

A Guide For Advocates To Understand The Legal Implications Of Abusive International Marriages

By
Asian Pacific Institute on Gender-Based Violence
and
Battered Women's Justice Project

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Authors: Kristine Lizdas, Battered Women's Justice Project
Bo Thao-Urabe, Asian Pacific Institute on Gender-Based Violence

Contributor: Grace Huang, Asian Pacific Institute on Gender-Based Violence

Advisors:
Judge Gail Chang Bohr
Pheng Thao
KaYing Yang
MayTong Chang
Hli Xiong
Sy Vang Mouacheupao
Lani Suarez

Asian Pacific Institute on Gender-Based Violence www.api-gbv.org
Battered Women's Justice Project www.bwjp.org



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INTRODUCTION

A Guide for Advocates to Understand the Legal Implications of Abusive International Marriages grew out of the need to identify legal remedies available to survivors and family members affected by this issue. It is intended as a resource for advocates who work with Hmong American women and families affected by abusive international marriages as defined below. Abusive international marriage is a very specific form of gender-based violence steeped in specific cultural experiences; hence, typical legal remedies designed for domestic violence and sexual assault might not be appropriate. Women in abusive international marriages often have a wide variety of legal and non-legal issues that need to be competently addressed, and it is easy for an advocate to feel overwhelmed. Advocates, however, can contribute a critical service to women by helping to identify the many issues in an abusive international marriage, and by exploring options and resources that might be available. This Guide provides information for advocates so they are better equipped to do just that.

The issues arising in cases of abusive international marriages implicate a very broad spectrum of legal and administrative arenas - family and criminal law, immigration law, housing, public benefits - just to name a few. No single advocate or attorney can competently assess or problem-solve the myriad issues implicated in these situations; however, recognizing the specific arenas implicated in a survivor's situation and making appropriate referrals are important services advocates can provide Hmong women.

The information provided in these pages is intended to promote advocates' ability to recognize and distinguish the legal and non-legal issues requiring resolution in a given situation, resulting in stronger and more tailored referrals to available resources. In many instances women will be best aided by teams of advocates and attorneys who possess specialization in the relevant areas. Advocates should encourage women to seek legal advice from local, licensed attorneys who practice in the relevant areas of law.

Many advocates who currently work with Hmong American women in abusive international marriages report a dearth of services available to these women. As these cases are often complex, and frequently require more specialized legal knowledge, necessary legal and social support might not be available. However, as advocates' understanding of the legal and non-legal needs of women in abusive international marriages grows, and gaps in services are more formally documented, advocates will be better positioned to engage in the types of institutional advocacy, outreach and partnerships that would improve and enhance services and resources.

Notably, while this Guide does reference some tenants of domestic violence legal advocacy generally, it is not intended to be a comprehensive resource on providing legal advocacy to survivors. Advocates are encouraged to avail themselves of the other materials available on this subject.ⁱ Additionally, this Guide is not intended to provide a thorough introduction to Hmong American culture; non-Hmong advocates seeking more social and cultural context for working with Hmong women are also encouraged to seek out other resources.ⁱⁱ This Guide does offer an overview and explanation of abusive international marriage and enough Hmong cultural background as is helpful for a basic understanding of this practice. Most of this Guide is dedicated to providing an introduction to the U.S. legal system, and the many areas of law implicated in abusive international marriage. The legal information provided is basic as it is intended primarily for Hmong American advocates with an emerging understanding of the U.S. legal system; and it is generic as it must be applicable to advocates working in different states. Importantly, *nothing in this Guide is intended to be construed as legal advice*. Advocates should encourage women to consult with local attorneys competent in an implicated area of practice to better understand how the law might apply in a given woman's situation.

I. ABUSIVE INTERNATIONAL MARRIAGES

The Hmong American Community

In America, our people were introduced to new concepts of self, and have interacted with a legal system and a set of laws designed based on a different set of values that were much more about personhood, not familial units.

~Advocate and 1st generation Hmong woman

The U.S. Census estimates that there are roughly 300,000 Hmong in the United States. Most of this community traces its immigration to the U.S. as part of the refugee resettlement waves of Southeast Asian Americans who came after the Vietnam War and Secret War in Laos. Every family resettled has members who served in the United States military guerilla units to stop the advancement of communism in Asia.

Though there is not extensive research about the population, it's known that the Hmong are ethnic minorities in the countries to which they have immigrated and have faced a variety of forms of discrimination and persecution. Many attribute the strong clan and familial units as a force that has enabled the community to survive for centuries. It is also true that the Hmong are a patriarchal culture. That culture has changed over time, but the specific roles carved out for men and women are widely understood by the young, old, men, women and LGBT community members.

In the Hmong American community gender-based violence steeped in patriarchy expresses itself as domestic violence in many forms, including abusive international marriages, sexual exploitation, victim blaming, and silencing women's organizing and activism. And while the women's and anti-domestic violence movements have created many structures to serve victims and survivors, there still exist extensive gaps when serving survivors who are immigrants and refugees.

In particular, Hmong advocates call attention to the lack of appropriate services for holistically serving victims of abusive international marriages, whose legal circumstances cross local, state, federal, and international lines. This complexity has left many survivors to attempt to find short term solutions and legal remedies that often feel dissatisfactory, and left advocates feeling unsupported and unequipped to serve survivors and their families.

The intent of this legal Guide for advocates is to start on the premise that there is room for all of us to do better serving survivors and victims of abusive international marriages and their families. Secondly, it is meant to be a tool that supports advocates (paid or unpaid) as they are often the only resource in the community helping survivors find solutions and justice. This Guide is a tool for advocates to help distill existing referrals so that survivors are not left trying to navigate complex legal systems alone.

Background: Hmong Advocates' Efforts to Identify, Serve, and Build a Movement to End Gender-Based Violence

Hmong American women have been organizing to share their lived experiences, serve the needs, and build a collective movement to end gender-based violence in the community since they first arrived in the United States in the late 1970s. This activism led to the establishment of many family strengthening/domestic violence programs and further organizing to connect the threads that aim to end gender-based violence, including abusive international marriages.

Hmong advocates and survivors first started exploring the connections between international marriages, domestic violence, and sexual assault within the Hmong community in 2007. In those explorations, advocates, survivors, and victims coined the term "*abusive international marriages and/or relationships*" encapsulating what they were seeing, hearing, and experiencing in the community as a new form of domestic violence. *Abusive International Marriages: Hmong Advocates Organizing in Wisconsin* analyzes this trend, its impacts on victims and their children, family members, and the community, and identifies strategies for prevention and intervention.ⁱⁱⁱ

Abusive international marriage is defined as "*the practice of older adults (mostly men) residing in the U.S. marrying younger [people] from Asian countries under deception that leads to abuse. What makes these marriages abusive are: the large age differences between the spouses that can range from 20 to 70 years; men's duplicity in declaring their true marital situation in the U.S.; wives in the U.S. coerced into divorce; and the sexual victimization of young persons. The practice of abusive international marriages causes physical, emotional, sexual, spiritual, and/or economic harms. Its victims include underage brides from Laos, Thailand, and China married to significantly older men; first, previous and/or current wives in the U.S.; young teenage and adult children in the family; the relatives, such as siblings and in-laws on both sides, and friends and family in the U.S., Laos, Thailand, and China.*" Ibid

Abusive international marriage is a form of domestic and family violence when some of the following types of abuses are present:

- Older men having relationships and marrying very young women (at times the age difference can be 20-50 years) creating a power differential that leaves young brides vulnerable to abuse.
- First wives being forced into accepting legal divorces and standing to lose community property, child support, etc. without their knowledge, especially in *pro se* (self-represented) divorce actions.
- Domestic violence that can include physical, sexual, economic and emotional abuses, and coercive control over the new wife, as well as the now divorced former wife.
- Sexual assault of young girls and women perpetrated by men going overseas in order to avoid issues regarding sponsorship and marriage.
- Overseas husbands making money by using their wives to lure Hmong American men into relationships with their wives.

- Women prohibited/prevented from leaving abusers, especially if they want to take their children with them, because clan and familial norms are enforced by husband, his family and clans. (This doesn't necessarily mean that these women want to leave the marriage)
- Young Hmong men in Asia engaging in abusive international marriages by marrying older, vulnerable Hmong American women who are single, divorced or widowed.
- Abandonment of wives or ex-wives, including pregnant wives, and/or children from both marriages by leaving them in Asia or the U.S. without any financial or legal recourses.
- Adult Hmong American sons who marry a bride from overseas intended for their aging fathers.

Before jumping into the legal considerations for cases of abusive international marriages, it's important to understand that beyond any laws, central to a Hmong person's identity is his/her family identity. Hmong culture values the collective unit; thus, every Hmong person is part of a family, and that family belongs to a clan. It is this collective sense of identity that defines who is responsible for an individual's care during times of need.

This collective identity combined with its patriarchal culture means that Hmong individuals are defined through their father's lineage, and only men are allowed to carry on the family name. Thus, a Hmong marriage is an important event in a person's life because it transfers responsibilities for a women's physical and spiritual well-being from one family to the other. Traditional Hmong marriage ceremonies are performed to define and transfer the woman's spiritual well-being to the husband's family and celebrations are about the two families now being joined through the couple's union.

Given this context of identity, the institution of marriage is necessary for a Hmong woman to find her identity in adulthood and to ensure her spiritual well-being is take care of. Through immigration to Western countries, some Hmong families and women are making individual choices. However, the majority of Hmong individuals still believe that marriage is necessary for a Hmong woman to find her family. In many international marriages then, most young brides accept the marriages as part of their normal life course and are not coerced to marry. Because the institution of marriage is so central to the identity of a Hmong person, this distinguishes international marriages that turn abusive from trafficking and sex tourism because it captures the cultural nuances of the dynamics of this unique form of gender-based violence towards women and girls under the umbrella of marriage.

Understanding this collective gendered culture is central to understanding the forms of gender-based violence that can occur through the lifecourse of Hmong women survivors. It also plays a central role in a survivor's decisions in the following ways:

- Because only a family with whom your spirit belongs can oversee your journey, through specific ceremonies, to the afterlife after death, many Hmong women who are animists (some Hmong are Christians and may not subscribe to these beliefs) will not leave their abusive marriages.
- A woman's individual choices to get a divorce, separate or stay single if widowed will often mean she does not belong to any family and she may be excluded from family ceremonies, celebrations etc.

Taking these cultural contexts into account means that advocacy and services for Hmong survivors cannot be individualized without fully considering family-generated and community-generated risks.

Advocacy & Safety Planning in Abusive International Marriages

Below are two scenarios based on the experiences of families facing abusive international marriages. They help illustrate the need for more holistic and supportive legal, social service, and advocacy strategies when serving victims of abusive international marriages. Given the cultural context above, Hmong domestic violence advocates have continued to be mindful that just using the U.S. legal system alone to resolve the issues in abusive international marriages does not work well. Additionally, Hmong advocates understand that Hmong cultural values don't have to undermine domestic violence services. However, many providers who are attempting to help Hmong survivors may only be looking for simple solutions when in reality to support a Hmong woman to safety may require multiple strategies.

Mai's Story:

Mai is a 17 year old woman living in Laos. When Mai's fiancé sponsored her to come to the United States, he changed her age to 22. As soon as Mai arrived to the United States, they were married. Two months after Mai was legally married, her husband began to isolate her. He would disappear for days without telling her. Mai didn't have access to food or other necessities while her husband was gone. Mai didn't know how to drive or speak English so she didn't go anywhere. Eventually, Mai's husband became physically abusive towards her. Mai's husband wanted sex every time he came home. Whenever she refused, he would force himself on her. Soon Mai became pregnant. After Mai had her baby, her husband was arrested for prostitution. Mai decided to leave and stay with some friends but they insisted that she go to a domestic violence shelter. Mai is trying to obtain her 10 year permanent resident status but she doesn't have any documents because her husband has hidden all of them. Mai's husband is out of prison on a cash bond and is looking for her. He has been asking for her at the local police station and threatening all of her relatives to tell him where she is. Mai is scared that her husband will find her and send her back to Laos. He has threatened her on several occasions that if she ever tries to run away from him, he would send her back to Laos and take her baby.

Lee's Story:

Lee and her husband Cha have 8 children together. They range from 2 to 10 years old. Lee works part time and receives Food Assistance and Cha is on Social Security Disability. During the last 5 years, Lee and Cha have been having marital problems. Cha has asked Lee to file for divorce so that he can sponsor his fiancé from Laos. Cha insists that he only wants to divorce Lee on paper but not in real life. He said that he will continue to provide for the children if Lee helps him sponsor his fiancé. Lee has paid for an attorney to file divorce papers. Every month, Cha sends \$300 out of his \$700 benefits to his fiancé in Laos. He has also incurred over \$2000 in cell phone bills to Laos and has demanded that Lee help him pay for it. Lee stated to her friends that she does not want to help her husband sponsor his new wife, nor does she want him to go back to Laos to marry a second wife. Lee thinks that Cha's girlfriend is under 18 but she is unsure. Ultimately, she wants someone to help her stop her husband from going back to Laos but she is willing to file for divorce so that he will stop nagging her. Lee stated that after the divorce is finalized, she will decide if she wants to continue to allow her husband to live with her or not.

Long-time Hmong advocates offer the following tips for working with Hmong victims of abusive international marriages:

- Do not make assumptions about who is a victim; it can be the first wife and/or the new overseas wife
- Listen, don't push a victim to a particular solution
- Work from the victim's perspective and cultural values and offer options
- Focus on safety first, not leaving the relationship - understand that by the time a Hmong woman seeks help from an organization it's pretty bad at home
- Learn about the victim's family/clan and their actions thus far
- Give her information, but let her make the decision (give her time to think about her decision)
- Reinforce that all information she shares is confidential (even if you see her in the community, you will not acknowledge her, because it protects her)
- Be there for her regardless of how long it may take her to decide what to do

There are many particular considerations for women in abusive international marriages, and advocacy and safety planning must be tailored to these circumstances. Much of the relevant relief offered by the U.S. court system is tailored to the experiences of victims of domestic violence, and advocates for survivors of abusive international marriages will need to be clever and resourceful in order to meet the real, lived experiences of victims of abusive international marriages.

II. PRINCIPLES GUIDING DOMESTIC VIOLENCE LEGAL ADVOCACY^{iv}

In the field of domestic violence *legal* advocacy, advocates serve a unique and important role to survivors. An advocate supports a survivor's ability to make strong decisions on their own behalf and on behalf of her family by listening to and affirming the survivor's experience, helping the survivor assess the risk present in his or her situation, identify opportunities and challenges available to the survivor, and navigate the survivor through confusing social and legal systems. In a legal system setting, such as the courts, a domestic violence legal advocate can often speak on behalf of a survivor, and provide insight as to which aspect of a survivor's experiences are legally actionable. Advocates' pre-existing relationships with individuals inside the legal system greatly benefit individual survivors as well.

Domestic violence legal advocacy emerged organically from the grassroots organizing around domestic violence as early as the 1970s. Individuals, often formerly battered women themselves, accompanied women who were in violent relationships to court - both criminal and civil courts. These women identified themselves as "legal advocates," because they provided their support, knowledge and experience to women in the court systems. They did not have a formal role in the legal system, but they understood the courts well, and could help battered women understand how to use the court systems to better protect themselves and their families. Over time, legal advocates who provided support to individual women identified basic principles around how to advocate for battered women in and outside the legal system.

While domestic violence and abusive international marriages are not the same thing, many of the fundamental tenets of domestic violence legal advocacy are relevant to the providing legal advocacy in the context of abusive international marriages, as illustrated in the earlier section. Below are some of the primary tenets of domestic violence legal advocacy that are relevant to providing legal advocacy to survivors of abusive international marriages.

Self Determination and Safety Planning

Fundamental to effective legal advocacy is understanding that individual women are in the best position to identify what promotes safety in their situations and what increases their risk - for themselves, their families and their communities. Individual safety does not lend itself to a one-size-fits-all solution. Indeed, individual women are often the best gauges as to the degree of risk they face for further violence or even lethality (especially if they are working with a good advocate).

Listening to Women

Many experienced advocates will state that the best role they can play in a woman's life is being a good, active listener. Many women in violent relationships need to speak about their experiences to someone who won't judge them or try to take control of their situations. When given an opportunity to share what is going on in their lives, women are better able to understand their own situations and reflect on the choices they may make. Advocates are helpful when they listen actively - repeat things they heard back to the survivor, ask clarifying questions, offer positive and reassuring feedback. Legal advocates can be helpful by translating the circumstances of women's lives to that which is actionable by the state or courts. Advocates can explain to women which facts or issues can be addressed by different legal and social service systems.

Supporting Survivors' Abilities to Make Good Choices for Themselves

To the extent that advocates can help women understand the discrete but overlapping issues in their lives, they can bolster women's confidence to problem-solve strategies for resolving any issues. Many survivors of domestic violence and abusive international marriages have been verbally, emotionally and psychologically abused by their partners. Hence, many survivors might lack the confidence or mental clarity to make good choices for themselves. Advocates can help restore women's confidence and encourage organized thinking so that women are again empowered to make the best decisions for themselves. Good outcomes in the legal system, in particular, require that participants be as informed as possible about the circumstances in their lives that are legally actionable and the options that are available to them.

Confidentiality

A tremendously important aspect of the support legal advocates offer women is the confidential nature of their communications. While advocates are ethically committed to providing confidential support to women in violent relationships, they are often legally obliged to as well (with some exceptions discussed later). State and federal law protect the communications between advocates and domestic and sexual violence survivors. This means that an advocate may not be forced to share information a woman has communicated to her even if faced with a court order. Advocates should consult with local attorneys to understand exactly how far these legal protections extend in their jurisdiction. Note that if a Hmong-speaking advocate is interpreting between a survivor she is working with and her lawyer, lawyer-client privilege becomes void.

Avoiding the Unauthorized Practice of Law

Licensed attorneys are individuals who have attained specific academic degrees and who have passed tests and otherwise demonstrated fitness to practice law to the legal authorities in their jurisdiction. Legal advocates might have knowledge of the law, and experience to recognize how the law is applied in individual cases, but they have not been given the formal authority to *practice law*. Therefore, legal advocates must be cautious that they do not purposefully or mistakenly provide actual legal *advice* to the women with whom they work - only licensed attorneys may do this. Advocates that offer legal *advice or interpretation* of laws may be reprimanded, face fines or possible criminal prosecution. It is important to know what activities constitute legal advice and interpretation, and what activities constitute legal advocacy. Legal advocates may inform individuals of the statutes in operation in their jurisdiction, and they may help individuals understand which life circumstances might have legal implications. Advocates may not, however, explain how a statute or specific case law applies to an individual's circumstance. For a fuller explanation and more detailed explanation of what constitutes the unauthorized practice of law for legal advocacy purposes, please see this article from the Battered Women's Justice Project: <http://www.bwjp.org/resource-center/resource-results/domestic-violence-advocates-and-the-unauthorized-practice-of-law.html>.

III. THE AMERICAN LEGAL SYSTEM

A. Overview

Many Hmong American women will not be familiar with the operation of the U.S. legal system or how it may or may not be used to alleviate her circumstances. An advocate will need to determine how much of an overview of the U.S. legal system should be provided.

The courts of the United State constitute one of three branches of government - the judicial branch. The judicial branch is charged with interpreting the laws written and passed by the legislative branch (e.g. the legislature). Additionally, the United States adheres to a "federalist" system of government, whereby the duties and authority of the government are shared between the federal (national) government and the state governments. (The jurisdiction of the Indian Tribes is more complicated, and beyond the scope of this Guide.)

State law and the state courts are the most relevant for the purpose of providing legal advocacy to survivors of abusive international marriages. Most of the processes for dealing with marital breakdown, child custody, spousal support and property division are properly addressed in state court. Relatedly, most crimes arising in this context would be prosecuted in state court. Federal courts, however, as well as specialized federal courts are used in resolving immigration matters, some interstate (across state lines) cases, and in some higher level crimes.

Another important clarification regarding the court system in the United States is that courts are often assigned to handle certain categories of law. For example, within a state court system, one court might hear "criminal" matters and another court might hear "civil" matters. Criminal courts are the forums in which alleged crimes are prosecuted by the "State" (as crimes are considered acts against the public generally). Civil courts are designed to address non-criminal disputes between individuals, and typically don't involve the "State." Confusingly, these courts might reside in the same building, and individual courtrooms might be interspersed. In these situations, it can be confusing to determine whether you are in criminal or civil court. Additionally, both criminal and civil courts might include more specialized courts that go by distinct names - e.g. "housing court" or "domestic violence court." And all of this organization is jurisdiction-specific. Not only is it different state-to-state, but it might also be different between areas of the state (between different judicial districts within a single state).

Advocates are especially important in the legal setting because the structure of the U.S. government and courts can be so confusing, especially to those born outside the United States. Simply navigating individuals through a specific court system is enormously helpful. There are other factors that make court systems confusing to individuals. Many court systems are not fully language accessible, which creates an additional challenge to women in abusive international marriages. Additionally, the judicial system can perpetuate social imbalances. For example, individuals with strong financial resources are more likely to fare better in the courts because they can pay more money to attorneys to develop their cases. Additionally, survivors of abusive international marriage might feel like they are losing control over their circumstances when the State gets involved in their case. This may happen in the criminal court and juvenile court settings. A single individual might be navigating several courts at once (e.g. criminal court, divorce court, and housing court), which can be confusing even for seasoned legal professionals.

Legal advocates must be very clear that different laws apply in all of these different court systems and to the different aspects of an individual's circumstances. Advocates do not need to know all of the applicable laws, nor should they be interpreting how laws apply to a specific

woman's situation. However, it is helpful for advocates to have a basic understanding of the laws in the most relevant legal areas, so they can help women recognize when their circumstances necessitate legal intervention. If significant legal advice and intervention is required, legal advocates can help steer women to the appropriate resources, including lawyers with relevant practice backgrounds.

The following sections include overviews of the most common legal issues that arise in cases involving abusive international marriages. The overviews are written to be broadly applicable to advocates and survivors throughout the U.S. Nothing in this Guide is state or jurisdiction-specific, and some material might even contradict the law in a specific area. Legal counsel from licensed attorneys in the relevant practice areas should always be sought, and nothing in the following sections is intended to replace that.

B. Family Law Issues for Legal Advocates^v

Family law and jurisdiction are the purview of each state, except in instances in which a tribal court has primary jurisdiction. Each state and tribal jurisdiction may have its own set of laws and jurisdiction-specific court practice. Again, nothing in this handbook is to be construed as legal advice, and advocates should encourage women to speak with attorneys licensed in their state, and knowledgeable about their jurisdictions laws and practices for family law. As you read through these various legal issues, consider how they impact the choices available to Mai and Lee's situations.

B1. Marriage

Within the United States, marriage is broadly defined as the legal union of a couple as spouses. While how a marriage is formed differs in each state, the essentials of a marriage remain similar throughout all states. In most states a couple must complete two requirements for their marriage to be recognized under law: get a marriage license, and participate in a marriage ceremony (which may be performed by religious officials, or certain government officials). Failure to complete either requirement will not usually affect the legality of the marriage, but some states will not recognize marriages without licenses. In addition to these two requirements, most states have requirements for the types of people who may marry one another. Some of these requirements include:

- Minimum age requirements;
- Mental ability to consent to marriage;
- Neither party is already married; and
- Agreement of both parties to enter the marriage

If anyone who does not meet these requirements enters into a marriage, the marriage is considered either voidable or void. A voidable marriage is a marriage that is originally invalid (not recognized under law), but unless terminated by a court order, remains in effect. This occurs, for example, if one of the parties lacks the capacity to consent due to age or if fraud or deceit was used to induce one into entering into the marriage (also called a fraudulent

marriage if the misrepresentation made was fundamentally important to the marriage, such as religious beliefs or the ability to have children). A voidable marriage may be turned into a legal marriage if the thing which made the marriage voidable has been removed (e.g., the underage spouse comes of legal age). A void marriage is a marriage that is invalid and can never be made a legal marriage. This occurs, for example, if one of the parties is already married.

Legal Consequences of Voidable or Void Marriages

If a marriage is voidable or void, there are legal consequences that result. Several of these consequences include:

Divorce: the legal process of ending a marriage.

Child legitimacy: the status of a child born to married parents.

Marital rights: the rights a married spouse has to property, children, and money after divorce or death of the other spouse. These include:

- Real and personal property rights: the rights a spouse has to his or her own property, and his or her spouse's property, upon divorce or death
- Child custody: the court-awarded right a spouse has to live with his or her child after divorce
- Child support: the court-awarded right a spouse has to receive money from his or her ex-spouse for the purpose of supporting a child after divorce
- Alimony: the court-awarded right a spouse has to receive money from his or her ex-spouse for the purpose of maintaining a certain quality of life
- Public benefits: money that the government gives to spouses, widows, or ex-spouses of an individual, which includes social security, Medicare, disability benefits, and veteran's benefits

If a marriage is deemed voidable, the marriage is invalid but remains in effect unless a court ends the marriage, and therefore has its own unique legal consequences. Because a voidable marriage remains in effect, an individual must pursue a legal divorce if he or she wants to leave the marriage; however, this also gives more marital rights to the parties divorcing. Divorcing parties have both property and alimony rights, as well as rights to public benefits such as social security, Medicare, disability benefits, and veterans' benefits. Any children from a voidable marriage will also be considered legitimate and the court will have to determine child custody and child support.

If a marriage is deemed void, the marriage is invalid and can never be made a legal marriage, and therefore has different legal consequences. In general, the wife has no marital rights upon the dissolution of the relationship or after the death of the husband. While this means that no legal divorce needs to be pursued, it also follows that the parties divorcing have fewer legal rights than they would have if the marriage had been valid. There are no property, alimony, or public benefit rights. Children from a void marriage will be considered illegitimate, although several states consider them legitimate per statute (such as Virginia). One thing that does not change are child support obligations, but paternity must be established before a court can order child support.

Putative Spouse Doctrine

Although, as explained above, if parties do not meet certain requirements their marriage can be deemed void or voidable, some states will recognize the marriages as legal marriages if it protects a spouse who intended to act legally and with honest intentions, especially if that spouse would otherwise face a very unfair result. This doctrine is known as the putative spouse doctrine. The putative spouse doctrine recognizes the marriage of an individual who participated in a marriage ceremony, believing that a legitimate marriage took place, and in ignorance of a fact making the marriage void or voidable (e.g., the person's spouse was already married, or did not get valid marriage license). The protection of the putative spouse doctrine usually only lasts until the spouse learns the truth about the marriage. In other words, once a spouse finds out, she needs to exit the marriage or, if remaining in the marriage, take action to legitimize the marriage, or she will lose all marital rights.

In some putative marriage situations, the putative spouse is ignorant that the other spouse is already married. As a result, when the putative spouse's partner dies, multiple spouses come forward and claim marital property rights from the dead spouse's estate. In this situation, some states, such as Minnesota, will divide property among the spouses, taking into account the length of each marriage, children, and the nature of the marital relationship.^{vi} Although this method provides more property rights to the first spouse, it still allows the subsequent putative spouse(s) some property rights.

B2. Divorce

Divorce is the legal terminating of a marriage by a court. As of 2010, all states in the U.S. have no-fault divorce, in which the parties are not required to prove either person was at fault beyond a showing of "irretrievable breakdown of the marriage or irreconcilable differences," or in other words, evidence of unresolvable issues between spouses. Because of no-fault divorce, obtaining a legal divorce is a readily accessible process.

Ex parte divorce: There are several routes a married couple can take to divorce. Traditionally, both parties participate in the divorce process, but there are situations when one party is unwilling or unable to cooperate in divorce, so the other spouse has to get a divorce over the other party's objection, without involvement of the other party. This type of divorce is called an ex parte divorce. In order to get an ex parte divorce, the party seeking divorce must live in the state in which he or she is filing for divorce (some states require the party to live in the state for a certain period of time before he or she can file for divorce), and provide the other spouse written notice of the divorce proceedings. If these requirements are met, the spouse can obtain a divorce without involvement of the other party, and the divorce is entitled to recognition by all other states. Although the party seeking divorce can obtain a legal divorce without involvement of the other spouse, he or she cannot have the court divide property or mandate alimony unless the ex parte spouse is served with the divorce petition in the state where the divorce is filed.^{vii}

Default divorce: If the party seeking divorce resides in the same state as the other spouse, and provides the other spouse sufficient notice of the divorce, the court can determine property division, alimony and child custody even if the non-involved spouse is not present for the proceedings. This type of divorce is called a default divorce, and only happens when one spouse does not respond to and is not present for divorce proceedings, even though he or she received adequate notice.^{viii} Because of the possibility of default divorce, it is important that a spouse pay attention to all official looking papers delivered to him or her. If the spouse cannot read or understand the documents, he or she is entitled to some level of translation help by the court. It is necessary that the spouse responds to and follows all instructions provided in these documents (i.e., show up for scheduled court dates), or else he or she risks losing marital property rights, alimony rights, and child custody.

Financial Consequences of Divorce

There are three primary financial consequences of divorce: property division, spousal support (or alimony), and child support.

Property division: Property division between divorcing parties varies depending on whether the couple resides in a community property state, or a separate property state. In community property states, an individual spouse personally owns any property he or she brings into the marriage, and any property obtained during the marriage via gift or inheritance. All other property earned by the spouse during the marriage is community property, meaning that it belongs to the marriage, and both spouses are entitled to an equal share of this property upon divorce. In a separate property (or equitable distribution) state, an individual spouse owns all property he or she brings into the marriage, and all property he or she earns during the marriage (i.e., wages and other income). Upon divorce, the spouses' individual property is equitably distributed subject to economic need, status, rehabilitation, contributions of parties to housekeeping/child-rearing, fault in divorce, etc. In other words, in community property states, spouses will receive the same share of marital property, whereas in separate property states, spouses can receive different shares of marital property. Most courts, both in community and separate property states, divide property under the theory that the parties should separate on as equal a basis as possible.

Spousal support (alimony): Sometimes, if after property division one spouse still lacks sufficient property or income to meet his or her reasonable needs, a court may require the other spouse to pay his or her ex-partner alimony (also called maintenance or spousal support). Different states have different approaches to allocating alimony, and most allow courts to award different types of alimony such as permanent, rehabilitative, or limited duration, depending on the need of the ex-spouse, and his or her likelihood of being able to support oneself in the near future. In all states, alimony is considered taxable income for the receiving spouse.

Child support: When determining child support, courts usually use a mathematical formula to determine how much each party owes in child support. Courts can go above or below the formula's guidelines, but they have to make a showing of why it is necessary for one party to pay more or less money in child support.

B3. Child Custody

If a divorcing couple has minor children, the court must make a decision regarding where and with whom the children will live. Both parents almost always retain legal custody of the children, meaning that both parents retain responsibility for major decision-making on the children's health, education, and other general welfare issues. Sometimes, only one parent is awarded physical custody of the children, meaning that this parent is responsible for the day-to-day care of the children. In this case the other parent almost always retains visitation rights. Most courts prefer to award both parents joint physical custody if workable, meaning that the children live part time with one parent, and part time with the other parent.

When making custody determinations courts use the "best interests of the child standard," and look at several factors to determine what living arrangement will be best for the children involved. Some factors courts look at include:

- Wishes of the child's parent(s)
- Wishes of the child
- Emotional bonds or connection between the child and parent
- Child's interactions with other people who would be in the home or present in the child's life
- Child's adjustment to home, school, and community
- Length of time the child has lived in a stable, satisfactory environment

In addition to these factors, courts making custody determinations work with several presumptions, facts assumed to be true unless there is evidence proving otherwise, about what is in the "best interests of the child." These presumptions include:

- Placing a child with a parent who is engaged in domestic violence is not in the best interest of the child
- Placing the child in custody of the primary caretaker is in the best interests of the child
- Placing the child with a natural parent rather than a third party (i.e., grandparent) is in the best interests of the child.

Custody determinations are not final, and are always modifiable if there is a change in circumstances that would make a different living arrangement better for the children.

Relocation of a Parent

In both sole physical custody and joint physical custody arrangements, the custody order will usually prohibit either parent from moving out of state with the child unless he or she obtains the court's permission or written consent of the other parent. If the relocating parent does not comply with a requirement to obtain the court's permission before moving out of state with children, the parent can be fined under civil law for violating a custody order, and risk losing custody of children, and/or be charged with parental kidnapping under criminal law.

Under the Parental Kidnapping Prevention Act (PKPA), the child's "home state" (where a child has resided for the last six months), is presumed to have control over a custody dispute from beginning until end. In other words, a parent may not move to another state with the child and

receive a custody order (or modification of a previous custody order) in the new state; the previous state has the primary authority to make the custody determination, and all other states must respect that state's custody order. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which all but one state has enacted, allows a state to assert temporary emergency control over a custody dispute if a child is present in a state and the child, its siblings, or its parents are subjected to, or threatened with, mistreatment or abuse. UCCJEA's temporary emergency control extends to child custody modifications as well.

B4. Civil Protection Orders and Related Relief

Civil Protection Orders are a common legal tool utilized in domestic violence cases. Consider whether civil protection orders are useful options to either Mai or Lee based on their circumstances and needs.

Sometimes a partner may experience domestic abuse within a relationship. Most states define domestic abuse as:

- physical harm or bodily injury,
- the fear of physical harm or bodily injury,
- terroristic threats (see below), or
- criminal sexual conduct (see rape, marital rape, and criminal sexual assault below),

by a "family or household member." "Family or household member" usually includes one or more of the following:

- Spouse or former spouse,
- Parents and children,
- Other blood relatives,
- Individuals living together or who have lived together in the past, or
- Individuals who are in a romantic or sexual relationship.^{ix}

If a spouse or partner is experiencing domestic abuse within the relationship, he or she can file for a civil protection order (also called temporary restraining order) to restrain the abusing partner from committing future acts of violence. These orders can usually be issued *ex parte* (when only one party has communicated with the court), if necessary, and can be issued during divorce proceedings. Violation of a protection order may subject the offender to criminal prosecution. The abuser may also be subject to criminal prosecution for the abusive acts, as well.

Although Civil Protection Orders (CPOs) are only temporary - typically 12 months but sometimes longer - they may provide the protected party important relief (help) during that time. CPOs always prohibit the abuser from engaging in future acts of violence, but the orders often require the abuser from having any contact with the protected party. In furtherance of this, a CPO might require the abuser to leave a primary shared residence, pay support or attend a program for abusers. The CPO might direct how parenting should be structured while the order is in place. CPOs can also specifically direct an abuser to surrender any firearms while the order is in effect.

Violations of Civil Protection Orders might be a crime, and law enforcement might have the authority to make a warrantless probable cause arrest based entirely on the contact violation. More information about this is contained in the Criminal Law overview below.

C. Criminal Law Issues for Legal Advocates ^x

When advocates work with women who are in abusive international marriages, some of the behaviors involved might implicate certain state and federal crimes. Below is a brief explanation of the criminal legal system in the United States as well as a listing of the more common crimes that might arise in this context. Advocates should explore the implications of the criminal legal system with women who are seeking assistance - these might be substantial. Note whether the circumstances in either Mai or Lee's situation involves any crime committed, and consider whether pursuing criminal intervention by the State is helpful and offers necessary protection, or is damaging, creating too many unintended consequences for everyone.

As with most of the legal issues discussed in this Guide, keep in mind that criminal law can significantly vary from state to state, so always consult your state's specific laws and ask a local criminal law attorney if you need more information about these crimes in your state.

C1. Basics

Criminal Jurisdiction

States typically only have jurisdiction, meaning the ability to control and decide a case, over a crime if the crime was committed within the state. For example, if a crime were committed in California, or in France, then Wisconsin would not have authority to prosecute the offender. Sometimes states gain jurisdiction of ongoing crimes if an offender moves to the state and continues to commit the crime in that state. For example, if someone illegally marries a second spouse in France, and then moves to Wisconsin with his or her second spouse, Wisconsin will likely be able to prosecute the person in Wisconsin.

State v. Federal Criminal Law

Most crimes that individuals commit are prosecuted in state courts by local or state prosecutors. Although states traditionally retain authority to make and enforce criminal law, there are some "interstate" crimes that the federal government has authority to prosecute. "Interstate" crimes include crimes that occur across state borders, or on tribal land. Some examples include human trafficking and mail fraud. Federal criminal law usually invokes greater penalties and fines on the offender than state criminal law.

Other Information about the U.S. Criminal Law System

Crimes are specifically listed and defined in state and federal statutes. States and the Federal government categorize crimes by severity. Generally, there are three categories a crime will fall into: misdemeanor, gross misdemeanor, and felony, with misdemeanor being the least severe, and felony the most severe. The classification of a crime relates to the amount of prison time or fine that may result.

C2. Crimes that Might Be Implicated in Abusive International Marriages

Polygamy/Bigamy

In most states the practice of polygamy (or bigamy) is subject to criminal prosecution that could result in imprisonment or a monetary fine. Polygamy is defined as: (a) the act of marrying another within the state with the knowledge that one of the parties has a prior marriage that has not been legally terminated, or, in some states such as Minnesota and Wisconsin, (b) the act of marrying another outside the state with the knowledge that one of the parties to the marriage has a prior marriage that has not been legally terminated, and then living together within the state.^{xi} Only individuals with *actual knowledge* about the prior marriage that has not been terminated will be liable under criminal law. For example, if a woman marries a man who is already married, but she does not know he is already married, she will not be liable under criminal law. Or, if a man marries a woman believing that his prior marriage is terminated under law, but it is not, he will not be liable under criminal law.

Rape

Rape is the act of having sex with another individual without that individual's consent. Rape is a felony, and can result in imprisonment, a monetary fine, and/or a requirement to register as a sex offender (meaning the offender's name and address will be listed on a publicly available list of people convicted of sex crimes).^{xii} Most states require there to be proof that the offender used physical force *and* that there was a lack of consent. A small amount of states only require proof of non-consent, and do not look at the use of force. Psychological coercion, economic coercion, or other types of coercion, are not usually considered "force" under most states' criminal rape laws. When determining if the victim did or did not consent, some courts assume there was consent unless there is direct evidence of non-consent, and often look to physical evidence for proof of resistance. Some states require affirmative consent, meaning that they presume non-consent unless there is direct evidence of consent. All states' criminal rape laws list instances when consent is not possible, in other words, anything that seems like consent is not actually consent. Some examples include:

- The individual is not of legal age to consent
- The individual is unconscious
- The individual is severely incapacitated because of drugs and/or alcohol
- The individual suffers from a mental disability that makes him or her incapable of understanding the nature of the conduct

Almost all states find no consent when a victim is severely incapacitated because the offender gave the victim drugs and/or alcohol, and some states find no consent when a victim is severely incapacitated regardless of who gave the victim drugs and/or alcohol. Most states allow an offender a mistake of fact defense, meaning that if the offender shows that he believed that the victim had consented to the sexual activity, he will not be liable for criminal rape. Most states require the offender's mistaken belief to be honest AND reasonable, though. In other words, if the offender actually believed the victim consented, but a reasonable person would never believe that the victim consented, the offender is still guilty.

Marital Rape

Until very recently most states did not consider marital rape, the act of having sex with a spouse without the spouse's consent, a crime. Most states have abolished the "marital rape exception," but many states still treat marital rape as a lesser crime than other rape by retaining lower sentences for offenders. If an offender commits marital rape in a state where this is considered a crime, the offender may also be subject to a civil protection order that restricts the offender's future behavior and contact with the victim.

Statutory Rape

Statutory rape is the act of having sexual relations (not necessarily just intercourse) with an individual who has not reached the legal age of consent in the state where the action takes place. Being convicted of statutory rape could result in imprisonment, a monetary fine, and/or a requirement to register as a sex offender. In many states, statutory rape is a strict liability crime, meaning that the offender's actual knowledge about the victim's age is irrelevant to conviction. For example, if someone has sex with a 13 year-old, but actually believes the victim is 19, the offender will still be guilty of statutory rape.

Sexual Assault

Sexual assault is the act of having sexual contact (any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire) with another individual without that individual's consent. Sexual assault can be a misdemeanor or a felony (depending on the state and circumstances), and can result in imprisonment, monetary fine, and the requirement to register as a sex offender. Like rape, lack of legal age to consent, unconsciousness, severe incapacitation because of drugs and/or alcohol, and mental disability all make consent impossible. If an offender commits sexual assault against a family or household member (see definition below), the offender may also be subject to a criminal or civil protection order that restricts the offender's future behavior and contact with the victim.

Domestic Assault ^{xiii}

Many states specifically criminalize domestic assault, which is usually defined as the act of:

- physically harming or causing bodily injury,
- attempting to physically harm or cause bodily injury, or
- creating the fear of physical harm or bodily injury,

on a "family or household member." "Family or household member" usually includes one or more of the following:

- Spouse or former spouse,
- Parents and children,
- Other blood relatives,
- Individuals living together or who have lived together in the past, or
- Individuals who are in a romantic or sexual relationship.

For an offender to be held criminally liable for domestic assault, he or she usually must commit these acts with intent, meaning that he or she must have acted while *intending* to hurt, attempt to hurt, or create the fear of hurt. Many states do not specifically criminalize “domestic assault,” but criminalize the behavior under their general battery and assault criminal statutes. Domestic assault can be a felony or a misdemeanor (depending on the state and circumstances), and may result in imprisonment and/or a monetary fine. Criminal prosecution often results in a criminal no-contact order, meaning the offender is not allowed to contact the victim. Additionally, a domestic assault offender may also be subject to a civil protection order, which the victim asks for, that restricts the offender’s future behavior and contact with the victim.

Terroristic Threat

A terroristic threat in the context of domestic violence occurs when an individual threatens to commit any act of violence with the purpose to terrorize another. Terroristic threat is usually a felony and can result in imprisonment or a monetary fine. If the offender commits terroristic threats against a family or household member, the offender may also be subject to a criminal or civil protection order that restricts the offender’s future behavior and contact with the victim.

Stalking^{xiv}

Stalking is generally defined as the intentional, repeated following of a person for the purpose of harassing the person with express or implied threats of violence or death. The definitions vary only slightly from state to state with some states adding things like lying in wait, surveillance, or warnings from police officers. In some states, such as Minnesota, an offender can commit stalking by using telephone calls, letters, delivery of packages, etc.^{xv} Stalking can be a misdemeanor or a felony (depending on the state and circumstances) and may be subject to imprisonment and/or monetary fine.

Violation of a Protective Order^{xvi}

If someone is subject to a civil protective order, and he or she violates that order by engaging in prohibited conduct (such as violence or contact with the person who got the order), he or she may be subject to criminal prosecution for violation of a protective order. Most states impose a maximum one-year sentence and a \$1,000 fine for violation of a protective order, but eight states requires mandatory jail time.

Human Trafficking

In criminal law, human trafficking is the illegal recruitment, transportation, transfer, harboring, or receipt of a person, especially one from another country, with the intent to hold the person captive or exploit the person for labor, services, or body parts. Human trafficking offenses include forced prostitution, forced marriages, sweatshop labor, slavery, and harvesting organs from unwilling donors. Human trafficking is usually a felony, and most states impose a sentence of at least 20 years on human trafficking offenders, in addition to requiring the offender to pay a monetary fine and pay restitution to the victim for unpaid labor.^{xvii}

Domestic Minor Sex Trafficking (DMST) and Commercial Sexual Exploitation of Children (CSEC)

Domestic Minor Sex Trafficking (DMST) is defined as the commercial sexual exploitation of minors through buying, trading or selling their sexual services. A commercial sex act refers to anything of value - money, drugs, food, shelter, rent, higher status in a gang - exchanged for sex.

Commercial Sexual Exploitation of Children (CSEC) refers to a range of crimes including (i) recruiting, enticing, harboring, transporting, providing, obtaining and/or maintaining (all acts that constitute trafficking) a minor for the purpose of sexual exploitation; (ii) exploiting a minor through street/internet-aided prostitution/escort services; (iii) exploiting a minor through survival sex; (iv) exploiting a minor through sex tourism, mail order bride trade, and early marriage; and (v) exploiting a minor in pornography and having her/him perform in sexual venues (e.g., strip clubs, peep shows).

Custodial Interference (or Parental Kidnapping)

Most states criminalize custodial interference (also called parental kidnapping if the offender is a parent). Custodial interference is the act of taking, enticing, retaining, detaining, or concealing a child, with the intent to deny access from a parent or guardian having the lawful right to physical custody or visitation time with the child. Custodial interference may be a felony or misdemeanor (depending on the state and circumstances), and the offender may be subject to imprisonment and/or monetary fine. Larger penalties are usually imposed if the offender is a parent of the child taking the child away from the other parent, if the offender exposes the child to a risk of injury or illness, and/or if the offender moves the child to another state.^{xviii}

Child Abuse and Neglect

Child abuse is intentional or negligent physical or emotional harm inflicted on a child. Child abuse can include sexual assault, statutory rape, physical abuse, failure to prevent a child from being abused, etc. Child neglect is the failure of a person responsible for a minor to care for the minor's emotional or physical needs. Child neglect is a type of child abuse. All states criminalize some forms of child abuse and neglect. Child abuse and neglect can be a misdemeanor or felony (depending on the state and the circumstances) and may result in imprisonment and/or monetary fine. Many states impose greater penalties for child sexual abuse, as opposed to physical abuse and neglect, unless physical abuse results in severe bodily injury or death. Most states impose lesser penalties for child neglect than other forms of abuse. Some states, such as California, impose less severe sentences for child sexual abuse if the offender is a caretaker. The penalties for child abuse are also usually greater or lesser depending on if the offender acted intentionally or negligently.^{xix} Child abuse and neglect criminal statutes vary widely from state to state. In addition to criminal prosecution for child abuse and neglect, if the offender is a parent, guardian of the victim Child Protective Services will likely get involved and the offender risks losing parental rights to the child.

Conspiracy

Criminal conspiracy is an agreement by two or more persons to commit an unlawful act, coupled with intent to complete the unlawful act, and (in most states) action or conduct that furthers the completion of the unlawful act. A conspiracy ends when the unlawful act has been committed or (in some states) when the agreement has been abandoned. Conspiracy is usually a low level felony and usually results in imprisonment. Conspiracy is a separate offense from the crime that is the object of the conspiracy, meaning that an offender can be convicted of the unlawful act (if completed), and conspiracy, and receive punishment for both convictions.

Aiding and Abetting

Criminal aiding and abetting (sometimes called complicity) is the act of assisting or facilitating the commission of a crime, or promoting completion of the crime. Some criminal statutes, such as the *Model Penal Code* will find someone guilty of aiding and abetting if a person had a legal duty to stop a crime from occurring, but failed to intervene. For example, if one parent knows that the other parent is going to abuse their child, the first parent has a legal duty to prevent the abuse, or he or she may be found guilty of aiding and abetting child abuse. If someone is convicted of aiding and abetting a crime, the offender will be penalized with the penalty for the crime. Some courts will lower penalties if an offender plays a lesser role in aiding and abetting the crime. For example, a street drug dealer would likely receive a lesser sentence than a kingpin for illegal distribution of drugs, even though the street drug dealer and the kingpin are both equally guilty of the same crime.

D. U.S. Child Protection System

If a parent or guardian is charged with child abuse or neglect, or if there is any other indication that a child might be unsafe in the home, Child Protective Services will often get involved to determine if the child is living in a safe and suitable environment. Child Protective Services is the government agency responsible for investigating allegations of child abuse and neglect, providing family services to the parent or guardian of a child who has been abused or neglected, and administering the state's foster-care program.^{xx} Occasionally, if Child Protective Services deems a child's home unsafe or a parent "unfit" for parenting, the agency may require the child to live in foster care for a temporary period of time, or even permanently. Child Protective Services will give the child's parent(s) opportunities to make the home safe for the child and reform behavior, but if after a certain period of time Child Protective Services determines that the parent is incapable of ever being a "suitable parent," the agency may completely terminate all parental rights.

Child Protective Services can be useful for a parent wishing to keep his or her child away from an abusing parent or other household member, but there are many criticisms of the agency. Child Protective Services sometimes creates more problems for victims who are parents, especially if the abuser still lives in the home. The victim may sometimes be deemed an unfit parent for refusing to take the child out of an abusive home and risk losing his or her child. If advocates are working with victims who are parents, remember that involving Child Protective Services may not always be in the best interests of the domestic violence victim or child.

Mandatory Reporting^{xxi}

States require some people to report known incidences of child abuse to the authorities (usually the police or Child Protective Services). Some states also require reports if someone knows a child is going to hurt him or herself, or someone else. Many states, such as Minnesota, only require people who work with children in a professional capacity (i.e., advocate, teacher, doctor, etc.) to report abuses, but other states require all citizens to report known incidences of child abuse. Additionally, some states, such as Minnesota, only require mandatory reports if the abuser has a certain relationship with the child, such as a relative or person of authority (e.g., teacher). Other states require mandatory report if any person is abusing a child.

Advocates must make sure to stay up to date with the state's specific mandatory reporting laws, and always state up front, the limits of confidentiality in initial meetings with clients.

E. Immigration Law for Advocates

This section provides basic information on various immigration remedies available to those in abusive international marriages who may have been victims of domestic violence or certain other crimes, including child abuse or human trafficking. This information is intended only to assist in exploring options with non-citizens, and is not a substitute for individual advice from an experienced attorney. Immigration laws and regulations are complex and constantly changing. No manual, including this one, can adequately explain all the factors that can influence one's immigration status. The risks of providing incorrect information or advice, including possible detention and deportation are great. Therefore, it is critical when working with immigrants to consult with an immigration attorney who has experience working with victims.

This section will cover:

1. A general overview of American legal immigration concepts and definition of terms
2. A general description of how people obtain legal status in the US, and how deportation fits into the process
3. How marriage and divorce are related to immigration status
4. Specific protections in immigration law for victims of domestic violence, sexual assault, and stalking
5. How advocates can help victims in the immigration process. For purposes of this chapter, a "child" is a person under the age of 21, whether married or unmarried. Please note that this chapter is designed to be a basic primer, and not a comprehensive guide, on immigration relief available to victims of domestic violence, sexual assault, child abuse, or human trafficking.

E1. General Definitions

This section will provide basic information about different forms of immigration status and terms.

United States citizens and nationals: Any person born in the United States or Puerto Rico is a United States citizen. Some individuals born abroad inherit U.S. citizenship at birth from a citizen parent. Others acquire citizenship because, before their 18th birthday, they became a lawful permanent resident and one or both parents became naturalized U.S. citizens. A lawful permanent resident who meets certain requirements can apply to become a U.S. citizen in a process called naturalization. A U.S. citizen cannot be deported (“removed”) for any reason, except in some circumstances where they became a U.S. citizen fraudulently. A U.S. citizen can apply for a parent, spouse, child† or sibling to immigrate, i.e., “sponsor” them to become permanent residents.

Lawful permanent resident: A lawful permanent resident (LPR) has the right to live and work indefinitely in the U.S. and, with some restrictions, to travel outside the U.S. for extended periods of time. After five years (or less in some cases), a LPR over the age of 18 can apply for naturalization to U.S. citizenship. A LPR can apply to immigrate a spouse or unmarried child, i.e., petition for them to become permanent residents. A LPR can lose lawful status and be deported from the U.S. (removed) if he or she comes within a “ground of deportability.” Common grounds of deportability include conviction of certain crimes, a court finding of a violation of a domestic violence protection order, and commission of certain immigration offenses. In some cases, the person can apply for a waiver to have the ground of deportability forgiven.

Non-immigrant visa holders and other temporary status: A non-immigrant visa gives a noncitizen the right to enter and remain in the U.S. temporarily for a specific purpose. Common nonimmigrant visas are for visitors for business or pleasure (B-visas); students or scholars (F- or J-visas); professional workers (H-visas); and fiancées of U.S. citizens (K-visas). In some cases, spouses and children under the age of 21 of the principal nonimmigrant visa-holder will be allowed to enter on the visa as well. These derivative beneficiaries are not necessarily authorized to work or study, even if the principal visa-holder is. Derivative beneficiary spouses will lose their status if the marriage terminates. If the principal visa-holder becomes deportable or otherwise violates the terms of the visa, he or she as well as the derivative beneficiaries will lose status. In addition, there are some noncitizens whom immigration officials know are in the U.S. without authorization, but who have been issued deferred action status, meaning that authorities have made an administrative decision to not remove them. Depending on the terms of the deferred action, these individuals may have permission to work lawfully in the U.S.

Undocumented persons: Undocumented persons are those who have no current immigration status. The person may have crossed the border surreptitiously without inspection by an immigration official (known as “entry without inspection” or EWI). Or the person may have entered with a temporary visa such as for students or tourists, and the visa now has expired. An undocumented person does not have the right to work lawfully or remain in the U.S. The person is subject to removal if detected by immigration authorities. The fact that a person is undocumented does not mean that her or she faces imminent deportation.

Immigration Court and Executive Office of Immigration Review (EOIR): The EOIR is the administrative court system where removal and deportation proceedings are decided. It includes the local immigration judges and the Board of Immigration Appeals, and is part of the Department of Justice. EOIR is not part of USCIS (U.S. Customs and Immigration Service) or ICE (Immigration and Customs Enforcement) but it often has courtrooms and offices in CIS or ICE District Offices. Individuals who appear in immigration court have the right to be represented by an attorney or EOIR-accredited representative, but there is no right to a free representative or counsel.

Inadmissibility: This is the concept that describes why noncitizens are prevented from being eligible for legal status in the U.S. (often, at a point of entry before they get in, or when they are applying for an immigration benefit). Border patrol officers can exclude individuals from entering the U.S. if the latter cannot show that they are eligible to enter. Various grounds of inadmissibility include criminal history, prior immigration fraud, health reasons, or terrorism.

Removal and removal proceeding: This is the process of forcing a noncitizen to leave the U.S. or the process of keeping him or her out of the U.S. before or when trying to enter in a court process before an immigration judge.

E2. Policy Framework

U.S. immigration law has four basic approaches to allowing individuals to immigrate, meaning to live permanently in the United States.

- Family reunification. The majority of individuals immigrating to the United States are sponsored by a family member. (63.5% in FY 2014). ^{xxii}
- Immigration through employment, whether through sponsorship by an employer or as employment creators (almost 15% in FY 2014).
- Humanitarian reasons, including individuals fleeing persecution (refugees and asylees), and others from countries facing unrest and natural disasters (13.3% in FY 2014).
- Other categories that Congress has created for individuals to be able to immigrate or maintain legal status, including diversity visas, adjustment of status for certain non-immigrant categories, such as Trafficking or Crime Victim non-immigrants, certain interpreters, and cancellation of removal.

E3. Family Based Immigration in the Context of Abusive International Marriages and Termination of Marriage

As noted previously, many applications for immigration status are based on a legal family relationship. Approximately half of family-based applications for LPR status are based on a spousal relationship. To immigrate based on the marital relationship, the marriage must be valid under the law of the state or country, and in addition, valid under immigration law. If a state court declares a marriage invalid or orders dissolution of a marriage (divorce), the immigration status of a spouse and/or children may be jeopardized. In addition, “good faith marriage” is important, because for a non-citizen to obtain lawful permanent residence through

his or her spouse, immigration law requires that the marriage not be entered into for the purpose of evading immigration law. INA §204(c); 8 U.S.C. §1154(c).

Petitions for declarations of invalidity, or annulments, generally have the same legal effect on immigration status as dissolutions of marriage or divorce. However, an annulment based on fraud might be problematic for a survivor who must prove a “good faith marriage.” It is not unusual for abusive spouses to seek annulments of marriage based on fraud, alleging that a non-citizen fraudulently induced them into marriage for immigration purposes.

E4. VAWA Protections

(a) VAWA Self-Petitioning Immigration Relief for Those Who Have Been Subjected to Spousal Abuse or Abuse by a Parent

This process applies to abused immigrants who are married to, or who are children of abusive U.S. citizens or lawful permanent residents. It allows immigrant victims of domestic violence to file their own petitions for lawful permanent residency without the cooperation of their abusive spouse, parent, or child. VAWA self-petitioning allows immigrant parents to file petitions for themselves and for their children if the children are abused.

Victims must show the following:

- Victim of domestic violence or child abuse
- Relationship with U.S. citizen or lawful permanent resident
- Where they reside and where the abuse takes place
- Good faith marriage (in cases where application based on marriage, i.e., they did not marry for the sole purpose of obtaining permanent resident status.)
- Good moral character

It is not necessary for a U.S. citizen or lawful permanent resident spouse or parent to have filed any paperwork previously. Immigrant parents of an abused child can also file for themselves and their children.

(b) Elements to be Proven

Domestic violence/abuse: The Department of Homeland Security (DHS) has interpreted abuse broadly, and has recognized sexual abuse, sexual assault, physical abuse, emotional abuse, mental abuse, financial abuse, or cruelty to constitute abuse. See, 8 C.F.R. §204.2(c)(vi).

There is no requirement that evidence of abuse must be in the form of police reports, medical records, court records, or child welfare intervention. However, while the abused spouse’s or child’s declaration attesting to the abuse is generally the primary form of evidence, other corroborating declarations would strengthen the self-petition.

Good faith marriage: To make this showing, the individual must provide evidence showing he or she lived in the same household as the abusive spouse, shared expenses or income, and/or shared family connections.

In addition, children who were not directly abused may qualify to be included in their parents' self-petition. If the child has a parent who was abused by the child's other parent (including stepparents) and the abusive parent is a U.S. citizen or permanent resident, then the abused parent can self-petition under VAWA, and the child derives the same immigration benefit and can also become a VAWA self-petitioner. In order to be included in an abused parent's VAWA self-petition, the child must be under age 21 at the time the abused parent submits a self-petition. As a general rule, VAWA self-petitioners must currently reside in the U.S. However, several important exceptions exist for self-petitioners residing outside the U.S. A spouse or child living outside the U.S. can self-petition if the abusive U.S. citizen parent is a U.S. government employee, a member of the uniformed services, or abused the child in the U.S. Thus, for example, a spouse who was abused by his or her U.S. citizen spouse who is stationed on a U.S. military base abroad would be eligible to self-petition.

Good moral character: The final eligibility requirement is that the person must be of "good moral character." All applicants 14 years of age or older must submit a local police clearance or state-issued criminal background check for every area in which they have lived for six or more months during the three years immediately preceding the filing of the self-petition. While there is no statutory definition of good moral character, there are actions that definitively bar someone from showing good moral character. When an abused spouse is involved in criminal proceedings, it is imperative that his or her attorney consults with an immigration expert immediately. Without appropriate counsel, the victim could admit to allegations that will make him or her ineligible for VAWA and lead to his or her deportation.

The approval of the VAWA self-petition is the first step for the individual to attain permanent residency. If the abusive spouse or parent is a U.S. citizen or was a U.S. citizen and lost citizenship due to a domestic abuse incident, then the individual can immediately apply for permanent residency. If the abusive spouse or parent is a permanent resident or was a permanent resident and was deported due to a domestic abuse incident, then the individual has to wait (sometimes many years because there is a cap on the number of people who can obtain permanent residence from each country), before applying for permanent residency. Permanent residency allows the child to remain in the U.S. indefinitely unless he or she commits acts that render him or her deportable or abandons his or her residency.

(c) VAWA Cancellation of Removal or Suspension of Deportation (cases pre-1997)

Spouse and children of abusive U.S. citizens or permanent residents who are placed in immigration removal or immigration deportation proceedings may be able to apply for a defense to deportation: VAWA cancellation of removal (formerly known as suspension of deportation). VAWA cancellation of removal is only available to those people on whom the DHS has already initiated removal proceedings.

In order to qualify for VAWA cancellation of removal, the petitioner must demonstrate that: (1) he or she has been abused by a U.S. citizen or permanent resident spouse or parent; (2) he or she has been physically present in the U.S. for a continuous period of at least three years immediately preceding the date of the cancellation application; he or she has been a person of good moral character during the three-year period; and (4) removal would result in extreme hardship to his or her children or his or her parent(s). In addition, the petitioner must not be inadmissible or deportable for various criminal reasons listed in INA §240A(b)(2)(A)(iv), 8 U.S.C. §1229B(b)(2)(A)(iv).^{xxiii}

Once a victim is granted VAWA cancellation of removal or suspension of deportation, he or she becomes a permanent resident.

E5. U-Visa: Battered Spouse Waivers | Humanitarian Protections in the Context of Abusive International Marriage

The battered spouse waiver is an immigration protection available for immigrant victims who have already obtained conditional residency (a conditional temporary 2-year green card), obtained through an application filed by their abusive citizen or legal resident spouse or parent. Normally, at the end of the two years that the individual has the conditional residence, the sponsoring spouse or parent must file a joint application to have the “condition” removed from the permanent resident status. In cases of abuse, a battered spouse can petition to have the conditions removed and have his or her conditional residency changed to permanent residency without his or her abuser’s knowledge or participation in the process.

The U-visa is a non-immigrant visa available to crime victims, including domestic violence, sexual assault, stalking, child abuse, and other crime victims who are willing to help law enforcement in a criminal investigation or prosecution. The U-visa is valid for three years, after which the U-visa holder can apply to become a LPR. To obtain the initial U-visa, there must be an investigation or prosecution conducted by a federal, state, or local law enforcement official, but there is no requirement that the investigation or prosecution result in a conviction. The law enforcement official must complete a form certifying that the individual was helpful in the investigation or prosecution of the criminal activity, to be submitted with the individual’s application. On the individual’s application, he or she needs to show that he or she suffered substantial physical or mental abuse as a result of having been a crime victim and that he or she possesses information concerning the criminal activity. If the victim is less than 16 years old, the latter requirement can be met by the victim’s parent, guardian, or other representative. The individual must show that he or she was the victim of one of the following crimes, or of attempt, conspiracy, or solicitation to commit one of the following crimes:

Abduction	Murder
Abusive sexual contact	Obstruction of justice
Being held hostage	Peonage
Blackmail	Perjury
Domestic Violence	Prostitution
Extortion	Rape
False imprisonment	Sexual assault
Felonious assault	Sexual exploitation
Female genital mutilation	Slave trade
Fraud in foreign labor contracting	Stalking
Incest	Torture
Involuntary servitude	Trafficking
Kidnapping	Unlawful criminal restraint
Manslaughter	Witness tampering

The crime must have occurred in the U.S. (including Indian country and military installations), territories, or possessions, or the crime must violate U.S. federal, state, or local law. This means that the crime must be one that a U.S. court has authority to prosecute. For example, under federal law a U.S. tourist who violates a federal sex tourism statute by sexually abusing

a child abroad can be prosecuted in U.S. federal courts and, therefore, if there is a victim of that crime, the victim, even if abroad, may be eligible for a U-visa.

Unlike in VAWA self-petition or cancellation of removal cases, the U-visa is not limited to victims who are abused by family members who have U.S. citizenship or LPR status. The U-visa is available to all victims, regardless of whether they were harmed by their spouses, in-laws, other relatives, boyfriends, girlfriends, or strangers, so long as the crime occurred in the U.S. or violated U.S. law. For many victims, the biggest hurdle to overcome in the U-visa application process is obtaining a certification from a law enforcement official, prosecutor, judge, immigration official, or other federal or state authority attesting that the individual is being, has been, or is likely to be helpful to a federal, state, or local criminal investigation or prosecution.

Once a victim is granted a U-visa, the victim's spouse and children, and if the victim is a minor, his or her parents and unmarried siblings under 18 can join him or her in the U.S., and after three years of U-visa non-immigrant status, the victim can apply for LPR status.

E6. T Visa

Similar to the U-visa, the T-visa is designed to advance two goals: (1) to provide protection to victims of serious crime; and (2) to assist U.S. law enforcement in investigating and prosecuting such crime. The T-visa is available to victims of a severe form of human trafficking, which is defined to cover victims who have been trafficked into the U.S. for labor or commercial sex purposes through force, fraud or coercion. In cases of individuals under age 18 who were involved in commercial sex acts, there is no requirement to show force, fraud, or coercion.

Victims must be willing to cooperate with the investigation or prosecution of the crime. Applicants less than 18 years old do not have to meet this cooperation requirement. The T-visa applicant must also show that he or she is physically present in the U.S., American Samoa, or the Commonwealth of the Northern Mariana Islands on account of human trafficking. Likewise, the child must show that he or she would suffer extreme hardship involving unusual and severe harm if deported from the U.S.

If granted, the immigrant victim will receive a legal immigration visa, access to public benefits, and work authorization, which may lead to lawful permanent residence. Once a victim is granted a T-visa, the victim's spouse and children, or if the victim is a minor, his or her parents and unmarried siblings younger than 18 can join him or her in the U.S.

E7. Special Immigrant Juvenile Status (SIJS)

SIJ status is an option for certain children who have been abused or neglected by their parents, whether inside or outside the U.S. SIJ status applicants must be under the jurisdiction of a juvenile court (for example, in child welfare proceedings or other juvenile court matters). For a child to be eligible for SIJ status, a juvenile court must have found that child to be a dependent of the court, and that it would be in the child's best interest to receive long-term foster care due to abuse, neglect or abandonment. The jurisdiction of juvenile courts varies from state to state, but many states limit jurisdiction to children less than 18 years of age.

In cases of children who have already been placed in immigration removal proceedings and are in the custody of the Office of Refugee Resettlement, the child's attorney must obtain advance consent from DHS to bring his or her case to juvenile court.

In addition, a SIJ status applicant must have been the subject of administrative or judicial proceedings in which it has been determined that it would not be in the child's best interest to be returned to his or her parents' previous country of nationality or country of last habitual residence. Once a child is granted SIJ status, he or she can immediately apply for permanent resident status. The child will not ever be able to file a family visa petition on behalf of his or her parents.

E8. Asylum

For an individual who suffered domestic abuse or sexual assault in his or her country of origin, asylum or withholding of removal may be an option for immigration status. Asylum law has similar origins to protections for refugees under international treaties. Applicants for asylum must show that they are unable or unwilling to return to their country of origin due to a well-founded fear of persecution on account of one of five grounds: race/ethnicity, religion, nationality, membership in a political social group, or political opinion. Many U.S. federal courts have recognized that domestic violence or sexual abuse constitutes persecution.

As a general rule, all asylum applicants need to file their applications within one year of first entering the U.S. Failure to meet this deadline will result in an automatic denial of the asylum claim, unless there have been (1) "extraordinary circumstances related to the delay in filing," or (2) "changed circumstances" (e.g. in the applicant's home country or in his or her membership in a particular social group) that materially affected the application for asylum.

Unlike VAWA relief and SIJ status, which are available only to those who are abused by family members, asylum is an immigration option available to those who have been assaulted by non-family members. Examples of asylum cases include women or children raped by the police, gay or lesbian victims raped by homophobic individuals, ethnic minorities raped by gangs, and indigenous children raped by the military.

It is not enough for a victim to show that he or she was sexually assaulted in his or her country of origin. In order to prevail in an asylum case, the individual must show that he or she was persecuted either by the government of his or her country of origin or by others whom the government was unable or unwilling to control. If the individual did not suffer persecution in the past, then he or she will need to show that he or she has a well-founded fear of being persecuted in the future if forced to return to his or her country of birth. Examples of persecution involving government officials include police, security forces, or military members. Examples of persecution where the state fails to control the persecutors include incidents where gangs, guerillas, militia members, or even spouses commit domestic violence or sexual assault.

In addition to the state action requirement, the asylum applicant must show that past persecution or well-founded fear of future persecution is on account of his or her race/ethnicity, religion, nationality, political opinion, or membership in a particular social group. It is not enough for someone to show that he or she was sexually assaulted by the police or military; she or he must also prove that he or she was targeted for persecution because of one of those five grounds. Proving the nexus element ("on account of") can be difficult for many survivors as they may not know or understand why they were persecuted. In addition, the

state action requirement and the nexus requirement may make asylum a difficult option for survivors of domestic violence by spouses or intimate partners. Many of these cases never come to the attention of state authorities, and thus the individual would have difficulty proving that the state failed to protect him or her from persecution.

CONCLUSION

As the number of Hmong American women grows in the United States, and with more and more Hmong American women speaking out against abusive international marriage, the demand on advocates to identify resources and provide assistance will increase. Being able to navigate survivors through the many legal systems implicated in these marital situations is a skill more and more advocates will need to develop. Much of the legal relief available in the U.S. court system was developed for survivors who voluntarily sought separation from their abusers. Advocates for survivors of abusive international marriages will need to be creative and nimble within a court structure that does not yet provide directed relief in cases of abusive international marriages.

However, advocates and survivors, working collectively, might be able to promote more narrowly tailored options for women, by educating communities and court systems about the realities of abusive international marriages and the clear gaps in necessary resources and services.

For technical assistance and training on these issues, programs and advocates are encouraged to contact the Asian Pacific Institute on Gender-Based Violence and/or Battered Women's Justice Project.

ⁱ See Jill Davies and Eleanor Lyon, *Domestic Violence Advocacy: Complex Lives, Difficult Choices*, Sage Publications (2013).

ⁱⁱ *Id.*

ⁱⁱⁱ Chic Dabby: Abusive International Marriages: Hmong Advocates Organizing in Wisconsin, Asian Pacific Institute on Gender-Based Violence (2012).

http://www.api-gbv.org/download/Abusive.International.Marriages_APIIDV_4.2013.pdf

^{iv} As noted earlier, this Guide is not intended to serve as full overview of domestic violence legal advocacy.

^v All family law information comes from *Black's Law Dictionary* or Kelly Weisberg, *Modern Family Law* (5th ed. 2013) unless otherwise noted.

^{vi} Minn. Stat. § 518.055.

^{vii} 24 Am. Jur. 2d Divorce and Separation § 174.

^{viii} *E.g.*, 750 Ill. Comp. Stat. § 5/405; Minn. Stat. § 518.13.

^{ix} *E.g.*, Minn. Stat. § 518B.01.

^x All criminal law information comes from *Black's Law Dictionary*, *The Model Penal Code* or Sanford H. Kadish, *Criminal Law and Its Processes* (9th ed. 2012) unless otherwise noted.

^{xi} *E.g.*, Minn. Stat. § 609.355; Wis. Stat. § 944.05.

^{xii} Sex Offender Registration, Westlaw's 50 State Regulatory Surveys, 0030 SURVEYS 23 (2014).

^{xiii} Domestic Violence, Westlaw's 50 State Statutory Surveys, 0030 SURVEYS 7 (2013).

^{xiv} Stalking, Westlaw's 50 State Statutory Surveys, 0030 SURVEYS 16 (2007).

^{xv} Minn. Stat. § 609.749.

^{xvi} Protective Orders, Westlaw's 50 State Statutory Surveys, 0080 SURVEYS 19 (2007).

^{xvii} *E.g.*, N.J. Stat. § 2C:13-8; VT Stat. § 2653; N.D. Stat. §12.1-40-01.

^{xviii} *E.g.*, Oregon Stat. § 163.257; WA Code § 9A.40.060; Minn. Stat. § 609.26.

^{xix} *E.g.*, Cal. Penal Code § 261.5, 270-271, 273a, 273d, 286, 288-289; Minn. Stat. § 609.223, 609.341-.346, 609.377-.378, 260C.007; N.Y. Penal Law § 120.40-.96, 120.02, 260.00-10, 120.05(8)-(9)

^{xx} Black's Law Dictionary.

^{xxi} Mandatory Child Abuse Reporting, Westlaw's 50 State Statutory Surveys, 0030 SURVEYS 13 (2013).

^{xxii} 2014 Yearbook of Immigration Statistics, found at

https://www.dhs.gov/sites/default/files/publications/ois_yb_2014.pdf

^{xxiii} INA 212(a)(2) or 212(a)(3); 237(a)(1)(G), 237(a)(2), 237(a)(3), or 237(a)(4), 237(a)(7)