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# “Usually It’s Something in the Writing”: Reconsidering the Narrative Requirement for Protection Order Petitions

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# “Usually It’s Something in the Writing”: Reconsidering the Narrative Requirement for Protection Order Petitions

Alesha Durfee \*

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## I. INTRODUCTION

With the people that I’ve taken, if they get denied [a protection order] . . . usually it’s just something in the writing. If you didn’t express enough, there wasn’t enough of a description of why you’re in danger or why you—it just wasn’t clear. It’s usually how they write it.<sup>1</sup>

Domestic violence civil protection orders (“POs”) (also called protective orders, restraining orders, protection from abuse orders, and relief from abuse orders) are intended to increase victim safety by

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<sup>1</sup> Advocate interview 4/18/2013 for Alesha Durfee & Jill Theresa Messing, LEGAL MOBILIZATION AND INTIMATE PARTNER VICTIMIZATION, NATIONAL SCIENCE FOUNDATION (Grant No. 1154098).

prohibiting contact between a victim and abuser.<sup>2</sup> Should an abuser violate the terms of the PO, the abuser can be arrested and prosecuted for that violation. Unlike criminal no-contact orders or criminal charges (where the victim is not a party to the case), POs are civil orders—thus victims initiating the PO process can request differing levels of protection depending on their specific needs and can ask to have an order dismissed at any time. Furthermore, victims filing for POs need not cooperate with law enforcement, pursue the arrest of their batterers, or assist with a criminal prosecution in order to qualify for an order, which are requirements of the U visa program.<sup>3</sup> Finally, and perhaps most importantly, victims cannot violate a PO when they are the protected party. This means that even if they initiate contact with the abuser, they cannot be arrested or prosecuted for violating that order. This component is often misunderstood by victims and abusers frequently take advantage of that confusion, threatening to contact the police and have the victim arrested for violating the PO if they do not comply with the abuser's demands.<sup>4</sup> Only the respondent (the "abuser" or "defendant") can be arrested for violating the order.

For a PO to be issued, a "preponderance of the evidence" must show that the respondent has committed an act of violence against the petitioner ("victim," "plaintiff," or "protected party") that meets the legal definition of domestic violence in that jurisdiction.<sup>5</sup> There are many reasons why meeting this burden is difficult for victims.<sup>6</sup> As acts of domestic violence often occur in private, there may be no witnesses to

<sup>2</sup> For more information about civil protection orders, see NAT'L CTR. ON PROT. ORDERS & FULL FAITH & CREDIT, BATTERED WOMEN'S JUSTICE PROJECT, INCREASING YOUR SAFETY: FULL FAITH AND CREDIT FOR PROTECTION ORDERS (2011), available at [http://www.bwjp.org/files/bwjp/files/IncreasingSafety\\_031411\\_Web.pdf](http://www.bwjp.org/files/bwjp/files/IncreasingSafety_031411_Web.pdf).

<sup>3</sup> See 8 U.S.C. § 1101(a)(15)(U)(III) (2012) (provision within the Victims of Trafficking and Violence Prevention Act of 2000, providing lawful status to noncitizen crime victims—including victims of domestic violence—who are assisting or are willing to assist the authorities in investigating crimes).

<sup>4</sup> See CAROLYN HAM, BATTERED WOMEN'S JUSTICE PROJECT, INJUSTICE DEFINED: WHY BATTERED WOMEN CANNOT AND SHOULD NOT BE CHARGED WITH VIOLATING CIVIL PROTECTION ORDERS THAT WERE ISSUED AT THEIR REQUEST (2003), available at [http://www.bwjp.org/files/bwjp/articles/Injustice\\_Defined.pdf](http://www.bwjp.org/files/bwjp/articles/Injustice_Defined.pdf).

<sup>5</sup> See AM. BAR ASS'N COMM'N ON DOMESTIC & SEXUAL VIOLENCE, STANDARDS OF PROOF FOR DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOs) BY STATE (2009), available at [http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/Standards\\_of\\_Proof\\_by\\_State.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/Standards_of_Proof_by_State.authcheckdam.pdf) (provides information on the standards of proof each state requires in protection order cases).

<sup>6</sup> See Alesha Durfee, *Victim Narratives, Legal Representation, and Domestic Violence Civil Protection Orders*, 4 FEMINIST CRIMINOLOGY 7 (2009); JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES (1999); Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and The Truly Local,"* 42 B.C. L. REV. 1081 (2001).

corroborate the victim's allegations. Additionally, victims may not report the violence or seek treatment from a health care provider and thus not have any external documentation.<sup>7</sup> Finally, victims must navigate a bureaucracy that uses specialized language and specific procedures—for example, they must know the definitions of “petitioners,” “respondents,” and “service”—all at a time where they are traumatized, sleep deprived, and have more basic needs to meet such as shelter, food, clothing, and safe transportation to work, school, and/or court. All this occurs in a system where access to legal representation for civil cases is not guaranteed (though the defendant may have legal representation in a concurrent criminal case), the cost of a family court lawyer is prohibitive, and civil legal assistance programs are severely underfunded and cannot represent all victims seeking orders.<sup>8</sup>

In response to these problems, there have been a number of significant changes made to the PO process, including the ability of petitioners to file for an order *pro se*<sup>9</sup> and a lower evidentiary requirement for POs than in criminal cases (most states that specify a burden of proof in their legal statutes use a “preponderance of the evidence” as the threshold).<sup>10</sup> Perhaps most importantly, in almost every state petitioners are “allowed” (but also *required*) to write a “narrative of abuse”—a section where victims, often in their own words, describe the abuse they have experienced and why they feel they need a PO.<sup>11</sup> A

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<sup>7</sup> See Jacqueline C. Campbell & Linda A. Lewandowski, *Mental and Physical Health Effects of Intimate Partner Violence on Women and Children*, 20 PSYCHIATRIC CLINICS N. AM. 353 (1997).

<sup>8</sup> See generally LEGAL SERVICES CORP., LEGAL SERVICES CORPORATION: 2012 ANNUAL REPORT 2, 18 (2012), available at <http://www.lsc.gov/about/annual-report> (“In 2012, the number of Americans eligible for LSC-funded legal assistance reached an all-time high, more than 61 million, while LSC’s congressional appropriations fell to \$348 million, an all-time low in inflation-adjusted dollars.”) (reporting that family law cases represented about one-third of the cases closed by Legal Services Corporation each year and highlighting legal services provided to victims of domestic violence).

<sup>9</sup> See, e.g., *Pro se*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining *pro se* as “[o]ne who represents oneself in a court proceeding without the assistance of a lawyer”).

<sup>10</sup> See AM. BAR ASS’N COMM’N ON DOMESTIC & SEXUAL VIOLENCE, *supra* note 5; see also Helen Eigenberg et al., *Protective Order Legislation: Trends in State Statutes*, 31 J. CRIM. JUST. 411 (2003).

<sup>11</sup> Alesha Durfee, *Equal Access to Protection? Variations in State Protection Order Forms* 15 (Apr. 2015) (unpublished manuscript) (on file with author). A 2014 review of forty-nine state protection forms available online indicated that only two state forms did not include a section for a narrative of abuse on the protection order petition (Vermont and South Dakota). Seventeen states (35%) allowed petitioners to check a box indicating the type of abuse experienced, but also required a narrative description of the abuse. Thirty states (61%) required a narrative, but did not have boxes available for petitioners to check. The space on the forms allocated for these narratives ranged from less than one

judge can then grant an order based on this narrative. From an outsider's perspective, this part of the form is deceptively simple in that a victim describes what happened, the judge reads the form, and if the person is found to be a "real" victim an order is issued. Through these and other "victim-friendly" adaptations, POs are now considered to be "accessible" to all domestic violence victims.

Yet previous research indicates that the PO process continues to reproduce broader social inequalities, even when "victim-friendly" procedures and policies are implemented.<sup>12</sup> One of the reasons for this is that these "victim-friendly" policies, procedures, and adaptations are based on a series of unstated and often invalid assumptions about victims of domestic violence. The assumptions concern legal status, language ability, education level, attributions for abuse, beliefs about which forms of violence are the most severe, "appropriate" victim responses to abuse, safety priorities, and whether the victim wants to terminate the relationship. While these assumptions are true of some victims, they are not true of all victims, and thus the current process has led to differential outcomes for some groups of victims, including an increased likelihood that the judge will deny various components of the PO request or dismiss the PO altogether.<sup>13</sup>

One of the points in the process where disparate outcomes emerge is in the creation of the narrative of abuse. It is difficult, at first, to see what could be problematic about asking a petitioner to describe why they need an order and then adjudicating the case based on that answer—in fact, it may appear that this is the most "victim-friendly" approach in cases of domestic violence where petitioners do not have legal representation. But this approach relies on a series of assumptions about domestic violence victims that are not true of all petitioners who have experienced domestic violence or in all protection order filings. For example, assumptions that domestic violence victims want to testify in a public setting about the abuse they have experienced, that they are able to vocalize/write what they have experienced, that they have enough distance from those events that they can fully discuss them, that what is most traumatizing to them is also what is legally relevant to a protection order filing, that they have specific information like dates, times, case numbers, etc., that the reason for seeking a PO is the most severe act of abuse a petitioner has experienced. As these assumptions about petitioners are implicit, rather than explicit, any failures of petitioners to successfully obtain protection

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line (South Carolina) to a full page or more. State forms for New Jersey and Wyoming were not available for review at the time of data collection.

<sup>12</sup> See Durfee, *supra* note 6.

<sup>13</sup> *Id.*

orders are attributed to the merits of the individual case instead of a systemic problem in the protection order process itself.

If the narrative of abuse element of the PO petition is not the best way for all petitioners to provide testimony to the courts, what other options might states consider? I argue that in cases where the petitioner has external documentation of abuse, such as police reports or medical records, the narrative requirement should be waived. Instead, petitioners should be allowed to submit their external documentation to prove the allegations of domestic violence by a preponderance of the evidence in order for a PO to be granted. In cases where the petitioner does not have external documentation of the abuse, they should be allowed to check boxes to indicate the form of victimization they have experienced and then provide external documentation that the abuse occurred with the PO petition at the time of the initial filing. By eliminating the narrative requirement, the courts would facilitate access to POs for all domestic violence victims, not just those who meet the assumptions described above.

In this essay, I first give a brief overview of domestic violence civil POs. I then discuss the significance of narratives to the PO process and PO hearing outcomes, the mismatch between the priorities and goals of domestic violence victims as compared to those of the legal system, and the assumption that the construction of narratives is empowering for victims. Finally, I propose an alternative to the current narrative requirement for PO petitions.

## II. DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS

Although every jurisdiction in the United States has made some sort of civil protective order available to victims of domestic violence, the official term for and provisions of protective orders can vary dramatically by jurisdiction. Navigating each jurisdiction's PO process can be confusing and frustrating for victims and their families, many of whom cross state lines in an attempt to hide from their abusers. These jurisdictional differences have also led to problems with the enforcement of orders, as police officers have to first determine what type of protective order was violated before they can make an arrest, which can be difficult if the order was violated in a different jurisdiction than the one that issued it. For example, in Connecticut a protection order is issued by a criminal court prohibiting contact between a victim and abuser in an active criminal case,<sup>14</sup> while in Arizona a PO is a civil order

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<sup>14</sup> CONNECTICUT JUDICIAL BRANCH LAW LIBRARIES, DOMESTIC VIOLENCE IN CONNECTICUT: A GUIDE TO RESOURCES IN THE LAW LIBRARY (Catherine Hogan Mozur ed., 2013), *available at* <http://www.jud.ct.gov/lawlib/Notebooks/Pathfinders/DomesticVi>

prohibiting contact that is separate from any criminal proceedings.<sup>15</sup> A victim who reports a violation in Arizona of a PO issued in Connecticut is likely to get a different response from police officers in Arizona than from officers in Connecticut, simply because of the differences in names and definitions between the two states. Compounding the problem of differing terminology among states is that the substantive provisions of POs also differ by state: in addition to prohibiting contact between the victim and the abuser, in some states POs can be used to evict the abuser from a shared residence; to set temporary custody, visitation, or spousal support; and/or allow the police to seize any weapons the abuser possesses.<sup>16</sup> Enforcing POs from other states has been highly problematic and was one of the catalysts for Project Passport (an effort to standardize orders across the United States).<sup>17</sup>

Once an order is issued, the respondent must be legally served with or notified of the PO in order for it to be valid (and thus enforceable).<sup>18</sup> After the PO has been served, under the “full faith and credit” provision in the Violence Against Women Act (VAWA) it is enforceable in any jurisdiction in the United States.<sup>19</sup> Full faith and credit applies to all POs, even if the victim would not qualify for an order in the jurisdiction where the order is violated. For example, an order obtained by a victim of abuse by a same-sex partner is enforceable even in jurisdictions where violence within same-sex partnerships is explicitly excluded by statute from the legal definition of domestic violence.<sup>20</sup> Orders can also vary in length

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olence/DomesticViolence.pdf (explaining the difference between restraining orders and protective orders under Connecticut law).

<sup>15</sup> ARIZ. REV. STAT. § 13-3602 (2013) (providing the grounds and procedure for granting an order of protection in order to restrain a person from committing an act including domestic violence).

<sup>16</sup> See Eigenberg et al., *supra* note 10.

<sup>17</sup> See NAT’L CTR. ON PROT. ORDERS & FULL FAITH & CREDIT, BATTERED WOMEN’S JUSTICE PROJECT, PROTECTING VICTIMS OF DOMESTIC VIOLENCE: A LAW ENFORCEMENT OFFICER’S GUIDE TO ENFORCING PROTECTION ORDERS NATIONWIDE (2011), *available at* [http://www.bwjp.org/files/bwjp/files/LawEnforcement\\_031411\\_Web.pdf](http://www.bwjp.org/files/bwjp/files/LawEnforcement_031411_Web.pdf).

<sup>18</sup> *Id.*

<sup>19</sup> See 18 U.S.C. § 2265 (2012) (ensuring that a valid protection order—as defined in subsection (b) of this same provision—“shall be accorded *full faith and credit* by the court of another State, Indian tribe or territory . . . and enforced by the court and law enforcement personnel . . . as if it were the order of the enforcing State or tribe”) (emphasis added); see also NAT’L CTR. ON PROT. ORDERS & FULL FAITH & CREDIT, BATTERED WOMEN’S JUSTICE PROJECT, FULL FAITH AND CREDIT FOR PROTECTION ORDERS: ASSISTING SURVIVORS WITH ENFORCEMENT ACROSS JURISDICTIONAL LINES (2011), *available at* [http://www.bwjp.org/files/bwjp/files/New\\_Advocate\\_031411\\_Web.pdf](http://www.bwjp.org/files/bwjp/files/New_Advocate_031411_Web.pdf) [hereinafter ASSISTING SURVIVORS].

<sup>20</sup> ASSISTING SURVIVORS, *supra* note 19, at 5.

from one day (for a temporary order) to a lifetime order; nearly all states allow victims to renew their orders prior to the PO's expiration date.<sup>21</sup>

The number of PO filings has dramatically increased over time, and they now constitute a significant proportion of the domestic relations caseloads in several states.<sup>22</sup> For example, in Arizona alone, fifteen percent of all civil court filings in 2013 were requests for some sort of protective order.<sup>23</sup> Nationally, a recent study estimated that most metropolitan courts each process approximately 3,000 to 4,000 POs every year.<sup>24</sup> While this increase in PO filings and issuances has led to increased expenditures, Logan, Walker, and Hoyt estimate that in 2007, Kentucky saved approximately \$85.5 million in one year by issuing 11,212 POs (\$30.75 for every \$1 spent).<sup>25</sup>

Even though the total number of PO filings has increased, only a small proportion of victims file for orders. Tjaden and Thoennes<sup>26</sup> found that only 17% of adult female intimate partner violence (IPV) victims in the United States filed for and received POs. One would expect that victims accessing services would have higher rates of PO use (if they are seeking one type of formal support they may be more likely to seek other formal support), but in one study only 12% of victims who had contacted police obtained a PO in the next year,<sup>27</sup> and in a separate study only 16% of victims residing in domestic violence shelters currently had a PO.<sup>28</sup> Women with children are more likely to contact the police after

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<sup>21</sup> *Id.*; see also Eigenberg et al., *supra* note 10.

<sup>22</sup> See R. LAFONTAIN ET AL., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 17 (National Center for State Courts 2012), available at [http://www.courtstatistics.org/other-pages/~media/Microsites/Files/CSP/DATA%20PDF/CSP\\_DEC.ashx](http://www.courtstatistics.org/other-pages/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx) (of note, civil protection orders constituted 41% of the domestic relations caseload in Missouri, 36% in New Hampshire, and 28% in North Carolina and Nebraska).

<sup>23</sup> *Id.*

<sup>24</sup> BRENDA K. UEKERT ET AL., THE NATIONAL CENTER FOR STATE COURTS, SERVING LIMITED ENGLISH PROFICIENT (LEP) BATTERED WOMEN: A NATIONAL SURVEY OF THE COURTS' CAPACITY TO PROVIDE PROTECTION ORDERS 59 (2006), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/216072.pdf>.

<sup>25</sup> T.K. Logan et al., *The Economic Costs of Partner Violence and the Cost-Benefit of Civil Protective Orders*, 27 J. INTERPERSONAL VIOLENCE 1137, 1147 (2012).

<sup>26</sup> PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 52 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

<sup>27</sup> Victoria Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 J. AM. MED. ASS'N 589, 589-594 (2002).

<sup>28</sup> Alesha Durfee & Jill Theresa Messing, *The Decision to Obtain a Protection Order Among Victims of Intimate Partner Violence: An Application of Legal Mobilization Theory*, 18 VIOLENCE AGAINST WOMEN 701, 701-10 (2012).



experiencing violence<sup>29</sup> and to obtain a PO if they have left the relationship,<sup>30</sup> most likely because women often report leaving violent relationships to protect their children.<sup>31</sup> Victims with higher income and education levels are more likely to have POs,<sup>32</sup> and white female IPV victims are more likely to engage in legal help-seeking than other women.<sup>33</sup> Finally, immigrant women are less likely to use legal resources and are less likely to file for a protection order because of concerns about their and their abusers' immigration status.<sup>34</sup>

### III. THE SIGNIFICANCE OF NARRATIVES

The narrative requirement should be a central focus of reform efforts because of the significance of narratives on PO hearing outcomes. One of the key differences between the PO process and all other legal interventions for domestic violence is the direct impact of the language of petitioners and respondents on case outcomes.<sup>35</sup> As stated previously, many victims do not have external documentation (medical records, copies of police reports, etc.) of their victimization; others are seeking PO on an emergency basis and do not have access to their records/files. In these cases, the only evidence supporting the claim that a PO is warranted may be the narrative of abuse written by the petitioner—who may be in a state of trauma, have no knowledge of the legal requirements for a PO, and who may not have access to any form of legal assistance.

To contest the PO, the respondent then files an affidavit disputing the petitioner's claims—an affidavit that, like the initial filing, is written without any legal assistance and without knowledge of the legal requirements for the entry of an order. In police reports and criminal cases legal actors paraphrase statements made by the victim and abuser and select specific quotes that best illustrate and support their claims. In PO filings, the entire document is directly constructed by the petitioner

<sup>29</sup> Amy E. Bonomi et al., *Severity of Intimate Partner Violence and Occurrence and Frequency of Police Calls*, 21 J. INTERPERSONAL VIOLENCE 1354, 1354–1364 (2006).

<sup>30</sup> Durfee & Messing, *supra* note 28.

<sup>31</sup> Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

<sup>32</sup> Durfee & Messing, *supra* note 28.

<sup>33</sup> Rebecca J. Macy et al., *Battered Women's Profiles Associated with Service Help-Seeking Efforts: Illuminating Opportunities for Intervention*, 29 SOCIAL WORK RES. 137 (2005).

<sup>34</sup> MARY ANN DUTTON ET AL., USE AND OUTCOMES OF PROTECTION ORDERS BY BATTERED IMMIGRANT WOMEN (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/218255.pdf>; Cecilia Menjivar & Olivia Salcido, *Immigrant Women and Domestic Violence: Common Experiences in Different Countries*, 16 GENDER & SOC'Y 898 (2002); Merry Morash et al., *Risk Factors for Abusive Relationships: A Study of Vietnamese American Immigrant Women*, 13 VIOLENCE AGAINST WOMEN 653 (2007).

<sup>35</sup> Durfee, *supra* note 6.

and respondent. And in many cases, the ability to construct a narrative determines the case outcome.

As PO filings are civil cases, legal representation and legal assistance are not guaranteed, and many petitioners and respondents navigate the process on their own. In order to make POs accessible to victims without legal representation, many states have created "victim-friendly" forms and instructions that use "everyday" language to help victims understand which forms to file, how to complete and where to file the forms, and what to expect during the PO process. These forms are available in multiple languages in order to provide access to victims with limited English proficiency.<sup>36</sup> Yet, embedded in these adaptations are three core assumptions about victims and narratives: (1) that victims share the same priorities, definitions of abuse, and goals as the legal system; (2) that given instructions, victims can write narratives within institutional constraints; and (3) that victims not only *want* to, but are *empowered* by writing their narratives. If these assumptions are not met, the petitioner may not be able to complete the PO process and/or receive a PO. Until these assumptions are critically examined and addressed, the narrative requirement will continue to be a structural barrier preventing victims who cannot construct a "legitimate" narrative for filing for and/or obtaining POs.

#### IV. THE MISMATCH BETWEEN PRIORITIES OF VICTIMS AND THE LEGAL SYSTEM

Yesterday was the last straw when he verbally abused me all the way home from his mother's house on mother's day . . . He did this all in front of our daughter. He told me I was a bitch, he only used me for money and sex, I'm pathetic because I have no friends, he's sorry I'm the mother of his child, and a bunch of other things I can't even bring myself to write on paper. Two weeks ago P & I got into a verbal altercation because of another girl & because of the way he speaks to me & he punched me in the back of the head twice with a closed fist.<sup>37</sup>

The quote above comes from the beginning of a relatively lengthy narrative of abuse included with a PO petition, and is an example of the mismatch between the priorities, definitions of abuse, and goals of domestic violence victims and those that are assumed by the legal system and legal actors. From a legal perspective, only the physical violence

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<sup>36</sup> For a more detailed discussion, see UEKERT ET AL., *supra* note 24.

<sup>37</sup> Durfee, *supra* note 6, at 19.

described by the petitioner can be classified as domestic violence (“he punched me”). In fact, if this narrative were written by a lawyer, it is likely that the physical violence would be the central focus of the narrative of abuse. The narrative would contain the date, time, and location of the action; the names and contact information of any witnesses; and what happened as a result of the “punch” (if she called police, received medical treatment, etc.). The verbal and symbolic abuse (what was said, when it was said, and the fact that it was said in front of her daughter) may be indicative of a poor relationship, but the state does not consider this to be as important as the physical violence. According to state statutes, this verbal and symbolic abuse is not domestic violence and this event would not be sufficient to merit a PO.

As this narrative was written by the victim, without legal assistance, the structure and emphasis of the narrative is very different than what would be submitted by a lawyer. According to Ewick & Silbey,<sup>38</sup> the structure of a narrative—including the selective inclusion and exclusion of events and persons and the order in which they are discussed—reveal their significance and meaning to the narrator. In this case, the petitioner first describes verbal violence (calling her a “bitch” and “pathetic”; stating he’s using her “for money and sex”) and symbolic violence (doing it on Mother’s Day in front of her daughter) and spends a greater proportion of the narrative on the description of these events. From the narrative, it appears that the verbal and symbolic violence is more traumatic than the physical violence described later in the petition and that it was the verbal and symbolic violence, not the physical violence, which caused her to file for a PO. This disjuncture between the narrative a lawyer would write and the narrative a victim would write is only one of a series of “mismatches” between the priorities, goals, and definitions of violence between the legal system and the victims that it is supposed to serve.

Furthermore, the focus of the narrative on verbal and symbolic violence (instead of physical violence) also violates social stereotypes about what “real” victims are like and how they should respond to violence.<sup>39</sup> A “real” victim would leave her abuser after experiencing an act of physical violence as severe as “punching” or “slapping”; but according to her narrative, this victim remained in the relationship for at least two weeks after being “punched.” From a legal perspective, this makes no sense—why would a “real” victim leave after being called a bitch, but not after being punched?

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<sup>38</sup> See Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Towards a Sociology of Narrative*, 29 LAW & SOC’Y REV. 197 (1995).

<sup>39</sup> Durfee, *supra* note 6.

The idea that verbal and psychological abuse is more harmful than physical abuse appears frequently in narratives of abuse filed by petitioners. In a separate case, a different petitioner wrote:

I HAVE APPROXIMATELY 1 YEARS WORTH OF DATED, DOCUMENTED journal of DAILY PSYCOLOGICAL ABUSE PERSONALLY I WOULD RATHER HAVE A BLACK EYE, THAT WAY PEOPLE & OFFICIALS WOULD REALIZE THIS FORM OF ABUSE IS FAR MORE detrimental to the CHILDREN IN QUESTION.<sup>40</sup>

As a researcher and former domestic violence advocate, I have heard victims make similar statements over and over again—that verbal, psychological, and symbolic violence is more hurtful and detrimental than physical abuse, most often because it is not viewed as “real” abuse by others (including legal actors such as police and judges). In PO filings, the allegations of a petitioner who writes that she would want to experience physical abuse severe enough to cause a “black eye” instead of “psychological” abuse are less likely to be believed because a “real” victim of domestic violence would not want to be physically assaulted. In that case, the judge denied the victim’s request for a PO. In both of these PO cases, the narrative of abuse proved more damaging than helpful, and both victims would have been better served by relying on external documentation of their abuse.

Finally, to receive a PO in Arizona (as in most states), a petitioner must have either experienced an act of domestic violence (often within a specific time frame) or have a “reasonable” fear that an act of domestic violence will occur.<sup>41</sup> While it is “victims” who merit POs, many petitioners do not want to be perceived as victims; as Martha Mahoney notes, “women often emphasize that they do not fit their own stereotypes of the battered woman” and have a “fear” that they will be identified as a “battered woman.”<sup>42</sup> Men who experience intimate partner victimization are even less likely to identify as a domestic violence victim than are women<sup>43</sup> because of what it means to be a “man” in American society.<sup>44</sup> I

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<sup>40</sup> Durfee, *supra* note 6, at 20 (note that statement is exactly as written in petition).

<sup>41</sup> ARIZ. REV. STAT. ANN. §13-3602 (2013).

<sup>42</sup> Mahoney, *supra* note 31, at 9.

<sup>43</sup> Alesha Durfee, “I’m Not a Victim, She’s an Abuser”: Masculinity, Victimization, and Protection Orders, 25 GENDER & SOC’Y 316 (2011).

<sup>44</sup> Mimi Schippers, *Recovering the Feminine Other: Masculinity, Femininity, and Gender Hegemony*, 36 THEORY & SOC’Y 85, 94 (2007) (Hegemonic masculinity “is the [set of] qualities defined as manly that establish and legitimate a hierarchical and complementary relationship to femininity that, by doing so, guarantee the dominant

argue elsewhere that men are more likely than women to have their PO requests denied because their descriptions of themselves, their female partners, and the events described in their narratives of abuse do not conform to stereotypes about domestic violence victimization, “victims,” and “abusers.”<sup>45</sup> By requiring petitioners to write a narrative of abuse, the state disadvantages those petitioners who do not share the same priorities, definitions of abuse, and goals as those of stereotypical victims.

## V. WRITING NARRATIVES WITHIN INSTITUTIONAL CONSTRAINTS

Because of this gap between the definitions of abuse, priorities, and goals of victims and those of the legal system, narratives filed by petitioners without legal representation are significantly less likely to result in a PO than are those filed with legal representation. PO narratives that focus on acts of violence that meet the legal definition of domestic violence, are temporally ordered, and provide specific details such as the time, date, location, and consequences of the action (the need for medical care, whether there was an arrest made or charges filed, etc.) are more likely to result in a PO than are other narratives, especially in those cases where the respondent has a lawyer.<sup>46</sup>

Part of the mismatch between the narratives preferred by legal actors and those written by *pro se* litigants may ironically be attributable to the “victim-friendly” adaptations that have been made to the PO petition and instructions. On the PO form in Arizona, the narrative element of the petition begins with the prompt “I need a Court Order because . . . .”<sup>47</sup> The unstated assumption is that the reason the victim is seeking an order is the same one that the state would consider to be legally relevant to the case. However, in the petition above, the petitioner is seeking the order because of the incidents on Mother’s Day—not the events that are legally defined as domestic violence. Thus, asking the petitioner to write why she is seeking an order, but adjudicating that response according to legal standards that are not communicated to the petitioner, is not a “victim-friendly” adaptation. Instead, it provides the foundation for a system where victims are blamed for their own inability to obtain a PO.

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position of men and the subordination of women.”). For discussions of masculinities, see Durfee, *supra* note 43, at 328–332; Kristin L. Anderson & Debra Umberson, *Gendering Violence: Masculinity and Power in Men’s Accounts of Domestic Violence*, 15 GENDER & SOC’Y 358 (2001); R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC’Y 829 (2005).

<sup>45</sup> Durfee, *supra* note 43, at 328–332.

<sup>46</sup> Durfee, *supra* note 6.

<sup>47</sup> AZ. JUD. BRANCH, ADMIN. DIRECTIVE NOS. 2013–03, 2006–01, PROTECTIVE ORDER FORMS APPROVED FOR USE BEGINNING ON JANUARY 1, 2007 (2013).

A second prompt used to assist victims in constructing their narratives of abuse is the request for the petitioner to describe the “most recent incident or threat of violence and date.”<sup>48</sup> Again, there are unstated and often invalid assumptions that justify this as a “victim-friendly” adaptation. First, the courts are assuming that violent relationships have a linear trajectory; that is, the violence gets worse over time, so the last event would be the most severe event. While this may be true of some violent relationships, research has shown that there is a wide variation in trajectories of violent relationships<sup>49</sup>—and if the last event is not the most violent event, the judge may not have the information needed to make an accurate assessment of the respondent’s dangerousness. Second, this instruction implies that victims leave their abusers in response to what the legal system considers to be the most “severe” act of physical or sexual violence,<sup>50</sup> as well as the reasons victims give for leaving or remaining in violent relationships.<sup>51</sup> In the case described above, the last act of violence would not qualify for a PO, and the judge would deny an order when one is merited. Thus even though the use of “victim-friendly” language helps victims more easily understand and complete the PO forms, the legal basis for an order (the legal definition of domestic violence and the legal requirements for a PO to be issued) remains unchanged, making it even more difficult for victims to obtain an order.

#### VI. ARE NARRATIVES EMPOWERING?

When they’re doing the paperwork, some are very disconnected, and then some are very emotional, where it’s just like writing it down scares the crap out of them. It’s very hard, and they’re crying, and we have to do some breathing techniques, just through the talking, on that portion . . . you gotta tell your whole story in . . . about ten sentences.<sup>52</sup>

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<sup>48</sup> PATTERN FORMS COMM. AND THE ADMIN. OFFICE OF THE COURTS, STATE OF WASH., WPF DV 1.015, PETITION FOR ORDER OF PROTECTION (2014).

<sup>49</sup> Mary Ann Dutton et al., *Patterns of Intimate Partner Violence: Correlates and Outcomes*, 20 VIOLENCE & VICTIMS 483, 483–97 (2005).

<sup>50</sup> Deborah K. Anderson & Daniel G. Saunders, *Leaving an Abusive Partner: An Empirical Review of Predictors, the Process of Leaving, and Psychological Well-Being*, 4 TRAUMA, VIOLENCE, & ABUSE 163 (2003) (listing a comprehensive discussion of theories of victimization and the ability to leave violent relationships).

<sup>51</sup> Margaret E. Bell et al., *The Dynamics of Staying and Leaving: Implications for Battered Women’s Emotional Well-Being and Experiences of Violence at the End of a Year*, 22 J. FAMILY VIOLENCE 413 (2007).

<sup>52</sup> Advocate interview 10/14/2013 for Alesha Durfee and Jill Theresa Messing, LEGAL MOBILIZATION AND INTIMATE PARTNER VICTIMIZATION, NATIONAL SCIENCE FOUNDATION (Grant No. 1154098).

Another implicit assumption about victims that has been incorporated into the current PO process is that victims are empowered by telling their stories in the courtroom. For some victims, writing the narrative of abuse and testifying in court is the first time they have confronted their abuser or shared their experiences. In these cases, the receipt of a PO may affirm, validate, and empower the petitioner. The idea that telling one's story is empowering for a victim has led feminists, activists, and advocates to describe a PO as "a symbol of her [the victim's] own internalized strength . . . a turning point for change . . . a vision of a better life in the future."<sup>53</sup> With the right support and in the right environment, victims will want to tell their stories and will be empowered and validated through that retelling. Thus it would make sense to push for the further education of judges and other legal actors about domestic violence and to prioritize the creation of "space" to allow victims to tell their stories in the courts.

However, the adversarial nature of the legal system, in combination with complex and confusing bureaucratic procedures and untrained court staff, may make the PO process an incredibly traumatizing experience—even with the "right" support and in the "right" environment. As Judith Herman observes, "If one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law."<sup>54</sup> Even with "victim-friendly" changes and staff/judicial education and training, for many petitioners the physical act of writing a narrative of abuse will remain a traumatic and revictimizing experience. In order to write the narrative of abuse, a victim must relive acts of victimization and recall specific details about events that they have repressed simply in order to survive. I interviewed a domestic violence advocate in 2013 who spoke of victims in shelters writing a single paragraph each day for their U visa application—even with a supportive advocate and a non-threatening environment, the victims felt too traumatized to write any more than the one paragraph. As the advocate said, "they're trying to forget what happened and here I am, asking them to write down, with as many details as they can, what they went through."<sup>55</sup>

Finally, by adjudicating cases based on personal narratives of abuse, the courts unintentionally adjudicate victims themselves. A petitioner who is denied a PO may feel that they were not believed—that their

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<sup>53</sup> Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQUENCY 414, 424 (1995).

<sup>54</sup> Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 574 (2005).

<sup>55</sup> Advocate interview, *supra* note 52.

stories do not count and their words do not matter—and, like when they experience a dual arrest or criminal prosecution, “the victim probably will not try the system for further protection.”<sup>56</sup> Yet the research described in this paper suggests that in some cases, it was not the petitioner’s experiences that were adjudicated—it was their ability to describe those experiences that dictated whether they were able to obtain an order.

## VII. RECONSIDERING THE NARRATIVE REQUIREMENT ALTERNATIVES

The civil court system, through the provision of POs, can be an important part of a “safety net that protects victims and holds perpetrators accountable for their actions.”<sup>57</sup> However, it is important to critically examine not only the explicit institutional practices associated with the PO process, but also the implicit assumptions that underlie those institutional practices. The narrative of abuse requirement is seen as a “victim-friendly” adaptation to the PO process so that victims could use their own testimony as grounds for a PO. However, the requirement that *all* petitioners submit a narrative of abuse with their PO petition has had unintended negative consequences for some groups of victims. Victims who do not share the same priorities, definitions of abuse, and goals as the legal system; who cannot write narratives within institutional constraints that are consistent with stereotypes about domestic violence and victimization; and who are not empowered by writing their narratives or telling their stories are less likely to receive a PO—even if they are able to complete the PO process. Because this requirement was meant to facilitate access to a greater number of victims, it should be removed in order to achieve that goal.

In order to protect the rights of respondents, however, petitioners need to submit some sort of evidence to support their claims of victimization (or imminent victimization). To balance the rights of respondents with the needs of petitioners, petitioners who have external documentation of their victimization (such as medical records or police reports) should be allowed to submit copies of that documentation in place of the narrative of abuse. In order to facilitate case processing, courts could add a section to the PO form that asks petitioners to check a box indicating which form of victimization they have experienced. Some states, such as Louisiana, have already made adjustments to their PO

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<sup>56</sup> Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421, 427 (1991).

<sup>57</sup> Ruth E. Fleury-Steiner et al., *Contextual Factors Impacting Battered Women’s Intentions to Reuse the Criminal Legal System*, 34 J. COMMUNITY PSYCHOL. 327, 340 (2006).



forms by providing petitioners with a list where victims can indicate the form of abuse they have experienced by making a checkmark<sup>58</sup>—but the petitioner is still required to submit a narrative of abuse.<sup>59</sup> In cases where the petitioner has a police report or medical records documenting the particular form of abuse indicated by the petitioner on the form, the narrative requirement should be waived. The respondent can then access the records submitted with the PO petition to determine the exact nature of the allegations made by the petitioner, thereby allowing the respondent to contest those allegations in the PO hearing or in a subsequent hearing. This change would balance the rights of respondents to know the allegations that have been made by petitioners with the needs of petitioners to be able to communicate information about their victimization in way that is less traumatizing than the current system and provides equal access to orders to victims who do not meet the unstated assumptions of the current system.

Deborah Epstein, Margret Bell, and Lisa Goodman argue that “effective advocacy” for victims “requires more than mere accompaniment in the courtroom or a conversation about how to navigate the court system.”<sup>60</sup> Meaningful access to legal protections against domestic violence can be achieved through a critical assessment of the PO process in conjunction with the institutional policies and procedures associated with that process and the assumptions about victims that underlie that process. Certainly this proposal is not a solution to the problems created by the narrative of abuse requirement—access to external documentation is not available to all victims and the ability to obtain external documentation differs by legal status, sexuality, race, ethnicity, etc. But a discussion of the shortcomings of the current “victim friendly” system, especially the requirement of the narrative of abuse, is long overdue. My hope is that this essay can lead to a dialogue about assumptions that have prevented victims from accessing legal protections against domestic violence.

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<sup>58</sup> *La. Protective Order Registry*, JUD. ADMR’S OFFICE LA. SUP. CT., [http://www.lasc.org/court\\_managed\\_prog/lpor.asp](http://www.lasc.org/court_managed_prog/lpor.asp) (follow “legal forms” hyperlink; then follow “Download full set of forms” hyperlink; ¶ 8, § A).

<sup>59</sup> *Id.* at ¶ 8, § B.

<sup>60</sup> Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims’ Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL’Y & L. 465, 488 (2003).