Now we have got to deliver with funds for millions of women and families that have suffered—for shelter, for counseling, for training, for law enforcement—all of which is so desperately needed throughout this country. Some argue that we can't afford to live up to our commitments. I say we cannot afford not to." Comments of Janet Reno, *Address to the Advisory Council on Violence Against Women* (July 13, 1995).
[78] Forro Precision, Inc., v. International Business Machines Corp., 673 F.2d 1045, 1060 (9th Cir. 1982).
[79] Ottensmeyer v. Chesapeake & Potomac Telephone Co. of Md., 756 F.2d 986, 994 (4th Cir. 1985).
[80] Protect Our Mountain Environment, Inc. v. District Court, 677 P.2d 1361, 1364 (Colo. 1984).
[81] Guarnieri, *supra* note __ at *12.
[82] *See* Smith, *supra* note __ at 1154 ("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 __ at 1299 and n.269 (describing rights of speech, press and assembly as progeny of right to petition).
[83] BE & K Constr. Co. v. NLRB, 536 U.S. 516, 524 (2002) (internal citations and quotations omitted).

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?[84]

One reason is that few litigants pressed claims under it.[85] Another reason, noted by virtually every scholar who has written about the right, is that the Supreme Court has not consistently distinguished it from the other First Amendment rights.[86] In some cases it treats Petition Clause claims as separate, and analytically distinct, from Speech Clause claims;[87] in others, it treats the right of petition as subsumed within the right of speech.[88]

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[84] PRING & CANAAN at 18 (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 except 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'") (citing D. Smith, *The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations* 151 (1971) (unpublished dissertation, Texas Tech University) and *id.* describing research findings on SLAPP suits and noting that "We frequently found that those involved fail to recognize a Petition Clause issue even when it is staring them in the face.")

[85] Wishnie, *supra* note __ at 715.

[86] *See, e.g.,* Spanbauer, *supra* note __ at 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 __ at 713 (current doctrine treats petitioning as subsumed within speech); Krotoszynski & Carpenter, *supra* note __ at 1305-1308.

[87] For example, in BE&K Construction Co. v. NLRB, *supra* note ___, the Court considers and rejects these analogies to speech doctrine. 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 concludes that while this analogy is helpful it does not suggest that the class of baseless litigation is completely unprotected. *Id.* at 530. Second, with regard to prior restraints on speech, the Court states: "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.

[88] Such as in its most recent decision, *Guarnieri,* discussed momentarily. 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: E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); Mine Workers v. Pennington, 381 U.S. 657 (1965); NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of RR Trainmen, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967); Cal. Motor Transp. Co. v. Trucking Unltd., 404 US 508 (1972); NAACP v. Claiborne, 458 U.S. 886 (1982); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983); City of Columbia v. Omni, 499 U.S. 365 (1991); Prof'l Real Estate Investors, Inc. v. Columbia, 508 U.S. 49 (1993); Christopher v. Harbury, 536 US 403, 415 (2002); and BE&K

An example of the former is illustrated by its two foundational Petition Clause decisions, *Noerr*[89] and *Pennington,*[90] both anti-trust 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.[91] No matter how aggressive the tactics used,[92] or even that the tactics are illegal under the antitrust laws – individuals (and companies) have the right, as set forth in the Petition Clause, to influence the government. With one, and 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.[93]

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.[94] There was no balancing of the individual's interest and the government's, as the Court engages in with the majority of Speech Clause

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Construction Co. v. NLRB, 536 U.S. 516 (2002). 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, *supra* note __ at 570; Spanbauer, *supra* note __ at 44.

[89] 365 U.S. 127 (1961).

[90] Mine Workers v. Pennington, 381 U.S. 657 (1965). *Noerr* and *Pennington* together are referred to as the Noerr-Pennington Doctrine.

[91] *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 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 intended to eliminate competition).

[92] PRING & CANAN, *supra* note __ describe 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." Pring at 24. *See also* the dissenting opinion of Justice Biggs in Noerr, describing the campaign as a "no-holds-barred fight." Noerr at ___.

[93] 365 U.S. at 144.

[94] For a particularly accessible summary of this doctrine, *see* PRING & CANAN, *supra* note __ at 19-29.

cases.[95] Rather than conducting a balancing test, the Court protected petitioning - almost absolutely.[96]

This was not so in *McDonald v. Smith*.[97] A North Carolina citizen wrote a letter to President Reagan, voicing his opposition to a particular candidate for the state's attorney general.[98] 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.[99] The Court unanimously rejected the argument. It held that the Clause does not confer an absolute immunity for petitioning, but only a qualified right.[100] The "right to petition is cut from the same cloth as the other guarantees"[101] of the First Amendment; thus the Court found "no reason to elevate the Petition Clause to special First Amendment status."[102]

In its most recent decision, *Burough of Duryea v. Guarnieri,*[103] 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." The Court elaborated: "There may arise cases where the speech 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." As I will later argue, a DV victim who calls the police for protection presents such a case.

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[95] Wishnie, *supra* note __ 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) (citations omitted).
[96] *See, e.g.,* PRING & CANAN, *supra* note __ 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.'").
[97] 472 U.S. 479 (1985).
[98] 472 U.S. at 481.
[99] 472 U.S. at 481-82.
[100] 472 U.S. at 484 ("[W]e are not prepared to conclude . . . that the Freamers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in exercise of that right.")
[101] 472 U.S. at 482.
[102] 472 U.S. at 485.
[103] 2011 WL 2437008 (U.S.).

Charles Guarnieri did not. But note: he was a government employee, not an ordinary citizen. 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: 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? 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.[107] 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.

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

[104] *Id.* at *11-12 (citations omitted).
[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 III.B.
[106] Guarnieri, *supra* note __ at *18.
[107] To be clear, I am not advocating such a position in public employment cases. To the contrary, I am a strong supporter of the critiques of Helen Norton. *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).

community wide, public concern, and not about a private dispute. For this reason, it was defensible, in the Court'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."[108] The question left unaddressed: what *does* the constitutional analysis of the Petition Clause turn upon?

III. Analyzing What Level of Scrutiny Ought to Apply to a Battered Mother'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.[109] Others argue that an absolute standard is both unnecessary and unrealistic, given the Court's affinity in First Amendment jurisprudence to balancing tests; they argue that a heightened, but not absolute, level of judicial scrutiny should apply to government burdens on petitioning.[110] Before analyzing whether a government policy is "unduly" burdensome, however, one must establish that the policy burdens the right at all.[111] 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

[108] 2011 WL 2437008 (U.S.) at *13.
[109] Smith, *supra* note __ at 1183 ("An absolute right of petition must be preserved to fulfill adequately the purposes and interests of petitioning."); 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 other than absolute."); Fais, *supra* note __ at 1222 (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.).
[110] *See, e.g.,* Wishnie, *supra* note __ at 727-728 (discussing a number of judicial tools that would give petitioning heightened, though not absolute, protection); *see also* Krotoszynski & Carpenter, *infra* note ___.
[111] *See* BE & K Constr. Co. v. NLRB, 536 U.S. 516, 529 (2002) (The Court "must first isolate the burden" before determining whether it raises First Amendment concerns.).

means" available.[112] I conclude that even under a less-than-strict (though still heightened) level of scrutiny, however, the reflexive "report-all" policy of the police 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 allusive 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."[113]

Victims of DV fear that by calling the police, they will put themselves in jeopardy of losing their children.[114] While social scientists have yet to conduct a rigorous exploration of how

[112] *See, e.g.,* Krotoszynski & Carpenter, *supra* note __ at 1297-1298 (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.").

[113] Wishnie, *supra* note __ at 718, citing BE&K Constr. Co. v NLRB, 536 U.S. 516, 530 (2002); Eckstein, *supra* note __ at 1683-1684 (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) (citations omitted).

[114] *See* Nicholson v. Williams, 203 F.Supp. 153, 204 (2002) ("[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.") (quoting expert witness Dr. Evan Stark, whose testimony the court relied upon); Einat Peled, *"Secondary" Victims No More: Refocusing Intervention with Children, in* Future INTERVENTIONS WITH BATTERED WOMEN AND THEIR FAMILIES 135 (Jeffrey L. Edleson & Zvi C. Eisikovits eds., 1996) (observing that victims may choose not to disclose domestic violence because they fear this will lead to their losing custody of their children); Karlyn Barker, *Policy Turns the Abused into Suspects,* Wash. Post, Dec. 26 at 2001 (discussing the potential backfire women face when they report domestic violence); 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 & Lorna Davis, *Child Abuse and Domestic Violence: Can Practice Be Integrated in a Public Setting?* 4 CHILD MALTREATMENT 158, 164 (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

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.[115]

In addition to this data, there is widespread acknowledgment amongst 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.[116]

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.[117] When these

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FAM. CT. REV. 654, 665 (2008) (arguing that removal of children based on a parent's victimization deters reporting of DV). *See generally* Peter G. Jaffe, *et al.,* CHILDREN OF BATTERED WOMEN 103 (1990).

[115] *See, e.g.,* Michelle Fugate, *et al., Barriers to Domestic Violence Help Seeking,* 11 VIOLENCE AGAINST WOMEN 290, 301, 303-04 (2005) (reasons victims surveyed did not call the police include fear of losing children to child protective services); 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); Sandra Wachholz & Bauke Miedema, *Risk, Fear; Harm: Immigrant Women's Perceptions of the "Policing Situation" to Woman Abuse,* 34 CRIME, LAW & SOCIAL CHANGE 301, 311 (2000) (study of immigrant women in Canada showing 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); 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 AND VICTIMS 333 (1998) (victims reported fear of police taking the children as a reason for reluctance to call the police).

[116] *See, e.g.,* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System*, 11 YALE J.L & FEMINISM 3, 35-37 (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 example of Phyllis Ojokolo) and *id.* at 36 ("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."); 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 (2004) and *id.* at n.115 ("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."). *See also* Jane C. Murphy, *Legal Images of Motherhood, Conflicting Definitions from Welfare "Reform," Family, and Criminal Law,* 83 CORNELL L. REV. 688, 745-52; Kristian G. Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings,* 22 HARV. WOMEN'S L.J. 89, 119 (1989) (arguing that because the state contributes to trapping women in situations prone to battering, it should not accuse women of a failure to protect unless it takes into account the social context of the violence); Jeanne A. Fugate, Note, *Who's Failing Whom? A Critical Look at Failure to Protect Laws,* 76 N.Y.U. L. REV. 272 (2001); Melissa A. Trepiccione, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect her Child an Acceptable Solution When her Child Witnesses Domestic Violence?,* 69 FORDHAM L. REV. 1487 (2001).

[117] 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 ANN. § 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

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.[118] 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 reportable act.[119] 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.[120] In addition to vague statutory definitions, many statutes do not delineate the circumstances in which reporters are required to report.[121] 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.[122] And in all

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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 REV. STAT. ANN. art. § 609 (2004); ME. REV. STAT. ANN. tit. 22, § 4011 (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 (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. § 2151.42.1 (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 (Vernon 2009); UTAH CODE ANN. § 62A-4A-403 (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).

[118] Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Amaltreatment,* 53 HASTINGS L.J. 1, 55-56 (2001).

[119] Weithorn, *supra* note __ at 55-56.

[120] *See, e.g.,* Cal. Penal code 11165, stating that child abuse includes "causing or permitting a child to suffer . . . mental suffering," but without defining mental suffering.

[121] Steven J. Singley, *Failure to Report Suspected Child Abuse,* 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" that someone has "permitted a child to suffer mentally or . . . placed the child in a situation in which his person or health has been endangered. Cal. Penal Code §§11166(a)(1) and 11165.7(a)(19).

[122] Singley, *supra* note __ at 246.

states, failure to report to child protective services carries criminal penalties, while making a good faith report provides immunity.[123]

Consequently, many reporters err on the side of caution; rather than ascertain a "reasonable suspicion," they report when there is *any* suspicion.[124] Indeed, there is evidence that police report to CPS when children are present but asleep during the incident,[125] and even when children are away from the home during the incident.[126] 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.[127]

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[123] Singley, *supra* note __ at 246; *see also* Brooke Albrandt, *Turning in the Client: Mandatory Child Abuse Reporting Requirements and the Criminal Defense of Battered Women,* 81 TEX. L. REV. 655 (2002).

[124] Singley, *supra* note __ at 243.

[125] DeVoe, *supra* note __ 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: phone interview with Sgt. Stephanie Jackson, Supervisor of Family Violence Unit, Tulsa, OK Police Department, 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.")

[126] For example, when the police took the report of Shawrline Nicholson, named plaintiff in *Nicholson v. Williams,* 203 F.Supp.2d 153 (E.D.N.Y. 2002), discussed *infra* part __, the police contacted the state's CPS to report the DV, resulting in the removal by that agency of Shawrline's two children. One of the children was at school when the assault occurred. Nicholson at 169. The other was in another room, in her crib. *Id. See also* note ___ (immediately following this note). *See also* Phone interview with Det. Bartley, Jacksonville Police Dept., 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 usual route the reports to CPS.")

[127] Phone interview with Det. Sylvia Vella, San Diego Police Dept., Dec. 7, 2010 (notes on file with author for all calls cited herein) ("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."); phone interview with Sgt. Gerard Asselin, Anchorage Police Dept., Nov. 29, 2010 ("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."); phone interview with Victims' Assistance Intern Ashley Spinney of Detroit Police Dept., 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

Victims of DV, and those who advocate for them, view the intervention of CPS as a highly negative occurrence.[128] As advocates for victims have argued, CPS:

> typically: 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]

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

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is the same if only one of the parties has a child, whether the child was present or not."); E-mail from Det. Becky Buttram, Indianapolis Metropolitan Police Dept., Dec. 14, 2010 ("I know personally, that in the time that MCSD had a DV unit, all DV cases were referred to Child protective services (CPS) for follow up that involved children present."); phone interview with Det. Mike Kellog, Denver Police Dept., 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. . . the number one goal is safety for the kids and Human Services will probably find out about it and decide what to do."); phone interview with Inspector Don Ciardella, San Francisco Police Dept., Dec. 29, 2010 ("More often than not, officers will report if the child was present at the incident . . ."); phone conversation with Sgt. Tina Jones, Domestic Violence Unit, Portland OR Police Dept., Dec. 29, 2010 ("I can tell you that all of our domestic violence reports where children are listed are cross-reported to human services."); phone interview with Carol Horowtiz, Santa Fe Police Dpet., 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."); E-mail from Lt. Michelle L. Robinson, Metropolitan Police Dept., District of Columbia, Dec. 8, 2010 ("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."); Minneapolis Policies and Procedures, http://www.ci.minneapolis.mn.us/mpdpolicy/7-300/7-300.asp#P381_29953 visited Aug. 2, 2011 ("When children have witnessed a domestic or were present in the same dwelling when the event occurred, officers will list the names of those children in the report . . . All domestic abuse related-offense/incident reports shall immediately be entered into CAPRS."); phone interview with Amy Lutz, Police Officer, Research and Planning Unit, Philadelphia Police Department, April 20, 2010 ("When we get a call to the scene and are told children are there we refer to DHS."); E-mail from Coleen Kohtz, Department of Family and Children's Services Law Enforcement Liaison, San Jose Police Department Family Violence Unit, February 11, 2010 (on file with author) ("Currently SJPD cross reports all Domestic Violence where children are present to Santa Clara County DFCS."). *See also* Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law,* 4 BUFF. CRIM. L. REV. 801, 834 & n. 125 (2001) ("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 by Stacey Bussel with Captain Drew Kirkland, Portland, Oregon Police Department (June 6, 2000). "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.")

[128] DeVoe, *supra* note __ 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.").

[129] Weithorn, *supra* note __ 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." (citations omitted).

CPS. A report-all DV policy therefore has a chilling effect.[130] 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.[131]

B. Analyzing the Burden

For the reasons I have already articulated in part II, *supra,* 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) who argue that there is no justification for treating the rights identically.[132] In other words, 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 police "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. After demonstrating why this is so, I apply strict scrutiny to the

[130] Weithorn, *supra* note __ 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.").

[131] 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. New York City Health and Hospitals Corp., 2009WL 804096 (S.D.N.Y. 2009) (finding that when the police have probable cause to arrest the 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. Here 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.

[132] I refer to Justice Scalia's dissent in *Guarnieri*, discussed *supra* part II.B and II.D.

police practice at issue. I also argue that even if a less-than-strict-scrutiny standard were applied, the reflexive, report-all policy as applied to battered mothers violates her right to petition.

1. Rationales for Heightened Scrutiny in Speech Cases

The right to free speech is not absolute.[133] The government may infringe on an individual's right to freedom of speech, though there is a continuum of protection, or "tiers of scrutiny,"[134] 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.[135] If it restricts the content of the speech, the law or policy is presumptively invalid[136] and subjected to strict judicial scrutiny.[137] If it restricts the means or mode of 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.[138] In these balancing tests, the Court weighs the government's interest in restricting the speech against the speaker's interest in expression;

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[133] Konigsberg v. State Bar of CA, 366 U.S. 36, 49 (1961).
[134] Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence,* 2007 U. ILL. L. REV. 783, 784 [hereinafter, *The Test*].
[135] Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose,* 38 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES 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, e.g.,* Frisby v. Schultz, 487 U.S. 474, 480 (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 Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983). Krotoszynski & Carpenter, *supra* note __ 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.").
[136] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
[137] Turner Broadcast System v. Federal Communication Commission, 512 U.S. 622 (1994).
[138] Geoffrey R. Stone, *Content Regulation and the First Amendment,* 25 WM. & MARY L. REV. 189, 191 (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," *citing* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 70 (1981)).

the greater the government interferes with speech, the greater the burden on the government to justify the interference.[139]

Application of the content-based versus –neutral distinction to a battered mother's call to the police is both unworkable on a practical level and undesirable on a theoretical level. First the practical. A policy that on its face directs the police to report the presence of a child at the scene of *domestic* violence, but not stranger violence, may constitute a subject matter (content-based) restriction, [140] for it restricts communication to the police about an entire subject – domestic violence.[141] 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.[142]

Regardless of whether the police policy may be categorized as a content-based or – neutral, the distinction is undesirable in Petition Clause cases. As discussed *supra* in part II.C., the heart of petitioning is access to a particular audience – the government – for the 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

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[139] Stone, *supra* note __ at 191 (discussing the Court's analysis of content-neutral restrictions: "The greater the interference with effective communication, the greater the burden on government to justify the restriction.")

[140] 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.) Stone, *supra* note __ at 239.

[141] A central purpose of the content distinction is to prevent government restrictions against particular viewpoints. 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, *et al.* v. Rector and Visitors of the Univ. of Va., *et al.,* 515 U.S. 819, 828 ("In the realm of private speech, the government cannot favor one speaker over another.") (citation omitted) and *id.* at 829 ("When the government targets not subject matter, but particular views taken by speakers on a subject, violation of the First Amendment is all the more blatant.") (citation omitted). 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 right to speech analytical tools to the right to petition.

[143] Wishnie, *supra* note __ at 718and n. 308 ("The threshold . . for treating a petition as unprotected sham is reasonably high.") (citing BE & K Constr. Co. for its holding that to be a sham, a petition must be both objectively baseless and subjectively intended for an improper purpose).

be analytically irrelevant.[144] The right to petition protects one's access to the government. 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 open to the speaker ample alternative opportunities for expression. Without these, 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.

But even when the Court does a apply a less-than strict (though still something more than "intermediate") level of scrutiny, it 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

[144] As discussed in part II.C, the right to petition is the right to make a request; it is the "there are no dumb questions" rule. Eckstein, *supra* note __ at 1685.
[145] Stone, *supra* note __ at 199-200.
[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, *Associational Speech, supra* note __ at 993-994.
[147] *See* Wishnie, *supra* note __ 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.")

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 restrictions;[150] in the other three the Court struck them down.[151] The linchpin was whether there were meaningful alternative avenues for communication.[152]

In 2008, Ashutosh Bhagwat similarly concluded 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

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[148] Stone, *supra* note __ at n.5.
[149] Stone, *supra* note __ at 191 and (significantly) n.5.
[150] These were United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981), Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981), and United States v. O'Brien, 391 U.S. 367 (1968).
[151] These were Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981), NAACP v. Button, 371 U.S. 415 (1963), and Schneider v. State, 308 U.S. 147 (1989).
[152] Indeed, Stone expresses this repeatedly. *See* Stone, *supra* __ at n.5.
[153] Bhagwat, *The Test, supra* note __ at 790. To the list of cases Stone analyzed, Bhatwat added these in the category of government restrictions the Court upheld, for providing alternative avenues of communication: Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), Frisby v. Schultz, 487 U.S. 474 (1988), Ward v. Rock Against Racism, 491 U.S. 781 (1989), Hill v. Colorado, 530 U.S. 703 (2000) and Thomas and Windy City Hemp Development Bd. V. Chicago Park Dist., 534 U.S. 316 (2002). To the category of those struck down, for failing to provide alternative avenues of communication, Bhagwat added: United States v. Grace, 461 U.S. 171 (1983) and Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992). For a similar discussion s*ee also* 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).

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, 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]

Lower courts of appeals have indeed applied these Speech Clause principles to their Petition Clause analyses. In the absence of Supreme Court cases, these decisions are instructive. In *Thaddeus-X v. Butler*, the Court was presented with the question of whether the public concern test should apply to prisoners' Petition Clause claims.[158] The court, like other circuit

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[154] "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 an agencies." Guarnieri, *supra* note __ at *9.

[155] Bhagwat, *The Test, supra* note __ at 789-790 (arguing that the Court's decisions in City of Ladue and Barnicki – see next note - 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), relied upon by Bhagwat, in reaching 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, *The Test, supra* note __ at 791.

[157] Bhagwat, *The Test, supra* note __ at 789 (discussing the Court's rationale in Ladue).

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

courts of appeal, held that it could not be imported into the prison setting.[159] In reaching its conclusion, the Court observed that First Amendment claims must be analyzed in context. It sketched out a continuum of contexts:

> 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 jailor can impose speech-limiting regulations that are "reasonably related to legitimate penological interests."[160]

Thus there is a continuum of settings within which the First Amendment protects petitioning. When the setting changes, so too does "the type of conduct deemed protected in that particular setting."[161] 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."[162] Public employees' right to petition is also distinct from ordinary citizens.' A citizen who accepts an offer of

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[159] 175 F.3d 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 the Supreme Court in *Pickering* cannot unhesitatingly import reasoning from the public employment setting into the prison setting."). *See also* Friedl v. City of New York, 210 F.3d 79, 87 (2d Cir. 2000) ("[We reject the contention . . . that where the [prisoner] alleges retaliation for . . . a petition to the government, he must establish that the speech in his petition . . . was a matter of public concern."); Jackson v. Cain, 864 F.2d1235, 1248 (5th Cir. 1989) (applying Turner's "legitimate penological interests" test without mention of the public concern test for prisoners' claims); Cornell v. Woods, 69 F.3d 1383, 1388 (8th Cir. 1995) (applying Turner without mention of public concern test for prisoners' claims); Bridges v. Gilbert, 557 F.3d 541, 551 (7th Cir. 2009) (citing the Fifth and Eighth circuit courts of appeals, and holding that the public concern test is not applicable in the prison context).

[160] Thaddeus-X, *supra* note __ at 388-89 (citations omitted).

[161] *Id.*

[162] Lewis v. Casey, 518 U.S.343, 335 (1996).

employment from the government "must accept certain limitations on his or her freedom."[163] 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 the unique nature of the government's interest."[164] 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.[165] 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 there are no less speech-restrictive alternatives.[166] This test establishes a very high burden for the government – not a general balancing test, but rather something approaching absolute protection.[167]

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[163] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).
[164] Guarnieri, *supra* note __ at *13.
[165] 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 __ at 196 (discussing the notion of high value speech, as embodied in free speech jurisprudence). Yet the court access doctrine, discussed *infra* part IV does – and given this doctrine's close affiliation, indeed groundedness in the right to petition, it seems worth mentioning here.
[166] Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
[167] Stone, *supra* note __ 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* Eugene Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny,* 144 U. PA. L. REV. 2417, n.95 (1996) (finding only one recent case in which the Supreme Court used a balancing test in evaluating a content based restriction, and

The protection of children from the risk of physical and emotional injury is well-established in First Amendment jurisprudence as a compelling state interest.[168] The question is whether the "report-all" policy is the least petitioning-restrictive means of identifying children at risk.[169] This is a factual, common-sense inquiry.[170]

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.[171] 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

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describing this as an aberration); SMOLLA *supra* note __ at 3-69 (characterizing "least restrictive means" as a standard that is extremely difficult to satisfy).

[168] This point is widely accepted, and has been for some time. *See* Prince v. Massachusetts, 321 U.S. 158 (1944) (Court did not accept claim for religious exemption from 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, s*ee e.g.* Sable Communications of California v. Federal Communications Commission, 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).

[169] *See* Rutan v. Republican Party, 497 U.S. 62, 74 (1990); Sable Communications v. FCC, 492 U.S. 115, 126 (1989); Florida Star v. BJF, 491 U.S. 524, 538 (1989); Boos v. Berry, 485 U.S. 312, 329 (1988); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 586 (1983).

[170] 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 (2005) and at 611-612 (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 are reliable).

[171] *See* note __ *supra* (citing the states' mandatory reporting statutes).

professionals who are required to report children 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 least (*i.e.,* reflexive) - reports.

While not much more need be articulated to be persuasive on this point, given the very high bar set for the government in the "least restrictive means" test, I add that in my inquiries to police departments across the nation, I found less restrictive alternatives. These policies bridge the gap between the arguably vague requirements of mandatory reporter statutes and more discerning and effective police reporting practices. For example, in Charleston, South Carolina, when police respond to DV calls they investigate, but maintain significant discretion, about whether to report to CPS. Within the ambit of possible referrals, there is a presumption that if a child witnessed the violence that a report will be made. But the inquiry does not begin or end there; the point for these officers is 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."[172] 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.[173]

Another example is Atlanta's policy. [174] There the responding officer submits to her supervisor a set of facts under the heading "Describe How Crime Committed" that includes the relationship of parties; the time, place and date of 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

[172] Email from Det. Mike Lyczany, Charleston Police Department, Dec. 6, 2010 (on file with author).
[173] *Id*.
[174] (Email from Atlanta's Officer N. Towns, Public Affairs/Open Records Officer, Dec. 1, 2010) (on file with author).

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."[175] 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

Even if the police "report-all" practice were analyzed under a less-than-strict level of scrutiny, it should still quite be struck down. In the less-than-strict line of speech cases identified by Stone and Bhagwat, in which the Court struck down content-neutral restrictions on speech, *NAACP v. Button*[176] provides the most appropriate standard of judicial review. The reason for this is that *Button*, although in name a right to speech case, was really a case about the rights of association and petition.[177]

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.[178] 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.[179] Only a compelling state interest could justify limiting such a First Amendment

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[175] *Id.*
[176] 371 U.S. 415 (1963).
[177] In Guarnieri, *supra* note __ at *12, the majority not only referenced Button, but characterized it as a case about petitioning ("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). As stated in Button, 371 U.S. at 428 ("Petitioner challenges the decision of the Supreme Court of Appeals on many grounds. But we reach only one: that [the law] as construed and applied abridges the freedoms of the First Amendment, protected against state action by the Fourteenth. More specifically, plaintiff claims that the [law] infringes the right of the NAACP . . . to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights."). *See also* Spanbauer, *supra* note __ at 45, characterizing Button as a right of petition case.
[178] 371 U.S. at 422.
[179] 371 U.S. at 430.

freedom.[180] The mere existence of the law "could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens."[181]

The Court found that "no matter how valid the state's interest may be, that interest does not justify the prohibition of NAACP's activities disclosed by this record."[182] The government failed to show that the law was narrowly enough tailored; in effect the law "proscribed 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.[183] 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 potential applications of the law.[184] 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."[185]

The police report-all policy is exactly the type of broad prophylactic rule that the *Button* court condemned. There are several justifications the government might offer for the policy, none of which can justify its broad sweep.

a. Co-occurrence of Domestic Violence and Child Abuse. It could be argued, for example, that some data show a significant correlation between the occurrence of DV and the physical abuse of children. Children who are abused by their own family members are the least likely to report the abuse to authorities. The state must therefore cast its net wide, to capture this

[180] 371 U.S. at 438.
[181] 371 U.S. at 436.
[182] 371 U.S. at 439.
[183] 371 U.S. at 433.
[184] 371 U.S. at 432-437.
[185] 371 U.S. at 438.

particular group of children who are simultaneously at heightened risk and most likely to fall below the radar. But while a correlation between DV and child abuse is now "commonly accepted,"[186] the hard data regarding the frequency of the co-occurrence are both in their infancy and vary widely.[187] Evan Stark, in a comprehensive review of this data, described the variance as ranging between 6.5% and 82%.[188] Loose statistics and "common" perceptions will not do, pursuant to *Button.*

b. Risk of Unintentional Injury to a Child. Another justification for reporting the presence of children at the scene of DV, but not stranger violence, is the likelihood that a child who is present during an assault will be hurt unintentionally. For example, a child may get hurt when he intervenes to try to stop the violence. The problem with this argument is twofold. It is simultaneously over-inclusive and under-inclusive. With regard to its over-inclusivity, the policy does not sufficiently target children at risk of incidental injury, for it does not require police to conduct even a minimal risk assessment, such as inquiring whether the child: was present on the date in question; was present during violent incidents prior to the date in question; or whether there have ever been violent incidents prior to the date in question, to name just a few indicators of risk.

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[186] Justine 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).

[187] *See, e.g.,* Joy D. Osofsky, *The Impact of violence on Children,* 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 33, 34 (1999) (reporting the rate of co-occurrence to be between 60-75%); John W. Fantuzzo & Wanda K. Mohr, *Prevalence and Effects of Child Exposure to Domestic Violence,* 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 21, 27 (1999) (noting the percentage of children exposed to domestic violence who are also victims of physical abuse). *See also* Dunlap, *supra* note __ at 568.

[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) (noting that, according to reports by women, the figure ranges from 6.5 to 82%).

The police policy is also under-inclusive: it fails to account for the risk of injury to a child who is present during an assault of his mother by a stranger.[189] Some children who are present during an incident of stranger violence, like some children who are present during an incident of DV, get caught in the cross fire of the violence.[190] To the extent the justification for the policy fails to account for an entire class of similarly situated children, it loses persuasive power.[191] The government's counter-argument might be that in DV situations, the perpetrator may live in the same household, or the relationship between the mother and perpetrator is more likely to be ongoing. Because DV is thought to increase in frequency and severity unless and until the intimate partners separate, the child is more likely to be repeatedly at risk, and thus the risk of physical injury is higher in DV than in stranger violence situations.

Police in "report-all" jurisdictions, however, do not ask where the perpetrator lives or assess whether the relationship is ongoing.[192] They report to CPS whenever they respond to a situation that could be charged as "domestic violence." Domestic violence is defined, in most states' statutory schemes, as acts or threats of violence that occur between intimate partners, or former intimate partners. It also includes people in intimate relationships who have never resided together. The facts underlying the named plaintiff's situation in *Nicholson* illustrate this point. The perpetrator of the violence against Shawrline Nicholson never lived with her; in fact, he lived in another state.[193] The assault that was the basis of her children's removal was the first

[189] Eugene Volokh argues that under-inclusivity may be applicable only to content-based restrictions (ie, only a factor in strict scrutiny determinations), relying upon Ward. *See* Volokh, *supra* note __ at n.29. I am not relying upon the standard set forth in Ward, however. I am persuaded by Bhagwat's argument that the Court in Ladue has given a clear signal that it will not extend Ward to the speech of an ordinary citizen, on private property. *See* Bhagwat, *The Test, supra* note __ at 790. *See generally* part III.B.
[190] *See, e.g.,* JAMES GARBARINO, LOST BOYS: WHY OUR SONS TURN VIOLENT AND HOW WE CAN SAVE THEM 80-93
[191] Stone, *supra* note __ at 207.
[192] *See* note __, *supra.*
[193] Nicholson, *supra* note __ at 168.

instance he had ever assaulted her.[194] He "flew into a rage," and "punched her, kicked her and threw objects at her" when she told him that she wanted to end their long-distance relationship.[195] The assault was considered DV, rather than stranger violence, not because the perpetrator lived in the same household, and not because Ms. Nicholson wanted to continue in an intimate relationship with him. Rather, it was DV – and thus reportable to CPS – because Ms. Nicholson and the perpetrator had a child in common.

Even when the perpetrator lives in the home, or the intimate relationship is ongoing, recent research challenges the once-accepted notion that, without intervention, DV increases in frequency and severity.[196] Several studies show that abusive relationships can become safer over time.[197] In fact, data show that women are at greatest risk of serious injury when they separate from the abusive partner.[198] Most critically, children are at greatest risk of serious injury when their mothers separate from abusive partners.[199] The government's argument does not account for these facts.

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[194] Nicholson, *supra* note __ at 168-69.
[195] Nicholson, *supra* note __ at 169.
[196] *See* D.J. Anderson, *The Impact on Subsequent Violence of Returning to an Abusive Partner,* 34 J. OF COMPARATIVE FAMILY STUDIES 93 (2003); P.L. Baker, *And I Went Back,* 26 J. OF CONTEMPORARY ETHNOGRAPHY 55 (1997); J.C. Campbell, *et al, Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study,* 93 AMERICAN J. OF PUBLIC HEALTH 1089 (2003); Jacobson, *et al., Psychological Factors in the Longitudinal Course of Battering: When Do the Couples Split Up? When Does the Abuse Decrease?,* 11 VIOLENCE AND VICTIMS 371 (1996); H. Johnson, *The Cessation of Assaults on Wives,* 34 J. OF COMPARATIVE FAMILY STUDIES 75 (2003); Peled, *et al., Choice and Empowerment for Battered Women Who Stay: Toward a Constructivist Model,* 45 SOCIAL WORK 9 (2000).
[197] *See, e.g.,* M.E. Bell, *et al., Name* (forthcoming 2009); Jacobson *et al., supra* note ___ at ___; Johnson, *supra* note ___ at ____.
[198] Anderson, *supra* note ___ at ___; Campbell *et al., supra* note ___ at ___; T. Hotton, *Spousal Violence After Marital Separation,* 21 JURISTAT 1 (2001); Johnson &Hotton, *supra* note ___ at ___ (2003); C. M. Rennison and S. Welchans, *Intimate Partner Violence.* U.S. DEP'T JUSTICE (2000).
[199] Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation,* 90 MICH. L. REV. 1, 65, 65-71 (1991); Sharon S. Clarke, *Strictly Liable: Governmental Use of the Parent-Child Relationship as a Basis for Holding Victims Liable for their Child's Witness to DV,* 44 FAM. L. REV. 149, 153 & n.61 (2006) (arguing that incidents of child abuse, and in rarer instances, child murder, have been shown to increase following the separation of the child's parents), *citing* Amy Levin & Linda G. Mills, *Fighting for Child Custody When Domestic Violence is at Issue: Survey of State Laws*, 48 SOCIAL WORK 463, 465 (2003).

c. 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 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.[200] 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.[201]

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. As one scholar noted: "The word is out."[202] 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.[203] Indeed, CPS is notorious for using overly-intrusive, coercive sanctions against victims of DV.[204] Among these is the removal of children from mothers who are physically assaulted by their partners or ex-partners on the grounds that the mothers have failed to protect their children from a risk of danger. In *Nicholson*

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[200] Commentators have expressed this concern. *See, e.g.,* Peled, *supra* note ___ at 135; Stark, *supra* note ___.
[201] Weithorn, *supra* note ___ 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.")
[202] Rabin, *supra* note __ at 1111.
[203] Weithorn, *supra* note __ at 29.
[204] Weithorn, *supra* note __ at 29 & n.109 (noting that DV advocates widely criticize CPS for its misunderstanding of DV and mishandling of cases, concluding that "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.") (citations omitted).

v. Williams,[205] mentioned above, children were systematically removed from their mothers' custody when their mothers, but not they, were assaulted by an intimate partner or former intimate partner. In a nationally televised interview, the plaintiffs in *Nicholson* said that they would never call the police again.[206]

Sweeping reporting statutes result in substantial over-reporting to CPS. Statistics confirm that approximately 60% of the reports made to CPS over the past two decades have been unfounded.[207] 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."[208] 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

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[205] 203 F. Supp.2d 153, 169-70 (E.D.N.Y. 2002).
[206] NBC News: Dateline (NBC television broadcast, July 31, 2001).
[207] *See* Singley, *supra* note ___ and *id.* 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 author published, the rate of unfounded reports was 69%). The most recent statistics published by the U.S. Department of Health and Human Services, Administration for Children and Families are for year 2009, showing the rate of unsubstantiated reports as 64.3%. *See* http://www.acf.hhs.gov/programs/cb/pubs/cm09/index.htm. In 2008 the rate of unsubstantiated reports was 64.7%, *see http://www.acf.hhs.gov/programs/cb/pubs/cm08/summary.htm ;* in 2007, 61.3%, *see http://www.acf.hhs.gov/programs/cb/pubs/cm07/summary.htm ;* in 2006, 60.4%, *see http://www.acf.hhs.gov/programs/cb/pubs/cm06/summary.htm;* in 2005, 63%; *see http://www.acf.hhs.gov/programs/cb/pubs/cm05/summary.htm ;* in 2004, 60%, *see http://www.acf.hhs.gov/programs/cb/pubs/cm04/summary.htm ;* in 2003, 58%, *see http://www.acf.hhs.gov/programs/cb/pubs/cm03/summary.htm ;* in 2002, 61%, *see http://www.acf.hhs.gov/programs/cb/pubs/cm02/summary.htm ;* in 2001, 59.2%, *see http://www.acf.hhs.gov/programs/cb/pubs/cm01/chaptertwo.htm#investigate ;* in 2000, 58.4%, *see http://www.acf.hhs.gov/programs/cb/pubs/cm00/chaptertwo.htm#investigate* ; in 1999, 54.7%, *see http://www.acf.hhs.gov/programs/cb/pubs/cm99/cpt1.htm* (last visited August 9, 2011).
[208] Weithorn *supra* note __ 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).

social service system collapses under the weight of this front-end policy. In the end, children suffer."[209]

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."[210]

Part IV: 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 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.[211] The Petition Clause provides legal, rather than policy grounds alone, for the argument that government responses to victims must be much more precise. Quite simply, "broad prophylactic rules" will not do; rather, "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[212]

As I have written elsewhere,[213] the legal system's responses to DV are overwhelmingly premised on the notion that the victim can, and should, separate from her intimate partner.[214]

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[209] Singley, *supra* note __ at 250.
[210] 371 U.S. at 430.
[211] *See, e.g.,* 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 (2006) ("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."); 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 "protagonist" 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).
[212] 371 U.S. at 438.
[213] Kuennen, *supra* note __ at 532-33.
[214] *See generally* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006).

This overarching "separation approach" as a means of ending DV underlies virtually every law and policy addressing DV. 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.[215] 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.[216]

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.[217] Their petitions are routinely met with hostility and frustration by police, prosecutors, judges, and court personnel. Police may be reluctant, or slow, to respond to calls for help after the parties reconcile, or they may blame victims for post-reconciliation violence.[218] Judges may be reluctant to issue restraining orders to women who they have previously seen dismiss their orders so that they may continue their relationships.[219] Court clerks may discourage victims from filing

[215] *See* 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 his threats to hurt her or the children); ANGELA BROWNE, WHEN BATTERED WOMEN KILL 61, 144 (1987) (discussing the high incidence of further abuse and risk of homicide); *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).

[216] *See generally* Buel, *supra* note __; Jinseok Kim & Karen A. Gray, *Leave or Stay?: Battered Women's Decision After Intimate Partner Violence,* 23 J. INTERPERS. VIOLENCE 1465 (2008); Vera E. Mouradian, *Women's Stay-Leave Decisions in Relationships Involving Intimate Partner Violence,* Wellesly Centers for Women Working Paper No. 415 (2004); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome,* 21 HOFSTRA L. REV. 1191 (1993).

[217] *See* 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).

[218] As noted by the court in N. 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."

[219] *See* Epstein, *supra* note 116, at 39-41 (1999) (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).

petitions for restraining orders.[220] 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.

When these actions move into the realm of holding the victim accountable for the DV, they 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, are fined, [221] held in contempt of court,[222] or criminally charged with aiding and abetting the partner's violation of the order.[223] When police, judges and prosecutors retaliate against victims as a result of their petitioning activity, victims may assert a § 1983 First Amendment retaliation defense.[224]

Or a victim may bring an affirmative case. The Tenth Circuit Court of Appeals decided such a case involving DV. In *Meyer v. Board of County Comr's of Harper County*,[225] the plaintiff had been involved in an intimate relationship with a man who was close friends with police officers where she lived.[226] The ex-boyfriend punched her in the face, and when she tried on several occasions to report the domestic violence to the police, she got the run-around. First,

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[220] *Id.*

[221] *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, "'[w]hen these orders are entered, you don't just do whatever you damn well please and ignore them"').

[222] The Iowa Supreme Court has twice upheld such contempt charges. *See* Henley v. Iowa District Court for Emmet Count, 533 N.W.2d 199 (Iowna 1995) and Hutchenson vs. Iowa District Court for Lee County, 480 N.W.2d 260 (Iowa 1992). *See generally* Marya Kathryn Lucas, *An Invitation to Liability?: Attempts at Holding Victims of Domestic Violence Liable as Accomplices When The Invite Violations of Their Own Protective Orders*, 5 Geo. J. Gender & L. 763 (2004).

[223] *See, e.g.,* Goodmark, supra note 116, at 25 (citing reports from advocates in Indiana that found similar prosecutions occurring there); Stephanie Simon, Judges Push for Abused to Follow the Law, L.A. Times, Jan. 22, 2002, at A12 (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").

[224] 42 U.S.C. § 1983 ("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. . . .").

[225] 482 F.3d 1232 (10th Cir. 2007).

[226] 482 F.3d at 1235.

the officer who responded to her home told her "she would have to go to town to report" the crime.[227] Later that day she went to the county sheriff's office and the dispatcher told her that "they didn't do that here."[228] Next the plaintiff went to the home of the city police chief; he sent her to a police station outside of the jurisdiction, where he directed an officer meet her.[229] There an officer photographed her bruises and said that he would "consult with the sheriff's office."[230] After leaving the police station, the victim went to a social gathering where she knew the ex-boyfriend would be in attendance, for the purpose of confronting him.[231] When she did, the police were called and responded to the scene. They arrested her, and had her involuntarily committed to a psychiatric hospital, despite evidence that she was never violent nor did she threaten violence to herself or anyone else.[232] The court found that the plaintiff met with "considerable resistance in her attempts to report the alleged assault"[233] and held that her attempts to file a criminal complaint were protected by the right to petition.[234] The case was a review of a grant of summary judgment to the police, so the court did not reach the issue of whether the plaintiff established her retaliation claim; it did however reverse the summary judgment of the district court, concluding that a reasonable jury could find that the arrest and commitment were conducted in retaliation for the victim's attempts to petition the government.[235]

DV was not a focal point in the court's analysis, nor should it have been; rather, the conduct of the police was the issue. Nonetheless, *Meyer* is instructive in terms of understanding

[227] 482 F.3d at 1235.
[228] 482 F.3d at 1235.
[229] 482 F.3d at 1235.
[230] *Id.* at 1235-1236.
[231] *Id.* at 1236.
[232] *Id.* at 1241 ("In our study of the record, we have not found any allegation by the defendants, much less evidence tending to show, that plaintiff had been violent, threatened anyone, or resisted arrest.").
[233] *Id.* at 1241.
[234] *Id.* at 1243.
[235] *Id.* at 1244.

the vehicle by which a DV victim asserts a violation of her right to petition, under 42 U.S.C. § 1983, and in understanding how a court analyzes the claim. More importantly, while *Meyer* presents a more egregious act of retaliation than the types of commonly experienced scenarios I mentioned above, such as a police officer who routinely makes low-grade, discouraging comments to victims who seek to file reports, the underlying premise remains. The Petition Clause protects a victim's right to report the violence to the government. A hostile cop may do just as much damage – or more – if he or she has developed a negative reputation amongst victims, or their advocates in the community. So too may a hostile court clerk.[236] 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 could quite predictably – and effectively – have a significant deterrent effect.[237]

Because the Petition Clause is designed to assure that "a particular audience, the government – is forever open to hearing a particular kind of communication – a request for a redress of grievances"[238] – 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 amongst the most likely of crime victims to under-report to law enforcement.

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[236] 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 __ at 728-733 and particularly at 730 ("[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.") and at 731 ("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.") (citations omitted).

[237] This is not to say that *any* act of a police officer or other government official will create a constitutionally cognizable section 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 the activity; and 3) the defendants'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, 1155-1156 (10th Cir. 2007).

[238] *See* note __ *supra* (quoting Michael Wishnie)

Perhaps the most 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 federal Violence Against Women Act.[239] The first exception protects undocumented immigrant-victims' reports to police. It allows the attorney general to cancel deportation for battered spouses and children who report DV, and U-Visas provide immigration relief to any immigrants, whether victims of DV or stranger violence, for cooperating with the prosecution of the perpetrator.[240] Congressional findings support the conclusion that the VAWA was passed implicitly, if not explicitly, to protect DV victims' ability to petition:

> [d]omestic battery problems can be 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.[241]

Similarly, to address the problem that Lapidus and Fais identified,[242] 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 terminating the assistance, tenancy, or occupancy rights of the victim of such violence" in federally subsidized housing. 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

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[239] VAWA was originally passed in 1994. Violent Crime Control and Law Enforcement Act of 1994; Title IV, Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (hereinafter "VAWA 1994"), and has been reauthorized twice, most recently in 2005: The Violence Against Women Act and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) (hereinafter VAWA 2005).
[240] 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).
[241] H.R. Rep. No. 103-395, at 26 (1993).
[242] *See* discussion *supra* part II.A.

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."[243] 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."[244]

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? Filtering the barriers to reporting DV through a Petition Clause lens has tremendous, and as of yet, untapped legal potential.

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,"[245] to participate in the political process, and to fully develop as citizens.[246] These concerns lie at the heart of the right to petition.

The early movement was committed to women's self-determination and democratic participation.[247] 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.[248] The resounding call by feminist legal scholars today is for the movement to return to its political

[243] *See* Fais, *supra* note __ at 1206.
[244] Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. No. 109-162, tit. VI, §601, 119 Stat. 2960, 3030 (2006).
[245] SCHECHTER, *supra* note __ at 317 (describing the history of the battered women's movement).
[246] ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 21-22 (2000).
[247] *Id.*
[248] Schneider, *supra* note __ at 22-23.

roots.[249] 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."[250] 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 DV through a novel legal lens, the Petition Clause of the First Amendment, to demonstrate how something as every-day and mundane for thousands of women and their children - calling the police to report violence in their homes - is in fact an exercise of a fundamental, political, and constitutional right, guaranteed by the First Amendment. One that was guaranteed by the very essence of what the Framers thought to be a pillar of self-governance and democracy. Something so inherently fundamental, in fact, that they did not so much as debate it before its ratification. I illustrated that the right, through its history and purpose, is a

[249] *See, e.g.,* Schneider, *supra* note __ 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 issues advocates.") (internal citation omitted); LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH AND JUSTICE 94 (2008) ("[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."); Miccio, *supra* note __ at 247-256 (2009).

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

significant and distinct right amongst the First Amendment guarantees. That the police (or a judge, or any other legal actor) might not regard its status with the fullest appreciation of it as essential to freedom, citizenship and democracy, to be protected with the strictest of scrutiny, is a trend that should be reversed. A DV victim's call to the police for help is an invocation of a constitutional right for one of the most critical and fundamental services the government can provide – protection from harm. Scholars, policymakers and advocates for DV victims have as of yet not tapped the potential of the right to petition.