

# The Illusion of Transformative Conflict Resolution: Mediating Domestic Violence in Nicaragua

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## INTRODUCTION

In November 2006, Sandinista leader and former Nicaraguan president Daniel Ortega was re-elected to the Nicaraguan presidency after nearly two decades of trying to regain power.<sup>1</sup> In the interim period while he was out of office, Nicaragua was transformed from a decade-long socialist democracy into a government with a strong neoliberal political and social agenda. This period experienced the transition of the Nicaraguan judicial system from an inquisitorial to an adversarial model that

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1. See Mark Engler, *The Return of Daniel Ortega*, NATION, Nov. 7, 2006, <http://www.thenation.com/doc/20061120/ortega>.

included U.S.-style dispute resolution.<sup>2</sup> This transition re-privatized and individualized conflict in areas such as domestic violence, which feminists had claimed as public and institutional. The change forced feminist, religious and community organizations of the Sandinista era to re-evaluate their direction. It also provided some hope in challenging the ineffectiveness of the adversarial model to eradicate domestic violence. The rhetoric of personal and societal transformation beyond conflict had tremendous appeal after decades of war, especially among feminists and Sandinista activists. The current state of access to justice and mediation efforts in Nicaragua in domestic violence cases provide an apt focus for analyzing the transformation of the country's social, cultural, and religious constituencies. The re-election of Daniel Ortega further provides the opportunity to examine whether the mediation of domestic violence in Nicaragua could also be re-infused with a public, institutional, and structural character as Nicaragua transitions into a new phase. Mediation may indeed represent an opportunity to bridge the gap in Nicaragua between approaches that are, on the one hand, public, structural, and socialist, and on the other, private, individualized, and neoliberal.

In the United States, the mediation of domestic violence cases began at least three decades before its introduction in Nicaragua. Even today, there are contradictory positions about the advisability of mediating cases involving domestic violence. Some scholars vehemently oppose its use based on concerns that informality and neutrality exacerbates power imbalances between perpetrator and victim,<sup>3</sup> or that mediation wrongfully presupposes that domestic violence is about conflict rather than control.<sup>4</sup> Despite this opposition, the reality is that domestic violence is mediated in the context of family court disputes, including divorce and

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2. See Richard J. Wilson, *Criminal Justice in Revolutionary Nicaragua: Intimations of the Adversarial in Socialist and Civil Law Traditions*, 23 U. MIAMI INTER-AM. L. REV. 269, 377 (1992).

3. See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992) (explaining how mediation returns men to their dominant position); Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1568-69 (1991).

4. See Karla Fischer, Neil Vidmar & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2118 (1993).

custody proceedings across the country.<sup>5</sup> Even those scholars who otherwise condone mediating some domestic violence cases that do not rise to the level of serious abuse criticize the implementation of mediation due to process and neutrality concerns.<sup>6</sup> This debate has not yet occurred in Nicaragua, where mediation is implemented and applied to domestic violence cases relying on the neutral third-party observer model without substantial discussion of its potential dangers or process concerns.

In this Article we examine the implementation of mediation in domestic violence cases in Nicaragua as a case study of the transnational movement of alternative conflict resolution as part of rule of law reforms across the world. Unlike scholarship about mediation in the United States, the effects of mediation's global implementation are undertheorized. Some scholars have examined its implementation in third world countries and have voiced critiques similar to those raised in the United States.<sup>7</sup> Others have addressed transnationalization of domestic

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5. See Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, 95 (2001) (citing a National Center for State Courts study demonstrating the "growth and popularity" of mediation in the state courts, particularly in family law).

6. See, e.g., *id.* (critiquing process dangers of mediating domestic violence cases and proposing safeguards for a safer mediation process); Desmond Ellis & Noreen Stuckless, *Domestic Violence, DOVE, and Divorce Mediation*, 44 FAM. CT. REV. 658 (2006) (addressing problems with screening risk assessment mechanisms in domestic violence mediation cases); Jane C. Murphy & Robert Rubinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53 (2005) (examining ways to improve procedures for the effective mediation of certain cases involving domestic violence); Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003) (arguing for the mediation of domestic violence on a case-by-case basis).

7. See, e.g., LAURA NADER, *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE* 307 (1990). But see Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295 (2006) (arguing that local adaptation of mediation does not always yield the same concerns raised against mediation such as privatization of conflict or power imbalances); Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569, 590-91 (2007) (arguing that in some cases developing countries' use of mediation has improved access to and the quality of local justice).

violence movements in developing countries.<sup>8</sup> Still others have discussed the challenges to implementing Western-style mediation in different cultural contexts.<sup>9</sup> This Article builds upon each of these critiques and analyses to examine the importation of U.S.-style mediation and its implementation in domestic violence situations in developing countries such as Nicaragua, where traditional legal systems are weaker than those institutionalized in the United States.

We undertake this examination of the implementation of mediation processes in Nicaragua at its early stages. We fully expect that cultural and societal forces in Nicaragua will produce an evolved mediation process that reflects the local reality. As this evolution occurs, we write this analysis in order to share with Nicaraguans who practice mediation the learned experiences of feminists and rights advocates in the United States who have identified and improved upon the deficiencies of the traditional mediation models.

In this Article, we focus on the ways that rural Nicaraguans implement mediation to address domestic violence. In particular, we evaluate mediation as applied in Mulukukú, an isolated community in the rural north central part of the country. An important Sandinista feminist cooperative, the Maria Luisa Ortiz Cooperative and Women's Center,<sup>10</sup> convinced the Nicaraguan Supreme Court to establish a mediation center in Mulukukú as a pilot site in a national project known as CAMINOS, with funding from the Inter-American Development Bank (IDB) and United States Agency for International Development (USAID).<sup>11</sup> The Mediation Center, which opened in early

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8. See, e.g., Sally Engle Merry, *Rights, Religion, and Community: Approaches to Violence Against Women in the Context of Globalization*, 35 *LAW & SOC'Y REV.* 39 (2001) (demonstrating how globalization allows differences on the basis of religion and culture while promoting similarities in techniques of fashioning the self).

9. See, e.g., Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 *UCLA L. REV.* 1 (1999) (discussing informal adjudication methods used by the Navajo); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 *WIS. L. REV.* 1359 (examining the potential for alternative dispute resolution to increase racial and ethnic bias).

10. Maria Luisa Ortiz Cooperative and Women's Center, <http://www.peacehost.net/Dorothy/Mulukuku/> (last visited Sept. 22, 2007).

11. CORTE SUPREMA DE JUSTICIA, PROYECTO ACCESO A LA JUSTICIA Y ATENCIÓN

2006, began to function in Mulukukú in the absence of a formal judicial system. What had existed until then was a very inconsistent and intermittent presence of the criminal justice system to deal with a few criminal matters, including ones involving domestic violence, the latter at the persistence and direct involvement of the Cooperative.

We have visited Managua and Mulukukú three times for a total of twenty-five days, first in August 2005, then in July 2006, and finally in July 2007, to work with the Cooperative to evaluate the application of mediation to domestic violence cases. During our visits, we interviewed more than twenty key players on issues of domestic violence and mediation in Nicaragua and Mulukukú, including government officials charged with implementing the Mediation Center;<sup>12</sup> university clinic faculty who mediate cases of domestic violence in Nicaragua;<sup>13</sup> several women who have worked for decades in the women's rights movement in Nicaragua in government or in women's non-governmental groups;<sup>14</sup> members of the Cooperative involved with domestic violence victims as lawyers, psychologists, social workers, or nurses; several trained mediators who mediate cases at the Mediation Center, including its current director; and several religious leaders of Mulukukú.<sup>15</sup> We were also present in Mulukukú when the Supreme Court conducted its first forty-hour mediation training to community leaders in August 2005, and

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AL USUARIO CENTROS DE ATENCIÓN, MEDIACIÓN, INFORMACIÓN Y ORENTACIÓN [CAMINOS], DISEÑO PEDAGÓGICO PARA LA FORMACIÓN DE MEDIADORES Y MEDIADORAS COMUNITARIOS (2004) (Nicar.) (copy on file with authors) [hereinafter CAMINOS PROPOSAL].

12. For example, on August 5, 2005, we interviewed Angela Rosa Acevedo, Director of CAMINOS, and Dr. Alba Luz Ramos, former President and current Justice of the Nicaraguan Supreme Court, who spearheaded the mediation project and has worked to improve the treatment of women by judges.

13. Interview with Fabiola Peña, Supervising Attorney, Clinical Program of the Univ. of Cent. Am., in Managua, Nicar. (Aug. 8, 2005); Interview with Dr. Luis Morales Parajón, Dir. of Mediation Ctr., Autonomous Univ. of Nicar., in León, Nicar. (July 10, 2007).

14. Among them were Juanita Jimenez, long-time feminist activist and current attorney and Lobbying Director of the National Women's Network Against Violence, interviewed on August 4, 2005, and the members of Grupo Venancia in Matagalpa, a not-for-profit working on reproductive rights and issues of intra-family violence, interviewed on August 6, 2005.

15. See *infra* Part II for a discussion of the key players of mediation in Mulukukú.

interviewed the trainers and a few of the trainees.

Mulukukú, which is less than a decade old, lacked the organic, indigenous dispute resolution model of other indigenous rural communities of Nicaragua when the Mediation Center opened. Still, the Cooperative and religious organizations conducted their own forms of dispute resolution, even if they did not call their practice mediation.<sup>16</sup> The CAMINOS programs did not consider these dispute resolution methods as possible models for the Mediation Center. Instead, the Mediation Center model was less organic or indigenous, and more the result of a combination of transnational forces converging with the practical necessity for a legitimate dispute resolution model.<sup>17</sup> Consequently, the community members were formally trained and counseled about the general superiority of the traditional United States neutral mediator model. The training, in fact, was almost identical to the training for small claims or community mediation in the United States,<sup>18</sup> except that mock cases used to simulate mediations dealt with serious domestic violence disputes or institutional violence.

The Mulukukú mediation experiment brings together the most unlikely players—Sandinista feminists, religious leaders, and rule-of-law reformists. As such, the Mulukukú mediation project is a concrete manifestation of what anthropologist Sally Engle Merry has identified as a transnational global movement that brings together feminists, rule-of-law reformers, restorative justice advocates, and Christians, despite their strong ideological differences and motivations.<sup>19</sup> Mulukukú is a fractured society inhabited by both former Sandinista and Contra combatants and their families, all of whom settled there for war-related reasons. Moreover, while the Cooperative has

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16. See *infra* Part II.

17. CORTE SUPREMA DE JUSTICIA, REGLAMENTO PARA LA OPERACION DE LOS CAMINO's 3 (2004) [hereinafter CAMINOS MANUAL].

18. See generally Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid Systems*, 79 NOTRE DAME L. REV. 1 (2003) (discussing various models of United States mediation and its effect on training).

19. See Merry, *supra* note 8 (examining three different approaches to domestic violence in one Hawaiian town based on rights, religion, and community).

had, from the inception of the Mediation Center, a significant presence and influence, it has also invited other community leaders, including evangelical and Catholic leaders, to be among twenty-five mediators trained by the Nicaraguan Supreme Court. As a result, leaders with strong Sandinista and neoliberal ideological leanings, as well as with divergent religious traditions, came together to establish and participate in the Mediation Center.

As Merry explains, the unifying rhetoric among the various players in the transnational arena emphasizes helping people make choices and holding them accountable; helping people identify and control their feelings; encouraging personal growth (i.e., self esteem or empathy) for those who batter as well as for victims; and promoting peaceful resolution to conflict.<sup>20</sup> To the feminist community in Nicaragua, the appeal of the rhetoric is born out of frustration over the inaccessibility and overall ineffectiveness of the criminal justice system to deal with the root causes of violence, particularly in a post-conflict society where domestic violence is rampant. To the Christian and restorative justice community, the rhetoric appeals to the message of personal salvation and individual transformation. To the rule-of-law reformists, the rhetoric presents an ideal solution to persistent social conflict and the growing backlog, ineffectiveness, or absence of a formal justice process.

In this Article, we reflect upon the community motivations and external influences bringing mediation to Mulukukú. We analyze these issues in order to foster a better understanding of how such a community can more effectively own and implement its dispute resolution processes. We argue in this Article that Mulukukú's mediation experience suffers from many pitfalls, both in its conception and as implemented. At the same time, we believe that the model may provide a vehicle that can incorporate the community's already-existing informal mediation methods. With that goal in mind, we identify three concerns.

First, we question the assumptions behind the rhetoric, or the illusion of transformation, that attaches to claims of transcendence of the victim and perpetrator of domestic

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20. *Id.* at 39.

violence alike from their cycle of violence. The claim of personal transformation is questionable considering that the rhetoric of transformative mediation is not applied with the appropriate model, at least as the model has been advanced by proponents such as Robert A. Bush and Joseph Folger.<sup>21</sup> Second, we are concerned, as are many feminists, that both the harmony ideology and the procedural informality that accompany mediation will have adverse consequences on the individual victims of domestic violence, and could even aggravate their victimization. Third, we are deeply concerned that an ideology of transformation through individual reform can be devastating to the collective ideal that the Sandinista Revolution aspired to disseminate. More specifically, we are interested in exploring potential tensions between a mediation model that emphasizes individualized resolutions and the Sandinista legacy of structural responses to social issues. Interestingly, during the mediation training that we observed, while the rhetoric of structural violence was certainly present, we witnessed how it completely disappeared during the mock mediation process, whose focus was on the individuals and whose purpose was to find a simple resolution to rather complex issues. We explore the implications of this dichotomy on the implementation of a successful Nicaraguan mediation program.

In Part I, we discuss the transnational movement of gender violence prevention as well as the feminist movement in Nicaragua during and after the Sandinista revolution, to contextualize the introduction of mediation in Nicaragua. In Part II, we focus on the players at the local level, their motivations, and their role in the implementation of the Nicaraguan mediation model as they have interpreted it. In Part III, we provide Nicaraguans with a survey of analysis and critiques of mediation in domestic violence cases in the United States and elsewhere. Finally in Part IV, we offer several prescriptions to Nicaraguans based on our observations of what is occurring there. We offer insights gleaned from the experiences of domestic violence victim advocates in the United States and other parts of the world. Principally, we aim to inform Nicaraguans about how best to own and adapt mediation to

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21. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 41-84 (rev. ed. 2005).



their cultural and societal needs. This exploration is particularly timely given the increasing skepticism of the transformation claims surrounding mediation and the growing realization at the practice level in Nicaragua that mediation in domestic violence cases carries potential dangers to victims.

## I. DOMESTIC VIOLENCE IN ITS GLOBAL AND NATIONAL CONTEXT

### A. *A Transnational Movement of Preventing Violence Against Women*

Transnational movements affect how local communities deal with social issues such as domestic violence. The domestic violence movement around the world has experienced a convergence of ideas, all with the goal of eradicating intra-family violence. The explanations for violence and proposed eradication strategies differ. The degree of influence by transnational movements and local adaptation of strategies also differ from community to community. Advocates throughout Nicaragua have utilized eradication strategies from three major transnational movements. These movements were also the principal factors shaping mediation activity in Mulukukú.

1. *The Principal Players: Global Feminism.* In Europe and the United States, and increasingly throughout the Third World, feminists have advocated for the treatment of domestic violence as a crime that requires state intervention.<sup>22</sup> This rights-based approach to domestic violence seeks increased regulation of what were historically considered private affairs. As Merry describes, “[u]sing the notion of the personal as political, feminists struggled to extract this form of violence from its protected space in the family and open it to public scrutiny as a crime warranting the intervention of the state.”<sup>23</sup>

The global feminist movement encourages women to

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22. See Merry, *supra* note 8, at 39.

23. *Id.* at 50 (citing Elizabeth Schneider, *The Violence of Privacy, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE*, 36 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994)).

advocate for the right not to be hit.<sup>24</sup> It prioritizes women's safety and equality among the sexes.<sup>25</sup> Women who fear continued violence are urged to separate from their spouses.<sup>26</sup> The movement identifies domestic violence as one symptom of women's overall subordination.<sup>27</sup> To that end, criminalization efforts have been encouraged in order to move the discourse about domestic violence from the private to the public realm.<sup>28</sup>

Unfortunately, the criminalization of domestic violence, by itself, has proven a limited tool. As Merry noted in her research on domestic violence programs in Hawaii:

[T]he law offers feminist activists only a blunt and imperfect weapon to protect women from violence. It renders men more subject to surveillance and punishment for violence against their partners than they have been in the past. It articulates a world in which violence is not the lot of women in relationships with men and provides women a place to turn for help. . . . However, . . . men resist these new images of masculinity and slip out from under the law's scrutiny. The program encourages women to take control over their lives, but is unable to provide them the material means to assert this control. Legal intervention is directed toward gender inequality, but it does not address the class and racial inequalities which constrain the lives of the women and the men who batter them.<sup>29</sup>

Thus, as the feminist movement has evolved, it has moved its focus toward changing men's attitudes in gender relationships.<sup>30</sup> It has attributed men's behavior and actions to low self-esteem and has begun to help men change violent behavior through therapeutic means.<sup>31</sup> In therapy, men are encouraged to treat their spouses as

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24. *See id.* at 39.

25. *See id.* at 51.

26. *See id.* at 41.

27. *See id.* at 49-50.

28. *See id.* at 50; *see also* Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 985-86 (1991).

29. Sally Engle Merry, *Gender Violence and Legally Engendered Selves*, 2 IDENTITIES 49, 51 (1995).

30. *See id.* at 53.

31. *See id.* at 58-62.

equals and to resolve conflict through negotiation.<sup>32</sup> Women's movement activity in Nicaragua reflects this shift in strategy.<sup>33</sup>

2. *Global Evangelism.* Evangelism is probably the most significant religious movement in the world today, including in Latin America, with a growth of approximately twenty million members a year worldwide.<sup>34</sup> Much of this growth has been the result of missions, mostly from the United States, but also from Europe.<sup>35</sup> This mostly-conservative church movement is, in important aspects, a foil to a rights-based approach to domestic violence.<sup>36</sup> Evangelical churches do not condone domestic violence; indeed, they consider it a sin.<sup>37</sup> However, the response to domestic violence favors a process of family transformation through divine rather than state intervention. Women are taught and encouraged to respond to violence with prayer and with gentle words.<sup>38</sup> Domestic violence is addressed through pastoral counseling, with a goal of reconciliation rather than separation.<sup>39</sup> As Merry describes it:

The counselor may meet with the wife and pray for the husband to

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32. *See id.* at 58.

33. *See infra* Part II.

34. *See* Anne Motley Hallum, *Taking Stock and Building Bridges: Feminism, Women's Movements, and Pentecostalism in Latin America*, 38 *LATIN AM. RES. REV.* 169, 171 (2003) (quoting HARVEY COX, *FIRE FROM HEAVEN: THE RISE OF PENTECOSTAL SPIRITUALITY AND THE RESHAPING OF RELIGION IN THE TWENTY-FIRST CENTURY*, at xv (1995)).

35. *See, e.g.*, RONNIE KAHN, *CTR. FOR LATIN AM. & CARIBBEAN STUDIES, UNIV. OF ILL. URBANA-CHAMPAIGN, RELIGION AND POLITICS IN LATIN AMERICA* (Spring 2002), [www.clacs.uiuc.edu/outreach/k12/teaching/religion/](http://www.clacs.uiuc.edu/outreach/k12/teaching/religion/).

36. In Nicaragua especially, evangelicals were not uniformly conservative and, indeed, some actively supported the revolutionary politics during Sandinismo. *See, e.g.*, MICHAEL DODSON & LAURA NUZZI O'SHAUGHNESSY, *NICARAGUA'S OTHER REVOLUTION: RELIGIOUS FAITH AND POLITICAL STRUGGLE* (1990) (discussing the intersection of religious renewal and political change in Nicaragua); Christian Smith & Liesl Ann Haas, *Revolutionary Evangelicals in Nicaragua: Political Opportunity, Class Interests, and Religious Identity*, 36 *J. FOR SCI. STUD. RELIGION* 440 (1997) (describing political attitudes of Nicaraguan evangelicals).

37. *See generally* *VIOLENCE AGAINST WOMEN AND CHILDREN: A CHRISTIAN THEOLOGICAL SOURCEBOOK* (Carol J. Adams & Marie M. Fortune eds., 1995).

38. *See Merry, supra* note 8, at 41.

39. *Id.* at 66.

be saved, for God to soften his heart, and for God to deliver him from the spirit of violence. . . . The Pentecostal counselor encourages a person to explore hurts in childhood and to forgive and let go of anger and those hurts.<sup>40</sup>

This model embraces anger management programs, focusing on men's choice to let go of their demons.<sup>41</sup> Just as with the feminist movement, evangelical eradication programs try to change men's behaviors. While the feminist movement attributes men's behavior to patriarchal systems, the evangelical movement attributes such behavior to demonic strongholds.<sup>42</sup> Both seek transformation in behavior, albeit with different approaches and, at times, different goals.

3. *The Rule-of-Law Reformers.* Liberalized economic policies and the importation of goods and services into developing nations yielded rule-of-law reforms ostensibly to promote greater transparency, access, and reliability of these nations' justice systems.<sup>43</sup> The rule-of-law reformers are represented mostly by funders, either from multilateral institutions, like the World Bank and the Inter-American Development Bank, or from individual government agencies, including USAID. These institutions believe that exportation of a mostly-U.S. model of justice is the best way of improving developing nations' legal institutions.<sup>44</sup> In Nicaragua, for example, the rule-of-law reform movement promoted the shift from the inquisitorial to the adversarial model in the 1990s and advocated for an increasing reliance on alternative dispute resolution (ADR) methods, including mediation.<sup>45</sup>

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40. *Id.*

41. *Id.* at 67.

42. *Id.* at 66.

43. See CTR. FOR DEMOCRACY & GOVERNANCE, ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS' GUIDE 1 (1998), available at [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacb895.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb895.pdf) [hereinafter ADR PRACTITIONERS' GUIDE].

44. David M. Trubek, *The "Rule of Law" in Development Assistance: Past, Present, and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, 74 (David M. Trubek & Alvaro Santos eds., 2006).

45. For a description of USAID's efforts to promote ADR in developing countries, see ADR PRACTITIONERS' GUIDE, *supra* note 43, at 1.

For example, in 2000, the Nicaragua Supreme Court established the Alternative Conflict Resolution Center, which initiated a pilot mediation program as part of overall civil court system reforms in Managua.<sup>46</sup> The pilot program mediated disputes referred by the civil district judges in Managua, as well as property disputes arising out of the Agrarian and Land Reform Acts in Nicaragua.<sup>47</sup> Subsequently, the Inter-American Development Bank (IDB) and USAID partnered with the Nicaraguan Supreme Court to fund the implementation of the nationwide mediation program in Nicaragua. In addition, several national institutions have supported the development of this mediation model in Nicaragua. They include the University of Nicaragua, the Polytechnic University of Nicaragua, the Nicaraguan Judicial College, and the Catholic Church (which has established peace commissions that mediate disputes throughout the country).<sup>48</sup> The impetus for the introduction of alternative dispute mechanisms in Central America, according to a recent IDB report, included the creation of effective mechanisms for the resolution of commercial disputes, given that deficiencies in the judicial systems had become an obstacle to investment.<sup>49</sup>

The Alternative Conflict Resolution Center implemented a hybrid form of mediation/negotiation, modeled after the Harvard negotiation model and the transformative conflict resolution model.<sup>50</sup> The Harvard negotiation model is based on conflict resolution with a focus on interests and collaboration.<sup>51</sup> The transformative conflict resolution model is based on the premise that humans have the capacity to transform themselves and their environment.<sup>52</sup>

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46. BRUNO MAURICIO GALLARDO PALAVICCINE, *MEDIACIÓN TRANSFORMADORA / NEGOCIACIÓN COLABORATIVA: UN CAMBIO DE PARADIGMA* 24-25 (2004).

47. *Id.* at 25-26.

48. *Id.* at 28.

49. INTER-AMERICAN DEVELOPMENT BANK, *AN ENDURING PARTNERSHIP FOR DEVELOPMENT: CENTRAL AMERICA AND THE IDB SINCE 1990*, at 15-16 (William R. Large ed., 2005), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=617224>.

50. PALAVICCINE, *supra* note 46, at 27.

51. See ROGER FISHER, BRUCE M. PATTON & WILLIAM L. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Penguin Books 2d ed. 1991) (1981).

52. See BUSH & FOLGER, *supra* note 21, at 65-72.

This individual change philosophy is reflected in the mediation process, which itself promotes tolerance and nonviolence.

In addition, in many of the pilot communities, pre-existing indigenous conflict resolution helped CAMINOS determine what types of cases would be suitable for mediation. The Supreme Court's initial assessment revealed that the eastern part of the country, populated mostly by indigenous Miskitos, had the least access to the courts.<sup>53</sup> Problems included distance, lack of resources for public legal enforcement mechanisms, and a general distrust among the Miskito population of official government agencies. As a result of its study, the Supreme Court established a pilot mediation program in the Miskito region. The areas chosen for implementation of the mediation program are five towns in the Miskito region of Nicaragua: Rama Cay, Orinoco, Auya Pihni, Kururia, and Mulukukú.<sup>54</sup> Mulukukú is the only town that does not have an indigenous identity. In the other pilot communities, the mediation program incorporated traditional elements of indigenous conflict resolution methods that already existed among Miskito communities in Nicaragua. Broadly speaking, the consensus was to include small private disputes as between neighbors, family members, and employers, but to exclude those serious enough to be considered crimes.<sup>55</sup> The latter included, for example, disputes involving serious physical harm, unless the matter could be categorized as a domestic dispute.<sup>56</sup> As to process, funding resources dictated that traditional U.S.-style mediation be applied to resolve small claims and community disputes.<sup>57</sup>

4. *Characteristics of the Global Movement to Protect Women: The Message and the Rhetoric.* The global movements described above, despite overt differences, converge in their transformation rhetoric. Each movement seeks to change the attitudes of the battered and the

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53. CAMINOS MANUAL, *supra* note 17, at 3.

54. *Id.*

55. See CAMINOS PROPOSAL, *supra* note 11, at 33.

56. *Id.*

57. *Id.*

57. *Id.* at 3-6.

batterer, albeit with different approaches and, at times, different philosophies. The feminist transformation rhetoric focuses on women's self-empowerment and men's transformation through an understanding of subordination patterns. On the other hand, evangelical transformation rhetoric asks God to save batterers from destructive behaviors that lead to domestic violence and family separation. In the rule-of-law movement, transformation rhetoric emphasizes forgiveness and the reconnection of the individual to family in the hope of broader community conflict resolution.

The transformation rhetoric of each transnational movement has influenced the introduction of mediation in Nicaragua, including in Mulukukú.<sup>58</sup> Mulukukú residents expressed hope that a mediation program would replace the violence that historically characterized conflict resolution. In turn, each movement has been uniquely affected by historical events in Nicaragua, including the Sandinista revolution, the Contra war, and the development of post-war neoliberal government policies. This convergence of the transnational and the local is particularly reflected in the social movements, such as among the Sandinista feminists and in Nicaraguan churches.

## B. *Women's Rights in Nicaragua and the Criminalization of Domestic Violence*

### 1. *The Role of the Women's Movement During and Post-Sandinista Nicaragua.*

a. *Feminist Movement Trajectory in the Sandinista Period.* Early in the Sandinista regime, the women's movement—in the form of Asociación de Mujeres Nicaragüenses Luisa Amanda Espinoza (AMNLAE), the Sandinista women's organization—scored huge victories for women in the policy and legislative arenas. Among legislative highlights: the portrayal of women as sex objects in advertising was banned; prostitution was curbed; legislation eliminated the distinctions between children of married and unmarried couples; adoption law made it possible for single women to adopt children; the legislature

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58. See *infra* Part III.

passed a series of laws ensuring equality of the sexes; the labor code was modified to end the family wage (under which the male head of the family received a single wage for the work of his family); and the notion of shared custody was introduced into the family code.<sup>59</sup> Each of these reforms had the goal of encouraging equality between the sexes, at least economically. The Sandinistas and their feminist organization counterparts believed that dismantling economic barriers and class inequities first would eventually end women's subordination.<sup>60</sup> This was a political strategy that fit the broader socialist perspective of the Sandinista government.

Faith in the power of the collective to resolve societal problems was an identifying characteristic of the Sandinista revolution. This collective spirit infused community movements, including the feminist movement. As a result, women were allowed to take leadership roles on all levels of decisionmaking in political, civic, and economic arenas. Sandinistas encouraged the participation of women at all levels of public life, and this opening created the possibility for women to empower themselves in their private lives.<sup>61</sup>

While the women's movement made great strides in women's participation in the political, legal, and social spheres, the Sandinista regime was less successful at diminishing the effects of machismo on the culture. As one researcher noted:

[F]ew explicit efforts were made to transform discriminatory laws and policies, or to challenge the cultural norms that tolerate or even encourage violence against women. Issues such as sexual and reproductive rights or domestic violence were largely dismissed as "feminist concerns" which were not relevant to the great majority of Nicaraguan women.<sup>62</sup>

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59. KAREN KAMPWIRTH, *FEMINISM AND THE LEGACY OF REVOLUTION: NICARAGUA, EL SALVADOR, CHIAPAS* 22-23 (2004).

60. These efforts were precursors to the splintered and diverse autonomous organizations that emerged after the Sandinista defeat. See FLORENCE E. BABB, *AFTER REVOLUTION: MAPPING GENDER AND CULTURAL POLITICS IN NEOLIBERAL NICARAGUA* 25 (2001); KAMPWIRTH, *supra* note 59, at 35-36.

61. See KAMPWIRTH, *supra* note 59, at 26.

62. Mary Ellsberg, Rodolfo Peña, Andrés Herrera, Jerker Liljestrand & Ann Winkvist, *Candies in Hell: Women's Experiences of Violence in Nicaragua*, 51 *SOC. SCI. & MED.* 1595, 1606 (2000).



In fact, the Sandinista focus on class struggle relegated women's issues to secondary priority. The feminist agenda was not fully embraced by the Sandinistas for a variety of reasons, not the least of which was a war that forced the government's focus away from what it considered controversial issues. Differences arose between those who supported the hierarchical Sandinista structure and subsumed the women's agenda to the broader wartime effort, and those who carried out women's agendas through subdivisions of other Sandinista unions and organizations for urban professionals, teachers, and health care workers.<sup>63</sup> In addition, women's advocacy for reproductive rights was thwarted by Sandinista efforts to court the Catholic Church.<sup>64</sup>

A number of women's organizations exist today in Nicaragua in large part because of the Sandinista legacy of mobilization and mass participation.<sup>65</sup> The Sandinistas created a "culture of organization" that remains its legacy today.<sup>66</sup> The legacy of organizing has created the space for women's organizations to publicize and advocate for societal change for women in broader society:

In the contemporary women's movements of Nicaragua, women's autonomous organizing has brought issues to the surface that were repressed or ignored under the Sandinistas: sexuality; reproductive rights; public denunciation of domestic violence, sexual abuse, harassment of women on the job and all forms of sexual violence; the decriminalization of abortion; men's participation in reproductive labor; and men's cultural attitudes toward women.<sup>67</sup>

b. *Role of the Feminist Movement in the Post-Sandinista Fight for Equality.* While the Sandinista regime allowed for the proliferation of women's organizations and the involvement of women in all spheres of political, social,

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63. KAMPWIRTH, *supra* note 59, at 30-35.

64. *Id.* at 44-46.

65. See Jennifer Leigh Disney, *Democratization, Civil Society, and Women's Organizing in Post-Revolutionary Mozambique and Nicaragua*, 25 NEW POL. SCI. 533, 535, 549-50 (2003).

66. *Id.* at 554 (quoting from a January 14, 2000 interview with Zoilamérica Narvaez).

67. *Id.* at 535.

and economic life, the women's movement did not become an independent and autonomous force until after the Sandinistas lost the presidency in 1990.<sup>68</sup> Over time, the women's movement transformed from an anti-dictatorial, to a nationalist, and most recently to an independent set of organizations.<sup>69</sup> One Nicaraguan feminist noted that "[t]en years after AMNLAE was hegemonic during the '80s, today it is just one movement more within the broad spectrum of the women's movement. The autonomous movement is now about 300 groups organized in the country."<sup>70</sup>

During the 1990s, following the pattern evident in other Latin American countries, women's movements had a place in the political and social discourse around issues such as health, intra-family violence, gay and lesbian rights, the environment, and the economy.<sup>71</sup> This women's movement had not just a feminist perspective, but one infused with the experiences and history of revolutionary practice. As one observer at an early 1990s women's conference noted:

Whether examining the effects of the economic crisis on their lives or the increasing reports of violence against women, they traced the problems over the last decade or more and sought to find connections among many apparently disparate questions. For example, in the working group on the economy, women spoke about the psychological cost of the economic crisis, especially for women and children. At a plenary session, the group considering violence against women was called on to expand their notion of violence to include the stress experienced by mothers of heroes and martyrs of the revolution.<sup>72</sup>

Thus, in the early 1990s, Nicaragua's feminist groups formed the national Feminist Collective to channel efforts to eliminate discrimination and sexism reflected in policy and legislation. The Collective's efforts paved the way for

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68. *Id.* at 534.

69. *Id.* at 557.

70. *Id.* (quoting from a January 25, 2000 interview with Sofia Montenegro, former chief of the Sandinista daily paper, LA BARRICADA).

71. KAMPWIRTH, *supra* note 59, at 25; *see also* Nancy Saporta Sternbach, Marysa Navarro-Aranguren, Patricia Chuchryk & Sonia E. Alvarez, *Feminisms in Latin America: From Bogotá to San Bernardo*, in *THE MAKING OF SOCIAL MOVEMENTS IN LATIN AMERICA* 207 (Arturo Escobar & Sonia E. Alvarez eds., 1992).

72. KAMPWIRTH, *supra* note 59, at 39.

the formation of several women's groups throughout the country, focusing on local efforts to eliminate violence against women, and to promote health and reproductive rights.<sup>73</sup>

Part of the impetus for the rise of post-Sandinista feminism was President Violeta Chamorro's anti-feminist policy agenda.<sup>74</sup> The women's movement had to confront the ways in which "gains made by women under the Sandinista government [were] being recast as destructive of the family . . . ."<sup>75</sup> Chamorro's agenda, consistent with the neoliberal lending policies of international lenders like the International Monetary Fund (IMF),<sup>76</sup> included eliminating the Sandinistas' policies favoring women in areas of social services, health, and education.<sup>77</sup> For example, support services for battered women and domestic violence prevention services were eliminated by 1991.<sup>78</sup> The governments of the 1990s attempted to re-introduce traditional roles for women, in part by reducing the role of women in employment, by emphasizing traditional family values and the importance of marriage, and by discouraging contraception or abortion efforts.<sup>79</sup>

One of the early post-Sandinista roles of women's organizations was to replace governmental services eliminated by the Chamorro regime. These organizations became a safety valve, in a "classic example of civil society being expected to meet needs that were the responsibility of the state in the days before the dominance of neoliberal policies."<sup>80</sup> At this early stage of government transformation, women seeking assistance believed that the autonomous women's organizations were branches of the state, providing services that the government previously offered.<sup>81</sup> Women's organizations filled the health care gap, for

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73. *Id.* at 40.

74. *Id.* at 48.

75. Sternbach et al., *supra* note 71, at 251.

76. KAMPWIRTH, *supra* note 59, at 48-49.

77. *Id.* at 48.

78. *Id.* at 49.

79. Ellsberg et al., *supra* note 62, at 1606.

80. KAMPWIRTH, *supra* note 59, at 49.

81. *See id.* at 49.

example, after the Chamorro government began to require fees for services at public health facilities.<sup>82</sup> Moreover, as the government eliminated its policy of providing contraceptive advice to high risk patients and cut reproductive, family planning, and child support counseling services, women's organizations filled the void. As one observer noted:

[T]he administration of Violeta Chamorro played an unintended role in the expansion of the women's movement in the first half of the nineties. As women sought out the women's houses that had existed for about a decade (mainly run by AMNLAE) and those that were newly formed (mainly run by autonomous feminists), the prominence and prestige of the women's movement was enhanced. And each time services for women were cut further, women's activists were energized and united around a common opponent: the Chamorro administration.<sup>83</sup>

The Chamorro regime's attack on education and literacy and its spread of anti-feminist propaganda through children's textbooks also strengthened the voices of feminist organizations. The neoliberal education agenda rolled back attitudes about gender relations and reinforced the role of the male in a traditional patriarchal model.<sup>84</sup> The agenda also resisted the decriminalization of abortion, reversed the acceptance of union outside of traditional marriage (in itself, a middle-class concept), and reinstated the superiority of traditional family values.<sup>85</sup>

The women's movement decentralized in a way that gave women's organizations the freedom to criticize state policies.<sup>86</sup> The result has been an active, dynamic movement that addresses a variety of issues.<sup>87</sup> The diversity of organization reflects the value that the nineties governments placed on freedom of association in a civil, neoliberal society.<sup>88</sup> Women's groups have made more

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82. *See id.* at 50.

83. *Id.* at 52.

84. *See id.* at 53.

85. *See id.*

86. *See* Disney, *supra* note 65, at 534.

87. *See* KAMPWIRTH, *supra* note 59, at 54.

88. *See* Disney, *supra* note 65, at 534.

inroads in developing autonomous organizations than in maintaining economic rights in part because of the growing unwillingness of neoliberal governments to focus on equitable distribution of wealth and services.<sup>89</sup> The result is that at the same time that women's organizations are expanding the discourse into traditionally-feminist agendas, they also replace the state (under the Sandinista regime) in organizing around economic and social justice issues. This makes sense for another reason: women's organizations and other non-governmental organizations (NGOs) are populated with staff that came from the Sandinista government. In a sense, they are continuing the work they began as state employees and doing the work that post-Sandinista governments do not value as worth continuing by the state.<sup>90</sup>

On the one hand, this arrangement gives NGOs a freedom they did not have under the Sandinista regime. On the other hand, as outsiders, they have lost the advantage of state support and an overall state strategy for a variety of issues, including domestic violence.

Ultimately, women's organizations have successfully placed domestic violence on the political agenda of the post-1990 governments.<sup>91</sup> And despite their decentralization, women's organizations have been able to unite around the need to eradicate the high incidence of intra-family violence in the country. The various groups met in 1992 at a workshop to outline their recommendations for change in the area of intra-family violence. The groups recommended that rape laws be changed to make rape a crime; the penal code be reformed to defend women; educational media campaigns be launched; a women's network against violence be formed; and the public schools begin teaching sex education.<sup>92</sup> By the end of 1992, all but the last of the proposals had been implemented.

Another example of the transformed role of women's organizations in Nicaragua is the response of women's groups to the revelation of Zoilamérica Narvarez that her

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89. *Id.* at 535.

90. *See, e.g., id.* at 552 (interviewing several former Sandinistas now working for NGOs).

91. KAMPWIRTH, *supra* note 59, at 63, 73-74.

92. *Id.* at 63.

stepfather, then-President Daniel Ortega, sexually abused her when she was a child.<sup>93</sup> Zoilamérica's accusation sparked debate throughout the country about intra-family sexual abuse and violence and the role of government to eliminate such problems.<sup>94</sup> Women's organizations split in their support of Zoilamérica, although not in their resolve to work on domestic violence campaigns that criminalized intra-family violence and publicized the extent to which domestic violence prevailed throughout the country. Moreover, as one commentator noted:

[W]omen's organizing is coalescing around an intersectional approach to body politics. Issues such as reproductive rights, sexual abuse, domestic violence, health, culture, the economy and the law are being constructed around a common understanding of women's bodily integrity. Women's organizations are recognizing the linkages between women's rights to be free from violence, to choose when, whether and how many children to have, to have access to health care and to economic opportunities, and to care for themselves and their families.<sup>95</sup>

The existence of an autonomous women's movement in Nicaragua does provide women access to information and resources around domestic violence, family planning, and legal issues. Moreover, the movement provides an integrated approach to women's advocacy by linking traditionally-women's issues to broader issues of social and economic justice.<sup>96</sup> This approach is reflected in the experimentation of women's advocacy efforts with policy proposals, including the criminalization of domestic violence, the rehabilitation of men who batter, alliances with government police to target domestic violence, and, more recently, nonviolent conflict resolution.<sup>97</sup> Each of these advocacy efforts have, in turn, resulted in laws or initiatives that, at the very least, keep the issue of intra-family violence in the public consciousness. For example, a

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93. Disney, *supra* note 65, at 549.

94. *Id.* at 549-50.

95. *Id.* at 555.

96. An interesting byproduct has been the level of coalition-building across the political spectrum, as women from the political left and right agree on gender interests, even if not on economic and collective rights.

97. See, e.g., KAMPWIRTH, *supra* note 59, at 67 (providing an explanation of Women's and Children's Police Stations).

coalition of women's organizations partnered with government police to establish Women's and Children's Police Stations or Commissariats to provide services to women seeking protection from batterers.<sup>98</sup> The Women's Commissariat helps women file charges, investigates their cases, and refers them to social service providers where available. The Commissariats are located within local police stations and offer a one-stop center for women who want to pursue charges against their spouses.<sup>99</sup> At their best, these initiatives reflect a movement that looks beyond individualist, neoliberal solutions to broader systemic solutions in Nicaraguan society.

2. *Domestic Violence Initiatives and Their Effect.* In the 1990s, the Nicaraguan women's movement successfully advocated for a domestic violence law to protect women and children from intra-family violence. At the time, advocacy and research initiatives documented the prevalence of domestic violence and abuse within Nicaraguan society. One influential study found that fifty-two percent of women who had been married reported physical abuse at some point in their lives.<sup>100</sup> Thirty-one percent of married women suffered physical abuse during pregnancy.<sup>101</sup> Twenty-one percent of married women suffered a combination of physical abuse, emotional abuse, and sexual violence.<sup>102</sup> The study provided the evidence that supported the movement's advocacy for legal protections.

The Nicaraguan legislature subsequently passed a law

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98. *Id.* at 67. Kampwirth describes the process of establishing such police stations:

Although a series of legal changes in the eighties and early nineties had strengthened the laws against domestic violence, those laws were only paper promises as long as victims of domestic violence were afraid to go to the police stations, which were mainly staffed by men who had not been trained to address such issues. In contrast, the Women's and Children's Police Stations were staffed by women and it offered a holistic range of services including legal, psychological, and medical support . . . .

*Id.*

99. *See id.*

100. Ellsberg et al., *supra* note 62, at 1595.

101. *Id.*

102. *Id.*

criminalizing behavior that had been considered the societal norm. Ley 230, the national domestic violence law, was implemented in 1996 as part of overall reforms to the Nicaraguan Penal Code.<sup>103</sup> It provided for the issuance of protective orders against abusers, gave law enforcement officials the authority to confiscate weapons from abusers, and created prison terms for perpetrators who caused scars or injuries to victims.<sup>104</sup> Ley 230 also recognized psychological violence as a crime.<sup>105</sup> The law also incorporated principles of the U.N. Convention on the Rights of the Child against child abuse.<sup>106</sup>

In evaluating the criminalization approach to domestic violence, the women's movement met several challenges. First, the criminalization approach did not adequately address rehabilitation issues, especially when public resources for such programs were scarce and had been developed on an ad hoc basis.

Second, the state lacked commitment to take women's rights seriously. For example, criminalization was hindered by a severe lack of access to justice, especially in rural areas, where there were often no police, no judges, and no real alternatives for lodging complaints.<sup>107</sup> At the same time, existing police and judges resisted treating domestic violence as a crime, blaming the woman instead for the violence.<sup>108</sup> Without state commitment, battered women could not easily trust that they had enforceable rights against violent treatment. After all, the institutionalization

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103. Ley No. 230, 13 Aug. 1996, Ley de Reformas y Adiciones al Codigo Penal [Reforms and Additions to the Penal Code]; La Gaceta No. 191, 9 Oct. 1996 (Nicar.) (commonly referred to as "La Ley Para Prevencion y Sancion de la Violencia Intrafamiliar" [the law for the prevention and sanction of intra-family violence]).

104. *Id.* arts. 2, 3, 137, 139-41, 143.

105. *Id.* arts. 137, 141.

106. Compare U.N. Convention on the Rights of the Child, G.A. Res. 44/25, arts. 19-20, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), with Ley No. 230 art. 102.

107. See LOUISA PÉREZ-LANDA, VIOLENCE AGAINST WOMEN IN NICARAGUA: IMPLEMENTATION OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN BY NICARAGUA 11-13, 28 (Carin Benninger-Budel ed., 2001), available at <http://www.omct.org/pdf/VAW/NicaraguaEng2001.pdf>.

108. See Ellsberg et al., *supra* note 62, at 1607 (quoting a Nicaraguan Supreme Court Justice's statement: "[I]f a man beats his wife, he must have a good reason. Surely she did something to deserve it.").



of rights depends “not only on educating people about the availability of rights but also putting into place practices within legal systems that will reinforce the experience of these rights.”<sup>109</sup>

Third, because of a severe lack of resources at the local level, women who did come forward to lodge complaints did not have access to social services that would allow them to transition out of domestic violence situations.<sup>110</sup>

Fourth, the criminalization approach, with its emphasis on punishment rather than on prevention, failed to provide adequate alternatives to reconciliation after intra-family violence occurred.<sup>111</sup> These problems continued to frustrate the efforts of the women’s movement to eradicate domestic violence on a societal level. Despite these limitations, women’s groups promoted compliance with Ley 230 by educating judges and police and by raising public awareness about the gravity of the domestic violence problem. The groups also advocated for the establishment of supportive law enforcement institutions such as the Women’s Commissariat program, to provide resources to battered women.

The problem of domestic violence in Nicaragua has arguably worsened as a result of the implementation of the adversarial legal system. Though appealing to international investors because of its familiarity and assurance of movement toward modernity, the adversarial system has created havoc at the local level, due to a lack of governmental resources. Under the old system, a judge conducted the inquiry and investigation of a case. Under the new system, victims depend on the police and the prosecutor, a figure that did not exist in the inquisitorial model, to arrest, investigate, and prosecute. As a result, women’s advocates who educated inquisitorial judges on their handling and investigation of domestic violence cases must now also educate the police and prosecutors.<sup>112</sup> In Nicaragua, however, the task proves even more daunting.

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109. SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 192 (2006).

110. See PÉREZ-LANDA, *supra* note 107, at 13-14.

111. See *id.*

112. Interview with Juanita Jimenez, Dir. of the Nat’l Women’s Network Against Violence, Red de Mujeres Contra La Violencia, in Mulukukú, Nicar. (Aug. 4, 2005).

The focus on evidentiary standards, for example, has meant that prosecutors have been less willing to pursue cases in which the only evidence is a woman's allegation of abuse.<sup>113</sup> Further, the new adversarial process has meant that women must now undergo intense questioning and cross-examination as witnesses, a process which re-victimizes women who are often terrified to confront their abusers.<sup>114</sup> Moreover, although a woman may file a private claim against her batterer under Nicaraguan law, she will have to bear the costs of the investigation, an attorney, and the prosecution of the claim.<sup>115</sup>

C. *The Future of Nicaragua's Response to Domestic Violence?*

As a result of women's disillusionment with the criminal justice system in addressing domestic violence, the language of reconciliation, love, and forgiveness began to dominate feminists' and even the Sandinistas' rhetoric.<sup>116</sup> Today, a significant segment of the feminist movement in Nicaragua emphasizes reconciliation over criminalization, nonviolent conflict resolution over rights assertion, morality over politics, and mediation over litigation. Further, the neoliberal perspective that now permeates Nicaraguan society has also influenced the Sandinista movement. As Nicaraguan commentator Andres Pérez Baltodano recently noted:

[T]he FSLN's [Frente Sandinista de Liberación Nacional, or the Sandinista party] nonconflictive vision of politics promotes the depoliticizing and disqualifying of social conflict, its negation as a normal expression of the confrontation of interests in any social formation. To exclude conflict from what is deemed politically legitimate, the non-conflictive vision of politics moralizes it. As a result, the existing order or the dominant positions that are defended assume the representation of "good" and any challenge to that order to any dominant position is interpreted as an attack

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113. See PÉREZ-LANDA, *supra* note 107, at 11, 13.

114. See *id.* at 13, 23-24.

115. See *id.* at 23.

116. This transformation message was evident in Daniel Ortega's presidential campaign strategy, whose message highlighted forgiveness and reconciliation.

from the forces of “evil.”<sup>117</sup>

Indeed, neoliberal ideology is among the most significant factor affecting the direction of the women’s movement in Nicaragua. The doctrine has infiltrated the political sphere to such a degree that the feminist agenda itself is articulated in terms of “good” and “evil” instead of the earlier discourse surrounding Sandinista efforts to resolve social conflict in favor of the country’s oppressed. The dominant view is one that “normalizes and legitimizes the marginalization and exclusion of those who can’t play the market game.”<sup>118</sup> By contrast, a more leftist paradigm would “transform Nicaraguan society’s common sense to prioritize the fate of the neediest.”<sup>119</sup> In the domestic violence context, the neoliberal perspective prizes the neutral and objective model that presupposes players operating on a level playing field. A more leftist perspective would advocate for a thumb on the scale in support of the domestic violence victim’s needs, even in the mediation context.

## II. THE LOCAL CONTEXT: MULUKUKÚ, NICARAGUA, THE MARIA LUISA ORTIZ COOPERATIVE AND WOMEN’S CENTER, THE MEDIATION CENTER, AND THE EVANGELICAL/CATHOLIC CHURCH MOVEMENT

The Mulukukú community sought an alternative to this post-Sandinista, neoliberal policy and the attendant criminalization of domestic violence. The next section of this Article analyzes the players at the local level, their motivation, and their role in the implementation of the Nicaraguan mediation model or their own interpretations of it.

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117. Andres Perez Baltodano, *How Can Consensus Be Reached When the Conflict is Denied?*, 25 ENVIO 35, 41 (2006).

118. *Id.* at 42.

119. *Id.*

*A. Mulukukú*<sup>120</sup>

Mulukukú is a relatively small and isolated rural community, located at the intersection of the RAAN<sup>121</sup> and the RAAS,<sup>122</sup> or northern and southern autonomous regions of the country. The community is actually a constellation of settlements that grew around what was a Sandinista military training center in the 1980s. The inhabitants of Mulukukú initially settled in the region to seek protection from a Sandinista military base during the “contra” war of the 1980s. After the war, the Nicaraguan government resettled several thousand war refugees, many of whom supported the Contras during the war, to this region. The composition of the community now includes current and former Sandinistas and former Contras. The demographics have political ramifications as the community moves to resolve its pressing issues: infrastructure development, education, health care, and domestic violence.

Mulukukú recently received municipality status, the first step in obtaining infrastructural resources from the government. Approximately 5,000 people inhabit the town, and another 30,000 people live in the surrounding area. Most government services are administered in Siuna, the region’s governmental seat, approximately seventy kilometers away.

Geographic distance from governmental and other services remains a problem for the residents. The community has grown from several hundred in the 1980s to several thousand today. Nonetheless, paved roads to and from are nonexistent. The dirt road into the town remains especially treacherous during the rainy season, which lasts approximately five months of the year. The road is often washed out during much of that time.

Mulukukú’s progress as a community suffered a serious setback when it was destroyed by Hurricane Joan in 1988. More than 200 homes were washed away in the post-hurricane floods. In response, the community carried out its

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120. This information on Mulukukú is based on interviews with several founding community members, including Mulukukú’s first mayor, Noel Montoya.

121. Región Autónoma del Atlántico Norte.

122. Región Autónoma del Atlántico Sur.

own reconstruction effort. At the time, a group of forty women formed a cooperative and, with international aid, built a block-making shop. They built their own homes and subsequently built a carpentry shop to help others rebuild.

The prevalent and dynamic cooperative movement of the time was fully supported by the Sandinista government. Production cooperatives owned much of the land in and around Mulukukú into the 1990s. Since the early 1990s, however, post-Sandinista governments have discouraged cooperative ownership, which has dwindled as a result.<sup>123</sup> Much of the land today is in the hands of private owners. The women of the cooperative decided to keep the cooperative structure, however, which facilitates the provision of services throughout the community and reflects an important part of the political identity the women want to foster.

B. *The Maria Luisa Ortiz Cooperative and Women's Center*<sup>124</sup>

The development of the Maria Luisa Ortiz Women's Cooperative tracks the path of the women's movement discussed in this Article. In the words of Dorothy Granada, a U.S.-born health care worker and one of the Cooperative's leaders: "Central to all activities is the organizing of the women themselves. First women learn to recognize their rights as human beings, as women and as citizens; and to understand historical, religious and social forces that have marginalized them . . . ."<sup>125</sup> Paralleling the development of the Nicaraguan women's movement described above, this rights-based feminist approach guides much of the Cooperative's work and vision. Most of the women in the Cooperative still consider themselves grassroots Sandinistas.

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123. See Florence E. Babb, *Unmaking the Revolution: From Cooperatives to Microenterprises in Urban Nicaragua*, 16 *ANTHROPOLOGY WORK REV.* 2 (2004).

124. The Cooperative's history told here is based on interviews conducted with several of its founding members, including its Founding and Current Director, Grethel Sequeira Montoya.

125. Background on Mulukukú, The Clinic & Dorothy, <http://www.peacehost.net/Dorothy/background.html> (last visited Oct. 9, 2007) (quoting Dorothy Granada). Dorothy Granada has lived in Mulukukú since 1990. She became a member of the Cooperative soon after her arrival and now holds a leadership position. *Id.*

They envision the Cooperative as keeping alive many of the ideals of the Sandinista revolution.

In 1991, the Cooperative established the Women's Health Center to address the need for adequate health care for the community's women and children. The Health Center provides health care to Mulukukú and to the surrounding settlements, a total population of about 35,000 people. Most of its funding comes from private donations and foundations in the United States. The Health Center's doctors and health care workers handle approximately 30,000 patient records and see about 13,000 people a year. The Health Center also runs a soy nutrition program for malnourished children, a homeopathic medicine clinic, a literacy program and an adult education program. The Center's priority is women with reproductive health needs, followed by children and men.

Soon after the Health Center became operational, the Cooperative members noted a pattern of symptoms among the women they treated. Many of the symptoms and health care needs resulted from intra-family violence. The cases were often severe and included incest, spousal rape, kidnapping of young girls for sexual exploitation, and physical and emotional abuse. The Cooperative decided to take an interdisciplinary approach to the problem by establishing a support system for women who suffered domestic violence. The Cooperative established a legal clinic to service the legal needs of the women in the community, particularly in the area of family law and domestic violence. The clinic is staffed by two attorneys and three paralegals who receive case referrals from the Health Center.

The Cooperative's approach to domestic violence was initially quite militant and involved resort to citizen's arrests (in the absence of police), public shaming, and prosecutions. Grethel Sequeira, Director of the Cooperative, proudly recounts stories of gathering a group of women and going to the home of the abuser to take him out in the streets to shame him. The Cooperative encourages abused women to file criminal complaints and accompanies the women through filing and completing the prosecution process. In fact, because there were no police in town, the Cooperative gathered all the evidence and assumed all costs, including transportation, to ensure the victim followed through with the criminal complaint. The Cooperative also used its community radio station to name

men who were abusers, to publicly denounce domestic violence generally, and to educate women on the types of services and legal remedies available to them. More recently, the legal clinic and the Cooperative also advocated for the establishment of a local Women's Commissariat program in Mulukukú. While this means that citizen's arrests are less common, the Cooperative continues to accompany the women when police arrest abusers.

Early on, however, the Cooperative recognized that it could not simply offer legal services to victims without addressing their social and psychological needs. Thus the Cooperative provided temporary housing and protection for women and children. Moreover, the Cooperative provided individual and group therapy to women and children for their abuse. Limited space and resources, however, made it increasingly difficult for the Cooperative to offer housing and economic support. The Cooperative became progressively more frustrated with what it perceived was the perpetuation of the economic dependence of women who replaced their spouses with the Cooperative for support.

Further, the Cooperative recognized that domestic violence was widespread in Mulukukú and that the solution could not be to send most men to jail. Reflecting the national and transnational trends, the Cooperative leadership became increasingly disillusioned with the criminalization model of resolving domestic violence issues. At the time, the Cooperative was frustrated with the intractability of the domestic violence problem. The problems at the local level paralleled the problems that national women's leaders identified: lack of access to justice, few viable alternatives to staying in the marriage, few resources to accompany women through the legal process, and the inability of the criminalization process to allow for rehabilitation or redemption.<sup>126</sup> The women who filed charges did not feel empowered by the legal process and often felt re-victimized as they proceeded. Often, they returned to their husbands because they could not maintain a livelihood or support their children alone. Because criminalization did nothing to change the patterns of

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126. See Sternlight, *supra* note 7, at 577-82, for an analysis of some of the problems, including frustrations with access to justice issues, that drive the trend toward alternative dispute resolution in developing countries such as Nicaragua.

violence, the cycles continued. The Cooperative leadership also found that women were conflicted about their identities as mothers and wives and their identities as individuals and victims operating within the criminal justice system. This same phenomenon has been analyzed in other local contexts around the world. Sally Engle Merry found that battered women are slow to accept rights or to internalize the rights-based discourse that undergirds the criminalization model:

Even after calling the police for help and filing for temporary restraining orders, battered women are likely to drop the restraining order or refuse to testify. They clearly fear retaliation by the batterer, but they also resist the shift in subjectivity required by the law. This is often a sense of self deeply at odds with others rooted in family, religion, and community. Taking on a rights-defined self in relation to a partner requires a substantial identity change both for the woman and for the man she is accusing. Instead of seeing herself defined by family, kin, and work relationships, she is invited to take on a more autonomous self protected by the state. At the same time, her actions allow the law to define her husband/partner as a criminal under the surveillance and control of the state. A battered woman may be pressured by kin to feel she is a bad wife, while her partner may claim she is taking away his masculinity. The only way she can rescue him from this loss is to deflect the very legal sanctions she has called down upon him. . . . [T]hese women are tacking back and forth across a significant line of identity transformation.<sup>127</sup>

In part because of this identity conflict among many of its clients, the Cooperative began to adopt non-prosecutorial alternatives, particularly for cases that were less egregious. The Cooperative helped form a nonviolent men's group for training in gender sensitivity, nonviolence, and human rights. In addition, the Cooperative increasingly resolved cases through informal and varied means: non-neutral mediation that included the threat of prosecution against men, compulsory participation in the gender sensitivity program, and public shaming.

### *C. The Mediation Center in Mulukukú*

In 2005, the Nicaraguan Supreme Court awarded

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127. MERRY, *supra* note 109, at 181-82.



Mulukukú a grant to build the Mediation Center. The Cooperative, perceiving that the mediation program could provide more effective access to justice in the region, donated land for the Center and hosted the first community mediation training in the region in August 2005. The Cooperative leadership perceived the Mediation Center as a positive step toward strengthening the position of women in domestic violence situations. The mediation model, with its emphasis on empowerment, community problem-solving, and non-violence, appealed to the Cooperative members' idealism about the community's ability to resolve its own conflicts. The Cooperative envisioned the implementation of the mediation program as a step toward the community's social transformation. This reform, intended to make justice more accessible, is an example of what Merry describes as the transplantation of a transnational movement into the local context.<sup>128</sup>

The Nicaraguan Supreme Court's community mediation trainings incorporate much from the community mediation models of the United States. The programs emphasize non-violent conflict resolution with an impartial neutral mediator at the center of a problem-solving process. Volunteer community members participate in forty to sixty hours of training before mediating disputes. The training and local manuals in Nicaragua were developed by the Institute for Mediation and Conflict Resolution, a U.S.-based non-profit mediation center.<sup>129</sup>

In Mulukukú, the volunteer mediators include community leaders from different fields. The initial training in August 2005 involved church leaders, Cooperative members, political leaders, health care workers, legal services providers, farmers, and ranchers. The training organizers ensured that organic community leaders participated because of the respect and credibility they garnered for the program. As a result, today the community leaders represent the political and ideological spectrum. As described below, this mediation model is, in a sense, a vessel into which various ideological perspectives can fit.

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128. See Sally Engle Merry, *Anthropology, Law, and Transnational Processes*, 21 ANN. REV. OF ANTHROPOLOGY 357, 367 (1992).

129. The Institute for Mediation and Conflict Resolution, Inc., <http://www.imcr.org> (last visited Oct. 9, 2007).

The local version of mediation in Mulukukú allows for the mediation of domestic violence conflicts. The mediator's manual notes that people in other countries consider domestic violence so violative of the integrity and dignity of the victim that mediation, with its emphasis on common ground, is not an option.<sup>130</sup> The Nicaraguan government's version of mediation nonetheless contemplates mediating domestic violence issues.

#### D. *The Religious Sector in Mulukukú*

1. *Religion and Mediation in Mulukukú.* A comprehensive study of how conflict resolution functions in Mulukukú must consider the role of religion in the community. Through interviews with several evangelical pastors and a Catholic nun, we learned that churches in Mulukukú engage in conflict resolution with their community members. Church-based conflict resolution, however, differs in significant ways from mediations by the Mediation Center or the Cooperative.

Moreover, evangelical church members do not utilize the resources available through the Mediation Center or the Cooperative to resolve conflict.<sup>131</sup> The non-use likely results from political and ideological tensions between the Cooperative and evangelical churches, and the fact that the Mediation Center is perceived as an extension of the Cooperative.

There were a few attempts during the establishment of the Mediation Center to incorporate church leadership into the program, but with little real training or follow-through. Five of the twenty-nine trained mediators are church leaders from the town or surrounding communities.<sup>132</sup> One

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130. CAMINOS MANUAL, *supra* note 17.

131. Unfortunately, we had little means of verifying how many evangelical or Catholic believers have used the Mediation Center, as patrons are not asked their religious affiliation during the intake process.

132. By church leaders, we mean that the mediators are actively involved in their churches, usually as Deacons, and were specifically chosen because of their involvement in the Church. This does not preclude the possibility that mediators who mostly associated as Cooperative Members or have other secular affiliation are not themselves affiliated with a religion. However, with one exception, the Interim Director who is both a Cooperative Member and a Deacon in an evangelical church, there is no significant overlap.

of them, currently the Mediation Center's Interim Director, is both a Cooperative Member and a church leader in a surrounding community; the other is a Catholic nun who travels to the fifty-four congregations in the surrounding communities. The other three reside outside Mulukukú. Despite the participation, no other religious leader in Mulukukú was trained as a mediator, except for the Catholic nun. Additionally, the few church leaders who have been trained as official mediators are not fully incorporated into the work of the Mediation Center. In theory, these mediators mediate cases in their church and in the broader community as part of the Mediation Center and file case records with the Center. However, the mediation records at the Center reveal only a handful of mediations conducted by religious leaders.<sup>133</sup> The absence of official records does not mean, however, that these trained church leaders are not conducting mediations. Indeed, some evidence suggests that cases mediated by trained church leaders in their own communities are not being reported to the Mediation Center.<sup>134</sup>

What can we learn about the possible relationships between the church-based and court-based conflict resolution programs? To answer this question, we summarize the origins, role, structure, and belief systems of churches in Nicaragua and, more specifically, in Mulukukú. In-depth historical, sociological, and anthropological studies of churches in Nicaragua have been written already.<sup>135</sup> Our

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133. We reviewed public intake information from the Mediation Center identifying mediators and mediation dates from January 2006 until July 2006. Of the seventy-three records we reviewed, three were conducted by religious lay leaders.

134. For example, the Interim Director described to us a case she mediated with a pastor in her church involving domestic violence that was never recorded in the Mediation Center's records. In addition, the Catholic nun who was trained as a mediator explained that she has never referred or been referred cases through the Mediation Center. She does not even appear to realize that she should report any case that comes to her. Indeed, during her interview she mentioned a large case involving a violent property dispute in a surrounding community of Mulukukú in which she and the priest intervened. In that case, which also does not appear in the Mediation Center's records, an agreement was reached, but it is not working, and violence is resurging.

135. See, e.g., Edward T. Brett, *The Impact of Religion in Central America: A Bibliographical Essay*, 49 AMERICAS 297, 298-341 (1993) (providing a list of major books and articles, including several about the church's role in Nicaragua).

goal here is only to highlight what we consider relevant to understanding the factors that influence church-based conflict resolution in Nicaragua, and, more specifically, in Mulukukú, with an emphasis on intra-family disputes.

The spread of evangelicalism and Catholic liberation theology—the two heavy religious influences in Mulukukú—have been closely linked to socio-economic and political factors.<sup>136</sup> In turn, these factors explain how Evangelicals and Catholics perceive conflict resolution differently. Our preliminary findings suggest that in Mulukukú, Evangelicals and Catholics alike, participate in largely localized lay movements, are responsive to poverty, and yet are still vastly different in their political ideologies. Evangelical churches in Mulukukú, not unlike much of Nicaragua, favor a more neoliberal ideology, while the leadership of the local Catholic Church has greater political affinity to the Sandinista socialist class and social struggle. This set of dynamics indicates that the Catholic Church in Mulukukú is more likely to emphasize the role of institutional (i.e. the state or multinationals) over individual violence, even in the case of intra-family disputes. In contrast, churches of a neoliberal tradition are likely to emphasize the role of the individual, especially in cases involving intra-family disputes. In addition, churches emphasize either individual or collective transformation through conflict resolution, depending on whether the church rejects or accepts the Sandinista's original ideals of collective transformation.

We also consider relevant church doctrine or religious ideology, specifically related to family, as well as the role ascribed to women and men within the family and the church. Here, Christian doctrine on the family, whether in the evangelical or in the Catholic Church, is likely to be the same: divorce is not permitted. Similarly, gender roles are likely to embrace a patriarchal paradigm, particularly in the evangelical churches, where men are considered heads of household according to Biblical teachings. Religious doctrine, more so than politics, is likely to produce divergent conflict resolution approaches and outcomes. Part of the divergence lies in the belief among religious leaders

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136. See Michael A. Gismondi, *Transformations in the Holy: Religious Resistance and Hegemonic Struggles in the Nicaraguan Revolution*, 13 *LATIN AM. PERSP.* 13, 23-31 (1986).

that conflict resolution of domestic violence cases should ideally transform violent men into peaceful and responsible providers, husbands and fathers. Women who are victims of domestic violence will tend to want to save their marriages and homes. Many will have turned to the church hoping that God will transform their men into better husbands or partners and better fathers. In fact, throughout the world, membership in evangelical churches is primarily made up of women, a statistic explained in large part by the positive social and economic support that churches provide to poor women on family issues.<sup>137</sup> Numerous writings on evangelical churches in Latin America note their value in helping women confront machismo—i.e., male behavior that includes “excessive drinking, violence against women, chronic infidelity, abdication of household duties, and a general identification with the street culture rather than with the home.”<sup>138</sup> Indeed, evangelical churches more closely resemble a new kind of Latin American feminism that emphasizes women’s essential nature and role as caregivers and mothers.<sup>139</sup>

We acknowledge that the evangelical notion of personal conversion and individual transformation could be effective to some extent in helping families overcome violence. We predict, however, that church conflict resolution of domestic disputes will be mostly individualized, informal, and private, whereas the Cooperative and, to some extent, the Mediation Center models will opt for a more public, formal, and collective process. We also predict that church-based versus Cooperative or Mediation Center conflict resolution is likely to diverge. Based on our observations, the church-based conflict resolution model will prefer conflict resolution over prosecution. As it stands, the Mediation Center cannot mediate domestic violence cases when the injury is “serious,” nor will the Cooperative. While the Mediation Center and Cooperative will likely diverge on what constitutes a “serious, non-mediabile” injury, churches may be even more reluctant to refer for prosecution cases where violence, whether physical or sexual, rises to the level of a crime.

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137. See Hallum, *supra* note 34, at 171, 176-78.

138. *Id.* at 178.

139. See *id.* at 181-84; see also ELIZABETH E. BRUSCO, THE REFORMATION OF MACHISMO: EVANGELICAL CONVERSION AND GENDER IN COLOMBIA (1995).

Churches and the Cooperative share a rejection of the “neutral” decision-maker model espoused by the Mediation Center but differ in their rhetoric and approach to conflict resolution. Churches in Mulukukú resolve conflict through counseling. Church doctrine and teachings of personal transformation through Christ are likely to become central to the rhetoric employed in cases involving intra-family violence. By contrast, the Cooperative will continue resorting to shaming or the threat of prosecution against the abuser during the mediation. Therefore, even as they share similar goals—i.e., a desire for helping families become non-violent—the divergence between Cooperative and church-based conflict resolution will be rooted in how “private” versus “public” their methods are. That is, churches primarily, if not solely, place the responsibility on the individual parties, that each of them may be transformed from within by God. In contrast, the Cooperative will involve extended families, the community, and the state—all external parties—to foment the change. However, both groups differ most from the Mediation Center, which insists on mediator neutrality and assumes a level playing field between the parties.

Relatedly, we predict that there will also be different levels of institutional support provided by churches, the Cooperative, and the Mediation Center to the parties in a domestic violence dispute—a difference which reflects their perceptions of the nature of the conflict as private or public. The least institutional support will be provided by the Mediation Center, not only due to its severely limited resources, but because its function has been framed solely as a neutral arbiter helping parties reach their own solutions, a very individualized approach. Churches, while emphasizing personal transformation, are still a community and are likely to provide more economic, moral, spiritual, and emotional support to the parties. Still, the model will be “private” in that the focus will be on the church providing individualized counseling assistance to its individual members.

The Cooperative is also likely to provide female victims, in particular, similar types of economic assistance and moral support, including counseling. However, the Cooperative, reflecting the direction of the broader women’s movement, is also likely to insist on treating domestic violence as a public issue by demanding that the state hold

abusers accountable, while also addressing some of the poverty factors that aggravate violence in Nicaraguan society, such as unemployment.

At this point in our research, we do not yet have data that either supports or negates our predictions in Mulukukú. We do, however, provide in this Article the context and some of the factors that any future study of church-based conflict resolution in Nicaragua and, more specifically, in Mulukukú, should consider. This preliminary analysis is based on church-based studies conducted in Nicaragua and other contextually similar parts of Central and Latin America, as well as on our own observations during our visits to Mulukukú.

2. *The Churches in Mulukukú: Basic Background.* Mulukukú houses five evangelical churches and one Catholic Church.<sup>140</sup> The term “evangelical” defines Protestant groups that identify with the sixteenth century Reformation, affirm the need for a personal experience of salvation, recognize the authority of the Bible in matters of faith and conduct, and actively engage in evangelism.<sup>141</sup>

In Mulukukú, the Catholic Church ascribes to a community-based model closely associated with liberation theology. Catholic liberation theology, which blossomed in Latin America in the 1960s, embraced the struggles of the poor against the injustice of Latin American dictators such as Somoza in Nicaragua. The movement adopted a new grassroots, people-oriented, and prophetic church model where the members of the church became not only observers, but protagonists and leaders.<sup>142</sup> The model established Comunidades Eclesiásticas de Base (CEBs), meaning that people at the grassroots came together not only in a new covenant with Christ, but also with one

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140. In the town itself, there is a population of about 5,000, while the entire Mulukukú municipality has about 35,000 residents.

141. See Jorge E. Maldonado, *Evangelicalism and the Family in Latin America*, 82 INT'L REV. MISSION 189, 191 (1993).

142. See Creuza Maciel, *Grassroots Communities: A New Way of Being and Living as a Church*, in BORN OF THE POOR: THE LATIN AMERICAN CHURCH SINCE MEDELLIN 99 (Edward L. Cleary ed., 1990); see also EDWARD L. CLEARY, CRISIS AND CHANGE: THE CHURCH IN LATIN AMERICA TODAY 26-50, 65-74 (1985) (discussing the origins and underpinnings of Liberation Theology in Latin America).

another and with the community.<sup>143</sup> In these loosely structured groupings of CEBs, poor people live out their struggle to transform church and society.<sup>144</sup> Thus, while Mulukukú has one priest, there are fifty-four CEBs in the surrounding mountainous regions. Each of these communities has a “Directiva” (a Board of Directors) which takes care of church matters and the coordination of social programs, mostly in education and health.

Originally, those who settled in Mulukukú and surrounding communities were predominantly Catholic, but with increased migration, conversions, and the settlement of former Contras in the region, the evangelical population has grown. The origins of the evangelical movement in Nicaragua have been closely associated with the importation of neoliberal values, mostly from the United States.<sup>145</sup> However, the movement’s more recent growth, starting in the late 1960s to today, has derived from a myriad of smaller local congregations which have developed their own local identity and practices, even as they retain “foreign” doctrinal teachings.<sup>146</sup> These churches have mostly surged in marginalized urban areas or in more urban resettlement migrant or post-war communities, where traditional institutions and infrastructure are noticeably absent.<sup>147</sup> In Mulukukú, where poverty is fierce due to ruralism and recent war, this trend is particularly true. The poor have turned to religion when they see their way of life falling apart around them.

The five evangelical churches include the largest, the Assembly of God Christian Worship Center, with approximately 500 members; the Church of God, with 137 members; the Nicaraguan United Mission of Evangelical

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143. See, e.g., Frances O’Gorman, *Medellin and Puebla: Turmoil and Hope at the Grassroots*, in BORN OF THE POOR, *supra* note 142, at 104.

144. *Id.* at 109.

145. See Margarita Almachiara d’Angelo, *El Desarrollo del Pentecostalismo en Nicaragua*, *Latinamerika* (Rostock) 25 (1990) 1, at 93-95; see also CARMELO E. ALVAREZ, PEOPLE OF HOPE: THE PROTESTANT MOVEMENT IN CENTRAL AMERICA WITH SELECTED STATEMENTS FROM THE CHURCHES 2-5, 52 (1990).

146. d’Angelo, *supra* note 145, at 98 (describing, as example, the evangelical crusades of the 1960s sponsored by Kenneth Strach, and the more recent one by YeYe Avila and Jimmy Swaggart).

147. *Id.* at 98-99.



Pentecostals, with ninety-four members;<sup>148</sup> the Church of God of the Prophecy, with approximately ninety members; and the Mennonite Evangelical Church, with approximately fifty members. “Members” refers to adults who have been baptized, received doctrinal teachings, and otherwise meet the comportment standards required by doctrine (i.e., not living unmarried with a partner). The term “member” therefore excludes children and others who fail to meet the requirements but who otherwise attend church. As a result, the number given for members of a church does not accurately count the persons comprising the church community. Even so, the number of evangelicals as reported by the pastors of each church was surprisingly smaller than we expected,<sup>149</sup> since the perception is that the majority of the town’s population is evangelical.<sup>150</sup> We know very little about the churches in the surrounding communities of Mulukukú, except that the evangelical presence there is less strong than that of the Catholic Church.<sup>151</sup>

Some of the churches were established in Mulukukú in the early years of the town’s settlement in the 1980s. Of the evangelical churches, the oldest church is the United Mission of Evangelical Pentecostals, which is approximately eighteen years old, while the newest church is the Assembly of God, which has been in Mulukukú for twelve years. Thus, the churches followed soon after the establishment of the town, as was also true of the Cooperative. Of course, all of the churches have international and national ties and are affiliated with larger world-wide institutions. For example, of the evangelical churches, except for the Nicaraguan United Mission of Evangelical Pentecostals, all have their base institutions in the United States. Even the Nicaraguan United Mission of Evangelical Pentecostals has its genesis in the United States, having split with the Assembly of God fifty years earlier. Yet, these church communities, as is Mulukukú as a municipality, are quite isolated from any national or international presence or support. All of the

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148. Of this denomination, there are two churches in the town, one of which we did not visit because the pastor was not in town.

149. The total number of church members is approximately 821 (excluding the church we did not visit), which is only 14% of the population.

150. Interview with Pastor Edilberto Méndez, Nicar. United Mission of Evangelical Pentecostals, in Mulukukú, Nicar. (July 15, 2006).

151. Interview with Sister Sandra in Mululuku, Nicar. (July 15, 2006).

churches we interviewed told us they receive from outside sources little to no financial assistance for their social or other programs.

3. *The Characteristics of Evangelicalism in Mulukukú.* Some of the following distinctive characteristics of evangelical churches in Mulukukú are relevant to understanding church-based conflict resolution in the region, particularly as applied to domestic violence cases.

First, evangelicalism in Mulukukú is largely a lay movement<sup>152</sup>—that is, propagated through the witness of ordinary believers and organized with human and economic resources that are mostly local.<sup>153</sup> Further, the practice tends to involve most of its members in the distribution of “holy goods,” as opposed to entrusting special or professionally trained clergy, a tendency which is more characteristic of the traditional Catholic Church.<sup>154</sup> As such, individuals and families institute self-governance and try out new modes of behavior and alternative types of relationships.<sup>155</sup>

In Mulukukú, we observed some of these lay characteristics. In the evangelical churches, for example, while one pastor heads the church,<sup>156</sup> the church members, including women, collectively run the church. Some may play a leadership role as deacons, preachers, teachers, or through radio programming, while others participate in fundraising for social or church programs. Particularly in a town like Mulukukú, where local entertainment (except for television) is sorely lacking, constant church activities allow members to assume responsibility for ample religious labor. In addition, the pastors themselves are integrated members of the community who share many of the same cultural and socio-economic characteristics. In that sense, most are viewed as insiders who understand and can relate to the daily hardships faced by the community.<sup>157</sup> One particularly

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152. See d'Angelo, *supra* note 145, at 100 (describing similar phenomena in other parts of Nicaragua); see also Maldonado, *supra* note 141, at 194 (generalizing these phenomena throughout Latin America).

153. See d'Angelo, *supra* note 145, at 100.

154. See Maldonado, *supra* note 141, at 194.

155. See *id.*

156. All but one of the pastors are male.

157. There was one pastor, a newcomer, who did not fit in as well. He came

interesting phenomenon in the town was the adoration for the late pastor of the Assembly of God, who had been in the community for several years. By all accounts, Pastor Game was extremely popular. He was sought daily for counseling, usually about family or other types of social problems. Indeed, he became such a legend in the town that his funeral was attended by thousands. Such was his appeal that his widow has been allowed to remain as pastor until her son, now fourteen, is ready to continue his father's legacy. The Pastor's popularity grew because of the involvement of the Assembly of God in the community as described below. Not surprisingly, aside from the Catholic Church, the Assembly of God is the only evangelical church with substantial Christian-based social programs in the community. The Pastor also left unfinished the construction of a temple that will seat 5,000 when completed.

Consistent with lay characteristics, evangelicalism offers its members a base community, a type of substitute family with new spheres of socialization that respond to the demands of the modern age.<sup>158</sup> At the same time, evangelical churches establish survival strategies through networks of mutual aid, information on community resources, and sometimes, experiments in informal economies.<sup>159</sup> Throughout Latin America, evangelical churches allow significant movement in informal and popular education and are a channel for upward social mobility and involvement.<sup>160</sup> In Mulukukú, where state institutions providing basic services are almost non-existent, churches often become the means by which their members can feed, clothe, and educate their children above the standard of their neighbors.<sup>161</sup> Evangelical church-based social involvement in Mulukukú is provided principally by the Assembly of God. The Assembly of God operates a private elementary school, for example, with a student population of about 700 and runs a program called Fuente de Vida (Source of Life), which feeds needy families in the church.

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from the second largest city of Nicaragua, Leon, and his education, manner of communication, and dress set him apart from the other pastors we interviewed.

158. See Maldonado, *supra* note 141, at 197-98; see also d'Angelo, *supra* note 145, at 105.

159. See Maldonado, *supra* note 141, at 198.

160. See *id.*

161. See *id.*

The Mennonite church and the Church of God also provide some food assistance to needy families. Also, in the context of church activities, many members learn organizational skills, leadership, effective communication, and are indoctrinated with a new work ethic that makes them able to compete more effectively in the labor market.<sup>162</sup>

At the same time that evangelicalism throughout Latin America and in Mulukukú creates a new type of community for the poor, it also calls for a personal experience of salvation (typically called conversion, regeneration, or rebirth).<sup>163</sup> This experience, although within the reach of all community members, represents an individual commitment and personal choice.<sup>164</sup> Notions of personal change and transformation particularly appeal to communities ridden with societal ills associated with poverty, such as alcoholism and violence.<sup>165</sup> In Mulukukú, as elsewhere, evangelical congregations reduce consumption of alcohol and drug addiction among their members, thus giving individuals the best possible opportunity for a new life. Indeed, personal conversion in evangelical churches usually occurs in persons who are undergoing difficulties, such as illness or family separation, or among those who feel rejected or ostracized by society (i.e., drug addicts).<sup>166</sup>

More importantly, although conversion is individualized, its intended effect is not to “break” or separate the individual from the non-converts, but rather, through the individual convert the entire family and, eventually, the entire community. Thus, new converts are expected to resume contact with their families and communities in a new way, as persons whose personal transformation has turned them into bearers of a higher calling which allows them to develop new social and family relations.<sup>167</sup> One common characteristic of evangelical churches in Mulukukú, for example, is an emphasis on the conversion of

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162. *See id.*

163. *See id.* at 194.

164. *See id.*

165. *See id.* at 196.

166. *See id.*; *see also* d'Angelo, *supra* note 145, at 101.

167. *See* Maldonado, *supra* note 141, at 195.

souls or evangelizing.<sup>168</sup> Similarly, members bear direct “witness” of their faith to their spouses and other family members. Consequently, the churches consider themselves in the best position to provide transformative opportunities in a domestic violence context.

Because of the potential or promised effect of personal transformation on families, evangelicalism in Latin America has been particularly popular among women, especially in the sectors where machismo has been most cruelly felt.<sup>169</sup> Indeed, women have comprised the largest representation of members in evangelical churches. Undoubtedly, evangelicals continue to espouse, based on Biblical teachings, an indiscriminate acceptance of the woman’s subjugation to the authority of the man as “head”—a notion which frightens feminists.<sup>170</sup> Yet, evangelicalism professes to restructure the family in a significant way by drawing in the father/husband and reinserting him emotionally in the family and giving him a complementary role in the upbringing of the children and management of household matters.<sup>171</sup> Thus, converted Christian men are taught to make use of qualities that appeal to women, including economic responsibility, non-violence, trustworthiness, and conjugal fidelity.<sup>172</sup> Making men the “head” of household also relieves women of the burden of being solely responsible for looking after the

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168. In Mulukukú, the most popular way churches evangelize is through radio programming, which may also explain the popularity and identification of the town with evangelical churches, even if church membership is smaller. Mulukukú now boasts a total of three radio stations, one established in the last year. The second oldest radio station, called Manantial de Vida (Fountain of Life), is owned and operated by the Assembly of God. This radio station has been around for about five years and is able to reach as far as the border of Honduras. Most of the programming is produced by the Assembly of God; however, the radio sells programming to several other evangelical churches in town. The third radio station, which is less than a year old, is called Estereo Linda and is apparently operated by the conservative Liberal Party of Nicaragua, the Partido Liberal Constitucionalista (PLC). Most of the Christian programming is comprised of what churches in Mulukukú call “evangelísticos” which means they include gospel, prayer, and a sermon.

169. See Maldonado, *supra* note 141, at 196.

170. Maldonado, *supra* note 141, at 197.

171. See *id.* at 196.

172. See *id.*

household and rearing children.<sup>173</sup> Thus, while philosophically both men and women advocate and support the patriarchal ideology, in practice, the implementation of a more co-participatory model of family management benefits women. For example, one of the most popular radio programs by the Assembly of God was a family counseling program that, until recently, ran twice daily. This program provided family counseling, including how a Christian couple should treat each other, how children should treat their parents, and comments on family planning.<sup>174</sup>

Another aspect of evangelicals in Mulukukú is their strong identity with the more conservative parties in Nicaragua, mostly with the Partido Liberal Constitucionalista (PLC). This identity originated from the original resettlers of the area, former Contras who aligned themselves politically with the PLC, the political party supported by the United States.<sup>175</sup>

4. *Characteristics of the Catholic Church in Mulukukú.* The Catholic Church in Mulukukú is closely associated with Latin American liberation theology, though we do not base this characterization on a theological assessment of church beliefs, doctrines, or teachings. The rhetoric of liberation theology in fact never surfaced in our conversations with Catholic leaders or members. Rather, we evince the doctrine primarily through the church's priorities and operational methodologies, which closely resemble the

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173. *See id.*

174. There are recorded tapings of these programs that could be made available for our research. Unfortunately, these were not available except at the radio station, and we did not have time during this trip to listen to the tapes. As such, we have no way of evaluating or describing the content of the programming.

175. In this past election, the United States supported of the Nicaraguan Liberal Alliance (Alianza Liberal Nicaragüense (ALN)), a political party created by Eduardo Montealegre and other members of the Constitutional Liberal Party (Partido Liberal Constitucionalista (PLC)) who opposed former President Arnoldo Alemán's continued control of the PLC after he had been found guilty of embezzling public funds. *See* Brian J. Carreira, *¡Mi Comandante Es Mi Presidente!: Daniel Ortega Comes Back to Power*, BROOK. RAIL, Dec. 2006/Jan. 2007, available at <http://www.brooklynrail.org/2006/12/express/mi-commandante>; THE CARTER CENTER, NICARAGUAN ELECTIONS: TRIP REPORT BY FORMER U.S. PRESIDENT JIMMY CARTER, NOV. 4-7, 2006 (Nov. 9, 2006), available at [http://www.cartercenter.org/news/trip\\_reports/nicaragua\\_trip\\_report.html?printerFriendly=true](http://www.cartercenter.org/news/trip_reports/nicaragua_trip_report.html?printerFriendly=true).

themes of liberation theology. This development grew naturally from the grassroots and organic nature of liberation theology. Liberation theology is not the product of theologians producing a fully developed belief system; rather, it is the product of priests working in different locations without a principal figure directing them and is developing out of immersion with the people “at the base.”<sup>176</sup>

Central themes have emerged in the work of Latin American liberation theologians that are also present in the operational aspects of the Catholic Church in Mulukukú. These distinctive characteristics of the Catholic Church in Mulukukú are relevant to understanding church-based conflict resolution in the region, particularly as applied to domestic violence cases.

One characteristic of liberation theology in Mulukukú is the church’s commitment to social justice and its criticisms of the economic and political system that maintains the status quo of social inequality in the region.<sup>177</sup> Liberation theology presents a religious option for the oppressed by making the members the focal purpose of the church.<sup>178</sup> Indeed, the nun’s order in Mulukukú has its origins in Nicaragua’s Sandinista Revolution. Today, the nuns continue in their struggle to improve the socio-economic conditions of the most marginalized communities of Mulukukú. Most of the work that the nuns conduct is in the area of health and education. The Catholic Church runs an elementary and a high school and has lobbied the state to establish the only other public high school in the region. In addition, the Catholic Church provides basic adult and young adult literacy education for youths who otherwise have no access to education. The nuns also provide basic health services to persons in the surrounding communities of Mulukukú in collaboration with the Cooperative.

Another theme that follows closely the idea of the church as an option for the poor is the central idea of liberation. Like evangelical conversion and transformation, liberation is also about sin and redemption, but salvation is

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176. CLEARY, *supra* note 142, at 82; *see id.* at 81-82.

177. *See id.* at 86-87.

178. *See id.* at 88-91.

perceived as a social event.<sup>179</sup> Thus, sin is not only personal and individual; its effects are seen in social structures and include political and economic oppressions. Persons must live within these “sinful” structures not by the direct will of God, but as a result of humankind’s moral failure to construct a world of justice. Christian salvation under liberation theology is thus not just an individual event, but rather a social event with responses to the well-being of society.<sup>180</sup> Moreover, salvation or liberation begins not in the after-life but in the “here and now” through “transforming the world, restoring creation, and seeking to overcome suffering.”<sup>181</sup> As such, liberation theology demands that followers be more concerned with its commitment to liberation as a practice rooted in service to others, especially the neediest, instead of concentrating on orthodoxy or doctrine.<sup>182</sup> In Mulukukú, the Catholic Church’s commitment to this vision of “liberation” is evidenced through various social programs, sometimes in regions that are quite inaccessible.

This view of salvation/liberation also translates into an attitude toward conflict under which “instability, institutionalized violence, and change [become] valid concepts for interpreting what is taking place in much of Latin America.”<sup>183</sup> We received an interesting contrast of responses when we interviewed church leaders about social problems in Mulukukú. Evangelical pastors would generally refer to poverty whereas the Catholic nun, Sister Sandra, was very specific in identifying the problem and addressing institutional accountability.<sup>184</sup> For example, she mentioned unemployment, abandoned women, and lack of access to health and education as some of the principal problems in the community and identified the vacuum in state services as being responsible for much of the community’s societal ills. She also expressed discontent with the manipulation of the poor by the political parties, while pointing out that most members of the mountainous

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179. *See id.* at 91-94.

180. *See id.* at 92.

181. *Id.*

182. *See id.* at 94.

183. *Id.* at 88; *see id.* at 87-89.

184. Interview with Sister Sandra in Mulukukú, Nicar. (July 15, 2006).



regions of Mulukukú (who are Sandinistas) cannot even vote because procuring a national identification card takes years. She also highlighted the absence of a working justice system, including a weak police force, as causes for the reigning violence in the region. Not surprisingly, the political identity of the Catholic Church in Mulukukú is strongly associated with Sandinismo. Many Catholic leaders and members we met espoused a public and open identity with Sandinismo. This fact has created a schism between the Catholic Church and at least some of the evangelical churches (especially the Assembly of God) while at the same time creating an alliance between the Catholic Church and the Cooperative.

### III. INSTITUTIONALIZING THE MEDIATION MODEL TO ADDRESS DOMESTIC VIOLENCE: NORMATIVE CONCEPTIONS OF MEDIATION AND THEIR EFFECT IN MULUKUKÚ

Translating transitional movements requires fitting the proposed program into the existing political and institutional structures. In Mulukukú, the mediation program “fits” in the context of a relative lack of access to justice, the feminist movement, the religious sector, and the realization that criminalization of domestic violence does not resolve the larger societal problem. With the exception of two female police officers who work in the Women’s Commissariat, Mulukukú has not had any other public official working on justice issues. The nearest prosecutor and public defender is in Siuna, a four hour car ride or an eight hour bus ride from Mulukukú. Not until the beginning of 2007 did the state appoint a judge for Mulukukú.

On the other hand, a government must establish and maintain a credible means to achieve justice in order to remain legitimate. One of the advantages of mediation is the relatively easy access to justice. However, there is a dilemma in the institutionalization of a mediation model that does not challenge underlying power structures. If advocates “frame human rights to be compatible with existing ways of thinking, they will not induce change. It is only their capacity to challenge existing power relations that offers radical possibilities.”<sup>185</sup> A mediation model may

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185. MERRY, *supra* note 109, at 136.

not challenge existing ways of thinking enough to engender change in social attitudes about domestic violence. This is especially true if the ideological perspectives of the mediators are allowed to interfere with the process. On its face, the mediation process does not prevent this type of interference, as it is broad enough to allow underlying assumptions about the outcome to infiltrate the process. For example, a mediator with an evangelical perspective may encourage keeping a marriage intact, even at the cost of a woman's safety. Or, for example, a feminist mediator may start with the premise that a battered woman should separate from her husband for her own safety.

Sally Engle Merry has analyzed this problem in the broader context of mediation as an alternative to litigation in the United States:

Dispute resolution is shaped by the culture of those who practice it. In order to understand disputing or any other social process, an observer must get "inside the heads" of the actors to discover what they think they are doing and what it means to them. The ideological definition of the process, springing from its social and cultural context, exerts a powerful influence on the behavior of those who carry it out. For example, a third party who believes that she is balancing demands based on contradictory rights will define the dispute resolution project differently than one who thinks that she is overcoming misunderstandings. A person who views her task as one of restoring peace or "making the balance" will have a different vision of the job than one who defines it as punishing rulebreakers. Some mediators, for example, understand their role to be bargaining between the contending parties, while others conceptualize the task as facilitating communication and allowing a therapeutic venting of feelings. Dispute resolution has a chameleonlike quality, whose character shifts with the perceptions of its participants.<sup>186</sup>

Mediation's "chameleonlike quality" is therefore both an advantage and a disadvantage in the Mulukukú context. Mediation provides for easier access to the judicial system but runs the great risk of failing in its goal of changing societal attitudes about domestic violence. The people of Mulukukú have approached mediation in ways that reflect their value choices about the purpose of the process. In this

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186. Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2064-65 (1987) (reviewing STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* (1985)).

section, we provide a theoretical framework for evaluating these choices and explain how they have been implemented in Mulukukú.

A. *Mediation as the Vessel for Ideological Perspectives*

Conflict resolution experts Bush and Folger describe four characterizations of the mediation process that correspond to normative perspectives on mediation.<sup>187</sup> The scholars describe the stories behind these perspectives as the Satisfaction Story, the Social Justice Story, the Transformation Story, and the Oppression Story. We rephrase them in the Mulukukú context as the Rights/Justice, the Community Organizing, the Transformation, and the Social Control perspectives. We utilize their normative concepts to reconcile the local influences in Mulukuku with the language of alternative conflict resolution.

1. *Mediation and the Rights/Justice Perspective: The Satisfaction Story.* Bush and Folger explain that the Satisfaction Story centers on the ability of mediation to satisfy the needs of the parties and to reduce harm to the parties in an informal, efficient, flexible, speedy, and cost-effective manner.<sup>188</sup> Mediation may appeal to those with a rights or justice-based perspective embedded in the Satisfaction Story because of mediation's ease of applicability and its informality. For rights and justice advocates, mediation seems a hopeful alternative to a legal system that lacks the resources to support a victim's right not to be abused. Its procedural informality allows the victim to avoid re-victimization. Its efficiency, speed, and low cost provide potentially viable avenues for conflict resolution between individual parties. The parties can address each other neutrally, thereby keeping tensions to a minimum.

Because one of the major frustrations with the legal system in Mulukukú is the lack of resources to investigate, prosecute, and incarcerate batterers, the rights/justice normative concept has broad appeal. While the women's movement in Nicaragua succeeded in making domestic

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187. BUSH & FOLGER, *supra* note 21, at 8-9.

188. *Id.* at 9-11.

violence a public issue, enforcement continues to be a problem, especially in the more isolated areas of the country. As one Mulukukú woman described, a domestic violence victim must walk several hours to the nearest police station to lodge a complaint against her abuser.<sup>189</sup> This is the beginning of a long process, in which women are re-victimized by the legal system as they pursue their claims. In a sense, the legal system itself inflicts a form of institutional violence against victims of domestic violence who perceive little to no support after their initial victimization. The rights/justice norm motivated the perceived need for successful dispute resolution alternatives in Mulukukú.

2. *Mediation and the Community Organizing/Self-Empowerment Perspective to Domestic Violence Disputes.* Bush and Folger describe the Community Organizing/Self-Empowerment perspective as the story of the power of individuals to organize around common interests to meet their objectives.<sup>190</sup> Bush and Folger note that “mediation reduces dependency on distant agencies and encourages self-help, including the formation of effective grassroots community structures.”<sup>191</sup> The term “popular justice” has also been associated with this perspective of mediation. As Merry notes, “[p]opular justice often envisages a system of justice under the control of local communities enforcing local or customary law and following amicable, consensual processes instead of the adversarial procedures of state law.”<sup>192</sup> This community organizing perspective appeals to the collective spirit of the Cooperative and its members, who adhere to a collectivist, communitarian mission in all of their work. That mediation has the potential to further the Cooperative’s organizing agenda, in addition to providing the vehicle for community discourse of domestic violence issues, is appealing in a broader sense. In this narrative, mediation becomes one more tool in the movement to eradicate violence in a post-conflict society. The narrative also includes the premise that conflict

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189. Interview with members of the Maria Luisa Ortiz Cooperative, in Mulukukú, Nicar. (Aug. 13, 2005).

190. BUSH & FOLGER, *supra* note 21, at 11-12.

191. *Id.* at 12.

192. Merry, *supra* note 128, at 367.

resolution prevents inequality or ensures that parties promote equality.<sup>193</sup> This perspective promotes the idea that coalition building and protecting weaker parties are more important goals than settlement or transformation of the parties.

Mediation, therefore, appeals to the popular justice notions of community and collective action movements, ideas which continue to predominate in Nicaragua after the Sandinista Revolution.

3. *Mediation and the Transformation Perspective.* According to Bush and Folger, both of whom are advocates of the Transformation story, mediation can bring to parties a greater sense of self-confidence and self-realization. Mediation helps parties understand the needs and problems of others. Accordingly, the power of mediation “lies in its capacity to transform the quality of conflict interaction itself, so that conflicts can actually strengthen both the parties themselves and the society they are a part of.”<sup>194</sup> This narrative appeals to the non-violent conflict resolution constituency and the restorative justice advocates who believe that mediation can transform society through the process of teaching people how to resolve conflict nonviolently.

Bush and Folger note that the transformation perspective’s premise is that “the most important benefit of mediation is the transformation of the parties’ conflict itself from a negative and destructive interaction to a positive and constructive one—which represents both a private benefit to them and a public benefit to society . . . .”<sup>195</sup> As they describe it, “the importance of conflict transformation rests on the assumption that people are, by their essential nature, both separate and connected beings, who are distressed whenever negative interaction between them continues, even if their separate needs get satisfied.”<sup>196</sup> In Mulukukú, the power of mediation to achieve transformation appeals to the sensibilities of a population dealing with the aftermath of decades of war. The norm is shared

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193. See BUSH & FOLGER, *supra* note 21, at 21.

194. *Id.* at 13.

195. *Id.* at 21.

196. *Id.* at 36.

throughout the community, which experienced years of armed conflict between former Sandinistas and Contras even after the war officially ended.

Under the transformative model of mediation, the mediator has a role as a neutral facilitator whose goal is to empower the parties and help them recognize their respective positions.<sup>197</sup> The ultimate goal of the mediator is to encourage individual moral development, with the expectation that such individual transformation will have positive effects on society as a whole.<sup>198</sup> The mediator encourages expression of and reflection on emotion; the parties are encouraged to explore their uncertainties about the negotiation or about past events that have led to the conflict.<sup>199</sup> The mediator assumes that the mediation is one point in a series of conflict-ridden experiences between the parties and that this particular interaction may not be the only one between the parties. The transformative model defines a successful negotiation as one in which the parties are empowered or strengthened by the process. Thus the parties “achieve greater clarity about themselves and their concerns, as they gain greater understanding of each other.”<sup>200</sup> Mediation is also successful if the parties become more open, attentive, trusting, understanding, and appreciative of each other’s positions.<sup>201</sup>

4. *Mediation and the Social Control Perspective.* There exists a counter-narrative about mediation that deserves mention because it reflects some of the criticisms about the mediation model implemented in Nicaragua. The norm in the narrative is summarized as follows:

Because of the informality and consensuality of the [mediation] process, it can be used as an inexpensive and expedient adjunct to formal legal processes, seeming to increase access to justice but actually operating to extend the control of the state into previously private domains of social conduct. Once having entered those domains, and given its lack of both procedural and substantive rules, mediation enlarges the discretion and power of state-

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197. *Id.* at 13-14, 76-77.

198. *Id.* at 14, 83.

199. *Id.* at 121, 146.

200. *Id.* at 26.

201. *Id.* at 55.

sponsored decision makers, and it can magnify power imbalances and open the door to coercion and manipulation by the stronger party. As a result, in comparison with formal legal processes, mediation has often produced outcomes that are unjust—that is, disproportionately and unjustifiably favorable to the state and to stronger parties. Moreover, because of its privacy and informality, mediation gives mediators broad strategic power to control the discussion, giving free rein to mediators' biases.

Finally, because mediation handles disputes without reference to other, similar cases and without reference to the public interest, it results in the disaggregation and privatization of class and public interest problems . . . . In sum, the overall impact of the field has been to extend the state's control of individuals' lives; to neutralize social justice gains achieved by civil rights, women's and consumers' movement, among others; and to reinforce the status quo and the privileged position of those who benefit from it.<sup>202</sup>

Our discussions with Cooperative leaders since the inauguration of the Mediation Center in Mulukukú reveal dissatisfaction with a model that does not allow for more protection and advocacy on behalf of the domestic violence victim. The Cooperative leadership has perceived, based on discussions with victims, that the neutrality model assumes too much of a level playing field, leaving women feeling as vulnerable and victimized as if they had filed and pressed charges with the police. Little room exists within the model for the Cooperative to continue its mission of organizing and educating people about the moral and legal wrongs of violence against women. In response, the Cooperative has reduced the number of referrals to the Mediation Center and has continued with its own mediations, which allow the presence of a legal advocate for the victim.

The next section of this Article provides some detail of the dangers described in the Social Control perspective of mediation. These are described in order to provide the parameters for the consideration of alternative mediation models.

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202. *Id.* at 15-16. For more in-depth arguments about the weaknesses of mediation, see Delgado et al., *supra* note 9, at 1375-83; Grillo, *supra* note 3, at 1555-1607; Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991); Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998 (1979).

B. *Problems Embedded in the Mulukukú Mediation Model*

1. *The Dangers of Harmony Ideology.* One of the early and principal criticisms of mediation and the alternative conflict resolution movement was that despite its promise of transformative capacities or of the satisfaction that parties achieved, the movement succeeded in part because it sacrificed rights or justice for harmony.<sup>203</sup> Anthropologist Laura Nader has observed that harmony ideology, which is premised on achieving harmony as an overall goal, assumes that absence of conflict is more desirable than achieving equality or maintaining rights for underrepresented parties. The danger in this assumption lies in the inability of weaker parties to gain leverage in a mediated conflict resolution environment. Harmony ideology is one that silences conflict in the name of peace or consensus building.<sup>204</sup> Nader argues that the notion plays a powerful role in the growth of ADR movements, at least in the United States, because of its appeal to both the Christian fundamentalist movement and psycho-therapeutic movements.<sup>205</sup> Harmony ideology embedded in some ADR programs “may silence disagreement for the sake of achieving consensus and adopting a worldview that transforms facts and legal rights into feelings, relationships, and community writ small.”<sup>206</sup> Nader notes that a society’s legal ideologies fluctuate between tolerance for controversy and a search for harmony, often at the cost of rights.<sup>207</sup> The Nicaraguan case exemplifies the influence of transitional evangelical movements on local dispute resolution choices.<sup>208</sup>

2. *The Pitfalls of Informality.* Legal scholars Richard Delgado, Trina Grillo, Richard Abel, and Kate Kruse expand on Nader’s concerns, focusing on the relatively weak

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203. See Laura Nader, *Harmony Models and the Construction of Law*, in CONFLICT RESOLUTION 41, 51-53 (Kevin Avruch et al. eds., 1991).

204. *Id.* at 53.

205. LAURA NADER, THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS 32, 141 (2002).

206. *Id.* at 131.

207. *Id.* at 13.

208. See NADER, *supra* note 7, at 307.



positions of women and minorities in the typical neutral observer mediation model. They argue that the informality of mediation processes may actually foster prejudice or preconceived biases.<sup>209</sup> Formal processes tend to protect the disadvantaged more than informal processes because structural, procedural mechanisms take unconscious biases into account more than informal processes.

In a foundational article expressing the process dangers surrounding mediation, Trina Grillo points out the very real dangers of court-ordered mediation in family cases where domestic violence may be present.<sup>210</sup> Grillo asserts that the mediation process obscures issues of unequal social power and sex role socialization.<sup>211</sup> Much of the effect can be observed in the interaction between the parties during mediation.<sup>212</sup> Grillo notes that the rules under which mediations take place may disadvantage women especially. Without adequate intervention, women may more readily give in, for example, to their spouses' needs and preferences. The mediation practice that downplays discussion of past grievances may too rigidly control what is said, how it is said, and how parties should behave during mediation.<sup>213</sup> As Grillo notes:

One adverse consequence of de-emphasizing discussion of principle and fault is that some persons may be discouraged from asserting their rights when they have been injured. Even more troubling, some persons may cease to perceive injuries when they have been injured, or will perceive injuries but those injuries will remain inarticulable, because the language to name them will not be easily available.<sup>214</sup>

A more serious problem that Grillo addresses is the focus of mediation mechanisms on formal equality. Such an approach, Grillo warns, fails to consider factors such as "institutionalized societal inequality."<sup>215</sup>

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209. Delgado et al., *supra* note 9, at 1387-92.

210. Grillo, *supra* note 3, at 1600-07.

211. *Id.* at 1549-50.

212. *Id.* at 1555.

213. *Id.* at 1563-64.

214. *Id.* at 1565.

215. *Id.* at 1569.

A related problem lies with the danger of introducing a purportedly impartial mediator into the mediation process who is, in fact, not impartial. Because impartiality is a myth, according to Grillo, failure to disclose or “out” the mediator’s prejudices or preconceived positions may create an imbalance in the mediation process toward one party or another. Thus, according to Grillo, “[t]he most salient feature of a good mediation process is that the failures of neutrality are not denied, but are recognized and addressed.”<sup>216</sup>

Kate Kruse argues, moreover, that alternative dispute resolution processes would benefit from articulation of normative concepts in order to fulfill their goals as true alternatives to adversary processes.<sup>217</sup> Dispute resolution processes need a “vision of ‘just harmony,’ a vision of ‘authentic participation,’” and a vision of “appropriate fit.”<sup>218</sup> According to Kruse, a theory of “just harmony” requires a balance between “harmony that resolves conflict and harmony that merely suppresses or silences the voices of those without political power.”<sup>219</sup>

A related and important critique was made early by Richard Abel, who warned that informal methods for resolving disputes masked the need for broader structural changes to protect the disempowered by individualizing conflict.<sup>220</sup> The processes established to administer informal justice not only fail to address basic structural issues, they encourage the notion that parties can make the changes on their own, and that all problems are subject to individual solutions.<sup>221</sup>

Other scholars critique the neutrality principle in mediation as unrealistic, given the human tendency to influence outcomes. Mediation studies have shown that mediators can control outcomes by selectively choosing

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216. *Id.* at 1588.

217. Katherine R. Kruse, *Learning from Practice: What ADR Needs from a Theory of Justice*, 5 NEV. L.J. 389, 389 (2004).

218. *Id.* at 394.

219. *Id.* at 393.

220. Richard L. Abel, *Introduction to THE POLITICS OF INFORMAL JUSTICE* 1, 7 (Richard L. Abel ed., 1982).

221. *Id.*

which opportunities parties should pursue;<sup>222</sup> by selectively intervening or failing to intervene to assure a fair process or outcome;<sup>223</sup> or by failing to address power imbalances in a mediation.<sup>224</sup>

In the domestic violence context, a neutral observer model of mediation may also push domestic violence issues back into the private realm, a development that works at cross-purposes with the broader feminist vision of making domestic violence a public issue. A private, neutral observer mediation model individualizes the domestic violence problem, because it takes the dispute out of the public and open adversarial model of conflict resolution. Domestic violence victims stand to lose the leverage that comes from placing a dispute in the public realm and from forcing government authorities to respond to domestic violence as a crime. Because the transformative model emphasizes the human development of the parties, its focus on achieving peace could have negative effects on a domestic violence victim's legal right to pursue criminal domestic violence charges. Moreover, individualizing the problem and the solution may conflict with a collective action approach to problem-solving. Individualizing also conflicts with the collective action ideals propounded by the Sandinista regime in the 1980s.

3. *The Illusion of Transformation.* The main criticism of the transformative mediation model espoused by the likes of Bush and Folger is that untested assumptions lie behind the idea of mediation as the catalyst for the moral development of the individual. The assumption is that perpetrators of domestic violence can be transformed in the absence of third party accountability. This assumption is

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222. See David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613 (1989); Hilary Astor, *Mediator Neutrality: Making Sense of Theory and Practice* 5 (Sydney Law Sch. Legal Studies Research Paper No. 07/46, 2007), available at <http://ssrn.com/abstract=998202>.

223. See Linda Mulcahy, *The Possibilities and Desirability of Mediator Neutrality—Towards an Ethic of Partiality?*, 10 SOC. & LEGAL STUD. 505 (2001).

224. See Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35, 45 (1991); Rosemary Hunter & Alice Leonard, *Sex Discrimination and Alternative Dispute Resolution: British Proposals in the Light of International Experience*, 8 Pub. L. 298, 307-08 (1997).

deeply rooted and has an appeal to all of the players involved in the development of the Nicaraguan hybrid model. Feminists (i.e., the Cooperative), as well as Evangelicals and restorative justice adherents all aspire to participate in the creation of the “New Nicaraguan,” one who learns to resolve conflict peacefully and justly.<sup>225</sup> The mediation model in general appeals to that aspiration.

Mediation scholar Jeffrey Seul notes, however, that the transformative mediation approach is not grounded in any comprehensive theory of human development.<sup>226</sup> Seul argues that the model, with its focus on process, is limited in its ability to account for people’s developmental and transformation capacities.<sup>227</sup> Seul explains that developmental psychology has identified several stages of adult development that are more or less likely to incorporate the transformative aspirations of mediation and translate them into daily interactions. Adults in the earlier stages of development may not benefit from the mediation process as well as those in the later stages of psychological development.<sup>228</sup> The transformative mediation model assumes, however, a later adult development stage at which everyone has the capacity for transformation.<sup>229</sup> Without further training incorporating transformative possibilities into mediation, mediators will successfully facilitate transformation in only a few cases.

4. *The Absence of Alternative or Culturally Appropriate Models.* As Folger and Bush describe, different types of mediation models address different needs for the parties. As a result:

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225. Author and Nicaraguan mediation expert and trainer Bruno Mauricio Gallardo Palaviccine expresses in his book on Nicaraguan mediation the hope that through mediation, Nicaraguans will work for a culture of peaceful coexistence and that mediation will initiate a genuine transformation and a paradigm shift in the way we perceive conflict as a means toward social, economic and moral development. PALAVICCINE, *supra* note 46, at 148.

226. Jeffrey R. Seul, *How Transformative is Transformative Mediation?: A Constructive-Developmental Assessment*, 15 OHIO ST. J. ON DISP. RESOL. 135, 136 (1999).

227. *Id.* at 156.

228. *See id.* at 163-64.

229. *See id.* at 167.

Mediation users can retain evaluative mediators, who will steer them toward outcomes in substantial conformity with legal rights. Or they can retain facilitative mediators, who will work to generate a settlement that meets the needs of all sides. Or they can retain activist mediators, who will ensure that parties (and even outsiders) are protected against domination and unfairness in the process.<sup>230</sup>

Our understanding of the influences and the participants in developing mediation as an alternative in Mulukukú indicate that a mediation model that incorporates parts of each of these approaches would best serve the needs of rural residents who do not otherwise have adequate access to justice.

Sally Engle Merry notes in her study of the cultural translation of ideas, especially those dealing with Western feminist concepts:

[E]ven though programs are translated into new contexts and framed in culturally specific ways, they are never fully indigenized. They retain their underlying emphasis on individual rights . . . . Despite arguments that human rights must be translated into local webs of meaning based on religion, ethnicity, or place in order for them to appear both legitimate and appealing, such transformations take place only at a relatively superficial level.<sup>231</sup>

Merry's observation aptly describes the tensions involved in making the Nicaraguan hybrid model more effective for local rural communities. Although the model appeals on the surface to a universal desire for nonviolent conflict resolution, the appeal will remain superficial unless Nicaraguans—in this case, Mulukukú residents—feel comfortable and trust the motives, methods, and processes behind the proposed mediation approach. In other words, they must make the model their own.

In the case of the Nicaraguan hybrid, each of the influential parties—the churches and the Cooperative—must buy into the model. Thus, at a minimum, the Mediation Center model must incorporate elements of the two alternative models, already operational informally in

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230. BUSH & FOLGER, *supra* note 21, at 44 (emphasis omitted).

231. MERRY, *supra* note 109, at 137.

church and Cooperative mediations, in order to produce a mediation process more reflective of the needs and experiences of the people of rural Nicaragua.

#### IV. PRESCRIPTIONS FOR MEDIATION IN MULUKUKÚ IN A POST-NEOLIBERAL ERA

Both the Sandinista and the neoliberal periods in Nicaragua are instructive for Mulukukú residents as they develop successful conflict resolution alternatives. The following proposals provide a starting point.

##### A. *Contextualize the Mediation Process*

The election of Nicaraguan president Daniel Ortega provides a rare opportunity for people at the grassroots level to revisit aspirational goals for the “New Nicaraguan.” During the Sandinista revolution there was much public discussion about the revolution as a catalyst for the New Nicaraguan, one transformed through the revolutionary process and committed to peace and justice. The mediation experiment in Nicaragua could allow for such transformation through nonviolent conflict resolution combined with a collective approach to structural problems in society. The current mediation model will need to be modified so that all parties feel comfortable and safe, and ultimately, trust that the process will yield positive results over time.

This position argues minimally for the rejection of the so-called neutral mediation model in favor of one that best protects the rights of victims. One such model, the advocacy or activist model, attempts to ensure that the parties and outside beneficiaries are protected in the case of an uneven playing field or of unbalanced power relationships and that the public interest is represented.<sup>232</sup> Adherents of this model encourage the neutrality and impartiality of the process, while recognizing that in many disputes mediators are motivated by political and ethical considerations that influence the process if not the outcome of the mediation.<sup>233</sup>

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232. BUSH & FOLGER, *supra* note 21, at 44.

233. See BERNARD MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION 17 (2004); John Forester & David Stitzel, *Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts*, 5 NEGOTIATION J. 251, 254 (1989); Lawrence Susskind & Connie Ozawa, *Mediated*

Part of the mediator's role under the activist model involves a responsibility to the public interest even in the context of ostensibly private matters. To the extent that the public interest—at the very least, an interest in maintaining a minimum level of rights and responsibilities to eliminate domestic violence from society over the long term—is implicated in domestic violence disputes, activist mediation advances the protection of victims in individual, private mediations. This type of rights-based mediation establishes a floor of rights in order to level the playing field among parties who may experience power imbalances.<sup>234</sup>

Legal scholar Amy Cohen describes an experiment in localization of the U.S.-based mediation model in Nepal not unlike that which is beginning to develop in Nicaragua.<sup>235</sup> This type of mediation is much less neutral in the traditional sense, yet still incorporates much of the traditional mediation procedures. This form of mediation is much more open, public, and rights-based than the prototypical mediation model prescribes.<sup>236</sup> In this Nepalese model that Cohen describes, self-determination and neutrality take on distinctively local meanings. Self-determination requires that the parties know about their rights under the law and publicly renounce those rights in favor of an alternate compromise. Self-determination in this context requires, therefore, that the mediator play a know-your-rights role during the mediation. Neutrality in the Nepalese mediation context means something different than the lack of preference for either party's position, as it is understood in the United States. In Nepalese mediation, neutrality is defined as the absence of political, racial, familial, or caste biases that a mediator may harbor.<sup>237</sup> Cohen finds that this activist mediation transcends the limited and ineffective enforcement mechanisms that exist in many rural communities and allows mediation programs to push the envelope in favor of rights for the most disadvantaged,

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*Negotiation in the Public Sector: Mediator Accountability and the Public Interest Problem*, 27 AM. BEHAV. SCIENTIST 255, 269 (1983).

234. Hunter & Leonard, *supra* note 224, at 311.

235. Cohen, *supra* note 7, at 337-51.

236. *See id.*

237. *See id.* at 339.

including women and the poor.<sup>238</sup>

This is the type of mediation to which forces such as the Cooperative in Nicaragua aspire. They already practice some of the same activist methods that the Nepalese model embraces. For example, in Nepal the mediation committee accompanies the woman in domestic violence disputes to invite the spouse to mediation.<sup>239</sup> During the mediation, the mediator may intervene “adding to [the woman’s] voice.”<sup>240</sup> When the offender refuses to appear for the mediation, moreover, the members of the organization will appear at his door, effectively requiring him to participate in the mediation.<sup>241</sup> These methods, along with public shaming, are outside the traditional mediation practices and yet have proven effective in establishing the credibility of mediation as a powerful dispute resolution tool.

The Nepalese mediation experiment demonstrates that the current Nicaraguan hybrid mediation model would benefit by incorporating the experiences of the religious sector, as well as those of the Cooperative. These influences necessitate incorporating activist, insider approaches—similar to those implemented by Nepalese grassroots community organizations—to the current mediation model. For the Cooperative, this means that a component of the mediation process will involve advocacy on behalf of victimized spouses, for example. The church leadership will need to be convinced that the localized mediation model will make room for a partial insider who knows and can monitor the family situation to ensure compliance against revictimization. Such compliance may serve as an indicator of the promise of transformation by the mediating parties to a pattern of nonviolent conflict resolution that reflects a deeper spiritual transformation.

In addition to proposing alterations to the Nicaraguan hybrid model that incorporate elements of advocacy and possibilities for transformation, we suggest ongoing evaluation of mediation cases that involve domestic violence. As part of this evaluation, the Cooperative has suggested follow-up visits and interviews with mediating parties to gauge their

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238. *Id.*

239. *See id.* at 342.

240. *Id.*

241. *See id.*



perceptions about whether domestic violence attitudes change over time after mediation has occurred. We suggest a broader survey of the Mulukukú communities to determine whether a correlation exists between the differing models of mediation and a change in conflict resolution outcomes over time.

Any mediation model ultimately adopted in Mulukukú should be supplemented with the types of programs that the women's movement sought to implement through legislation in the 1990s. For example, group or individual therapy will facilitate a process of transformation that may be initiated through a mediation process. The mediation process alone cannot adequately create transformation if the mediating parties are not prepared to reflect and act upon the transformative power of the mediation experience.<sup>242</sup> Therapy or counseling may provide a more adequate foundation from which to reflect upon the transformative power of mediation.

#### B. *Make the "Personal" Political*

For decades now, women's movements and community groups in Nicaragua have struggled with taking domestic violence issues out of the private realm and placing them in the center of public debate. The criminalization of domestic violence has been part of this effort. To the extent that a mediation model may threaten to place domestic violence issues back into the private realm, we suggest the following prescriptions. These ensure that domestic violence issues continue to be addressed on a structural and societal level at the same time that individual cases may be resolved on a private basis through mediation. In other words, the public discussion about domestic violence issues must continue as the backdrop for individual mediation cases. Without it, and some of the prescriptions we describe here, individual women may feel isolated despite mediation.

1. *Incorporate Public Shaming of Perpetrators and Violence.* The Cooperative occasionally uses the tactic of publicly outing domestic violence abusers. This form of shame works, in part, because decades of effort in Nicaragua have made domestic violence publicly unacceptable.

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242. See Seul, *supra* note 226, at 154, 159.

The public shaming works best when reputation is at stake, such as when the perpetrator holds a position of community respect. The public denunciation of Daniel Ortega by his stepdaughter Zoilamérica and her supporters serves as the example for Cooperative leadership of the effectiveness of this tactic. Of course, advocates must evaluate the potential for increased violence in every situation in which public shaming is a possibility.

2. *Insist on Dialogue of Rights for Women (and Men) Including Economic, Cultural, and Social Rights.* As discussed earlier, the Sandinista regime began a rights-based dialogue, which continued in various forms through the women's movement of the 1990s neoliberal government. This rights-based approach is key to the success of mediation in Nicaragua. The most effective domestic violence mediation will need to bargain under the protection of strong laws and equally strong law enforcement. Otherwise, women will not feel safe enough to trust even an indigenous and completely trustworthy mediation process.

3. *Strengthen the Criminal Justice System.* Domestic violence victims must perceive that they have viable options for rights enforcement in the existing criminal justice system. One of the biggest threats to successful mediation is that people perceive they are not operating on a level playing field. Domestic violence victims cannot successfully negotiate if they do not perceive that they can walk away from the mediation table and enforce their rights through the traditional legal system. One of the problems with the current system, however, is that the mediation model has been implemented in pilot areas where all of the interested parties recognize serious access to justice problems. Nicaragua's recent conversion from an inquisitorial to an adversarial system of adjudication has compounded the problems. In addition to historical problems involving lack of resources, residents of rural areas now also face problems of expertise and lack of understanding of the operational aspects of an adversarial model. These are serious threats to a successful mediation model, especially when processes have traditionally operated on the assumption that parties have viable options for conflict resolution if they choose to walk away from mediation. Thus, the Nicaraguan Supreme Court and other interested parties must continue parallel efforts to strengthen the existing criminal justice system at

the same time that they establish and institutionalize a Nicaraguan mediation model.

4. *Reclaim Cultural Notions of Conflict Resolution.* In the late 1980s, sociologist and conflict resolution expert John Paul Lederach participated in and studied the conflict resolution process between the Sandinistas and the indigenous Miskitos on the Nicaraguan East coast. As a result of this process, Lederach observed that successful conflict resolution in Nicaragua involved not the traditional neutral observer model, but instead succeeded because of partial insiders or trustworthy individuals who have knowledge of the situation.<sup>243</sup> Contrary to the neutral observer model which calls for the mediator to take an impartial third party role in the process, these partial insiders were involved, familiar with the conflict, and were as affected by the outcome of the process as the mediating parties.<sup>244</sup> Lederach concluded that this type of conflict resolution succeeded in Nicaragua because of culturally specific norms that made parties on both sides of the conflict feel comfortable with the process. Parties were more candid, forthcoming, and trusting if they knew or had a common bond with the mediator and if the mediator was as grounded in the realities of the conflict as the mediating parties. Such a relationship enlisted the parties in a discussion which allowed them to figure out what positions they held in the conflict so that they could arrange a way out.<sup>245</sup> The model is much less formal and more fluid than the traditional mediation model familiar to United States mediators.<sup>246</sup> Lederach concluded that this type of adaptation of the traditional mediation model was not only acceptable but necessary.<sup>247</sup>

A recent study of post-conflict psychological work in Nicaragua takes Lederach's observations a step further. The study revealed that the most effective method of

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243. John Paul Lederach, *Of Nets, Nails, and Problems: The Folk Language of Conflict Resolution in a Central American Setting*, in CONFLICT RESOLUTION 165, 183-85 (Kevin Avruch et al. eds., 1991).

244. *See id.* at 183-85.

245. *See id.* at 176.

246. *See id.* at 181.

247. *Id.* at 184-85.

addressing issues such as domestic violence was as “participant observers.”<sup>248</sup> We think that both the informal church-based mediation model and the Cooperative’s advocacy model incorporate this approach. In the study, professionals linked seemingly individual problems with the broader political and social context. Professionals’ legitimacy arose from shared experiences with the trauma of war and its after-effects. Professionals agreed that successful approaches to the effects of trauma—including domestic violence, child abuse, individual, and interpersonal stress—included a pedagogical approach to psychological problems, a normative position based in the need for reconciliation, placing the problems in a broader context, psychological help in conjunction with other social services, and creating connections between clients and professionals arising out of shared wartime experiences.<sup>249</sup>

The pedagogical approach described by professionals in the study focused on “creat[ing] ways of understanding the psychological distress” of their clients.<sup>250</sup> They focused on explanations of stressors, how they develop and possible reactions to them. This was helpful in orienting clients toward a fuller understanding of their particular situations.

The normative stance allowed professionals to focus on values and morality rather than on the specific problems in relationships or with individual clients. The focus also allowed professionals to speak in the language of reconciliation allowing for forward-looking solutions.<sup>251</sup>

The broader context and the connections between client and professional reflect the “participant observer” perspective, which facilitates strategies to eliminate violence in a post-conflict society.<sup>252</sup> By contrast, the neutral approach recommended in other countries does not work in the Nicaraguan context according to the experiences of mental health professionals.

The Ho’oponopono model that Sally Engle Merry and

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248. See Nora Sveaass, *Psychological Work in a Post-War Context: Experiences from Nicaragua*, 3 COMMUNITY, WORK & FAM. 37, 45-53 (2000).

249. See *id.* at 45-53.

250. *Id.* at 46.

251. See *id.*

252. See *id.* at 39.

others describe in their work contains elements of the “partial insider” perspective that Lederach and others endorse in contexts like Nicaragua. James Wall and Ronda Roberts Callister describe many of the components of that mediation model as containing spiritual or religious connotations.<sup>253</sup> The religious undertones of this type of mediation reflect the same types of religious influences that we observed in Mulukukú. The belief in God as an active participant in the daily lives of residents typifies both the Hawaiian and the evangelical traditions of rural Nicaraguans. The Ho’oponopono model reflects the religious tradition by, among other things, having a “high status” community member preside over the dispute; opening the mediation with a prayer; maintaining a period of silence during the mediation; calling for a confession to God and to each of the disputants; calling for restitution, mutual forgiveness, and release from guilt; and closing the mediation with a prayer.<sup>254</sup> In the Ho’oponopono model, the mediator plays a more dominant role than in traditional Western mediation models. The mediator frames the problem, asks questions, requires that responses be channeled through him, and enforces silence when appropriate.<sup>255</sup> This model seems effective because of the authority or sway that the mediator has with the involved parties.

5. *Create an Integrated Paradigm for Eradicating Domestic Violence.* Incorporation of rights at the local level involves layering discourse over already existing cultural and legal structures. Thus the potential conflicts become co-existing paradigms. As Merry describes, “grassroots individuals take on human rights discourse through a double subjectivity as rights-bearers and as injured kinsmen and survivors. There is not a merging and blending, but two somewhat distinct sets of ideas and meanings that coexist.”<sup>256</sup>

Accordingly, the mediation model may be less antagonistic to the masculine identity of the aggressor and

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253. James A. Wall, Jr. & Ronda Roberts Callister, *Ho’oponopono: Some Lessons from Hawaiian Mediation*, 11 NEGOTIATION J. 45, 48 (1995).

254. *Id.*

255. *Id.* at 50.

256. MERRY, *supra* note 109, at 180-81.

therefore more acceptable to the parties as a path toward eradicating domestic violence. Mediation may frame a discussion that resonates with the parties, rather than serving as a more radical approach that requires the parties to adopt new, uncomfortable identities (the female as autonomous individual, the male as aggressor). In the absence of a concerted effort to arrest, prosecute, and sentence the crime, however, women will not want to take the risk, or consider themselves autonomous selves. Mediation does not and should not change the regulatory function of the law and the responsibility of the state to protect against violence.

#### CONCLUSION

In the end, we cannot simply tell the Maria Luisa Ortiz Cooperative women to abandon mediation altogether or to refuse to apply it to domestic violence cases, a position held by many feminist advocates we interviewed in Nicaragua. We agree with the Cooperative that the criminal justice system *per se*, as poorly implemented as it is in Mulukukú, offers an equally unsatisfying response to the domestic violence situation. We also agree with the Cooperative that their community must focus on addressing the root causes of domestic violence, including the culture of machismo in women and men alike, and we agree that an alternative to the criminal justice system is better suited to address these goals. Thus, in thinking of prescriptions for Mulukukú, we make this series of recommendations to Mulukukú, with the general aim that the alternative process adopted become an adjunct, rather than the panacea; that the people of Mulukukú be able to reclaim the “political” in the personal; and finally, that they incorporate and capitalize on the local strengths of Mulukukú, including their own cultural and local notions of conflict resolution.