

Comparing Philosophies and Practices of Family Law Between the United States and Other Nations: The Flintstones* vs. The Jetsons**

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Legal pundits, practitioners, judges, psychiatrists, psychologists, social workers and virtually anyone who has dealt with families in distress due to divorce or related issues have agreed for years that the family law legal system is broken.¹ Parties remain angry years after the initial hurt, relationships crack under stress, and most difficult of all, children are unable to maintain meaningful and positive associations with their family members.² While everyone involved in litigious family law proceedings, most especially the parents, likely believe, or at least convince themselves, that they are acting in the children's best interests, the reality is that this system creates unnecessary turmoil in everyone, particularly the children, separate and apart from the difficulties inherent in the initial breakup itself.³

In recent years, there has been a trend in a number of states towards using non-litigious methods for resolving family matters, including negotiation, mediation, and, more recently, collaboration.⁴ The ideals of collaborative law, better known and

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¹ See generally Janet Weinstein, *And Never the Twain Shall Meet: The Best Interest of the Children and the Adversarial System*, 52 U. MIAMI L. REV. 79 (1997).

² See *id.* See generally Judith S. Wallerstein & Julia Lewis, *The Long-Term Impact of Divorce on Children: A First Report from a 25-Year Study*, 36 FAM. & CONCILIATION CTS. REV. 368 (1998); Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L.J. 215 (2008) [hereinafter Freeman, *Applying the Realities of Therapeutic Jurisprudence*].

³ See Wallerstein & Lewis, *supra* note 2; Freeman, *Applying the Realities of Therapeutic Jurisprudence*, *supra* note 2, at 217.

⁴ See generally Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement"*, 6 PEPP. DISP. RESOL. L.J. 1 (2006).

used in other areas of law,⁵ have been promoted by practitioners and commentators alike.⁶ Collaborative law, according to them, creates a new and, many believe, better methodology for dealing with family matters, especially dissolution and its integrated issues. This is especially true when collaborative law moves from a merely behavior-controlling paradigm,⁷ to one encompassing the precepts of therapeutic jurisprudence.⁸ Therapeutic jurisprudence recognizes the need not only to address specific conduct, but the underlying issues that have led to it.⁹ Yet, for all the agreement among legal practitioners, the Bench, and mental health experts that such processes are far better for family members, particularly children,¹⁰ there remains reluctance in many states, and even great fluctuations within states,¹¹ against requiring a switch to such methods. While there are legitimate concerns among those involved in family law matters, relating to the specifics of the collaborative method,¹²

⁵ See David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work*, 89 A.B.A. J. 54, 54–56 (2003) [hereinafter Wexler & Winick, *Putting Therapeutic Jurisprudence to Work*].

⁶ See Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 322–24 (2004) (criticizing the costly and conflict-engendering process of traditional family law); Freeman, *Applying the Realities of Therapeutic Jurisprudence*, *supra* note 2, at 217 n.6. See also Daicoff, *supra* note 4, at 3 (describing the new forms of resolution as a “comprehensive law movement”).

⁷ See Freeman, *Applying the Realities of Therapeutic Jurisprudence*, *supra* note 2, at 223, 229.

⁸ See Wexler & Winick, *Putting Therapeutic Jurisprudence to Work*, *supra* note 8, for insight and examples of using the philosophies of therapeutic jurisprudence in multiple areas of law to achieve not just momentary legal resolve but lasting emotional changes to carry the parties forward.

⁹ See Freeman, *Applying the Realities of Therapeutic Jurisprudence*, *supra* note 2, at 223–28.

¹⁰ *Id.*; Forrest S. Mosten, *Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going To Court*, 43 FAM. L.Q. 489, 496 (2009). See also Tesler, *supra* note 6, at 321–22; Weinstein, *supra* note 1, at 83; Daicoff, *supra* note 4, at 7–8.

¹¹ In New York, for instance, the Courts appear to remain reluctant to even promote, let alone require, non-litigious methods of resolution such as mediation. In Florida, by contrast, the Courts have long required mediation before the parties may get before a judge. See FLA. STAT. ANN. § 44.102 (West 2003). Nevertheless, despite a long history of supporting such methods statewide, only a handful of judicial circuits have thus far adopted Administrative Orders requiring collaborative methods in the dissolution case. See Marsha B. Freeman, *Florida Collaborative Family Law: The Good, The Bad, And Getting Better*, (forthcoming 2010) (citing Administrative Order 07-08: Authorizing the Collaborative Process Dispute Resolution Model in the 11th Judicial Circuit) [hereinafter Freeman, *Florida Collaborative Family Law*].

¹² Freeman, *Florida Collaborative Family Law*, *supra* note 11, at 5 n.13:

See generally Model Code of Prof'l Responsibility (1980), and Code of Judicial Conduct (1990, 2008), which are adopted in some form in every state. The Codes guide lawyers and judges in their roles and conduct in the legal system. There are serious concerns about some of the practices of collaborative law. The Colorado Bar Association issued a ruling saying the non-disclosure requirement of collaborative agreements violated the Rules of Professional Responsibility, leaving lawyers in that state at a loss as to how to proceed in these cases. See Colo. Bar Ass'n Ethics Op. 115 (Feb. 24, 2007). The ABA felt

the overriding opinion among most legal and virtually all mental health professionals is that such methods, especially since they encompass the philosophies of therapeutic jurisprudence,¹³ are so superior to the litigation system in resolving the original issues and in allowing all parties to proceed forward in a healthier manner that they must be promoted and adopted on a widespread basis.

It is often hard to remember that the United States is a comparatively young nation, only an official two hundred and thirty-three years old. Many times, this national youth allows us to find newer and better methods of operating, unhindered by hundreds, perhaps thousands of years of historical perspective and reluctance to change. Other times, it can become mired in its own sense of youthful righteousness, unwilling to admire or bend to older nations' experiences and expertise. Many of these older nations, far longer accustomed to dramatic changes, have an easier and swifter time adopting and implementing new ideas and formats.¹⁴

History allows that law has not always been a litigious activity. Many early efforts at resolution involved both theological and civil roles.¹⁵ The Talmud of the first and second centuries addressed the goal of peaceful settlement in the Sanhedrin, stating: "What is that kind of justice within which peace abides? We must say, arbitration."¹⁶ Early leaders of the Greek city-states similarly used arbitration to solve disputes.¹⁷

that collaborative law is so important to the practice of family law that it responded with an advisory opinion finding that the clause did not violate the rules. See American Bar Association Standing Committee On Ethics and Professional Responsibility, Formal Opinion 07-447: Ethical Considerations in Collaborative Law Practice (August 9, 2007). The ABA opinion notes that Colorado was the only State Bar to find a conflict arose from this collaborative law requirement. *Id.* at n.7.

¹³ While focusing on mental health and justice issues of juveniles, the paradigms of therapeutic jurisprudence are clear in their ability to help children and parties in other areas of the law, especially divorce procedures. Scott Nolen, *Adolescent Mental Health and Justice for Juveniles*, 7 WHITTIER J. CHILD & FAM. ADVOC. 189, 190 (2008).

¹⁴ The United States is in the minority on such major issues as the death penalty, for example, which has long been abandoned in most of the Western world. It is truly remarkable to contemplate the ability of European nations, for instance, to join together in a European Union and even give up their own monetary systems in some cases and the right of final judicial review. It is frankly difficult to think that this nation would be willing, let alone capable, of acceding to any other jurisdiction's superiority. Indeed, we have steadfastly refused to join other nations in allowing criminal sanctions over our citizens. Paul W. Kahn, *Why the United States is So Opposed*, THE CRIMES OF WAR PROJECT MAGAZINE, Dec. 2003, http://www.crimesofwar.org/icc_magazine/icc-kahn.html.

¹⁵ JEROME S. LEVY & ROBERT C. PRATHER, SR., TEXAS PRACTICE GUIDE: ALTERNATIVE DISP. RESOLUTION § 1:2 (West 2004).

¹⁶ *Id.*

¹⁷ *Id.*

The Spanish Admiral Balboa of the Great South Sea Expedition was apparently so concerned with formal legal actions that in 1513 he wrote to his monarch, King Ferdinand of Spain: "One thing I supplicate, your majesty: that you will give orders, under a great penalty, that no bachelors of law should be allowed to come here (to the New World); for not only are they bad themselves, but they also make and contrive a thousand iniquities."¹⁸ Perhaps Shakespeare was not, after all, the first to suggest we "kill all the lawyers."¹⁹

Although such drastic results are not the goal, even our ancestors sought better results outside of formal legal systems, partly due to apprehension that such systems were a threat to the harmony of their new and small communities.²⁰ They instead utilized private resolutions to foster accord and to protect their communities.²¹ The colonists also brought a distrust for the legal system, fostered by religious leaders who compared lawyers to the "biblical serpent" responsible for mankind's fall from grace in the Garden of Eden.²² Some of the colonies, including Virginia, actually barred lawyers from practicing, while others denounced them officially.²³ In Massachusetts, arbitration was required before progressing to a formal suit, while the Quakers practiced an early form of third-party dispute resolution.²⁴ Native Americans had a similarly advanced outlook, using what was known as the "sentencing circle" with the concurrent objectives of dealing with the offense and simultaneously returning the offender to the community in a healing way,²⁵ very similar to today's goals of restorative justice.²⁶ It was only at the end of the eighteenth century that American jurisdictions began to follow a more formal legal system for adjudication of disputes,²⁷ one from which they have seldom looked back.

Be it a civil or a criminal matter, resolution is even today handled differently in different nations.

¹⁸ VARDIS FISHER & OPAL LAUREL HOLMES, *GOLD RUSHES AND MINING CAMPS OF THE EARLY AMERICAN WEST* 296 (Caxton Printers, 1990).

¹⁹ WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2.

²⁰ LEVY & PRATHER, SR., *supra* note 15, at § 1:2.

²¹ *See id.*

²² *See id.*

²³ *Id.*

²⁴ *See id.*

²⁵ *See* Leena Kurki, *Restorative and Community Justice in the United States*, 27 *CRIME & JUST.* 235, 281 (2000).

²⁶ *See* Wexler & Winick, *Putting Therapeutic Jurisprudence to Work*, *supra* note 5, at 56.

²⁷ LEVY & PRATHER, SR., *supra* note 15, at § 1:2.

International criminal issues handled by the International Criminal Court (ICC) often arise from political unrest and involve large-scale atrocities.²⁸ The Court recognizes the need to restore belief in judicial systems while at the same time promoting widespread healing, and it utilizes the concepts of restorative justice to do so.²⁹

Although the ICC is a more extreme example of other nations' legal resolution systems and goals, other issues, such as resolution of family law matters, are similarly handled differently in many nations of the world. Some are incrementally distinct from the United States, and some are a sea change in attitude and practice. This article will examine how other exemplar nations handle domestic relations matters, and it will compare them to the still mainly litigious and nascent rise of non-litigious methods, including collaborative family law and therapeutic jurisprudence practices in the United States.

Recalcitrant Followers:

Some commentators believe the United States has already succeeded in moving family courts from the concept of adjudicators to conflict managers.³⁰ While, certainly, there have been numerous instances of such change, family courts in the United States remain widely disparate as to the processes used to resolve disputes.³¹ Practitioners and educators alike have been promoting the idea of collaborative and even therapeutic methods of family law resolution³² for a number of years, arguing

²⁸ See Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 652 (2010).

²⁹ *Id.*

³⁰ See generally Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363 (2009), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/122407917/PDFSTART>.

³¹ See Freeman, *Florida Collaborative Family Law*, *supra* note 11.

³² The term "collaborative law" generally refers to a number of methods of attaining a litigation-free divorce settlement, and is usually attributed to Stuart Webb, J.D. Freeman, *Florida Collaborative Family Law*, *supra* note 11, at n.4. Mr. Webb promoted a formal methodology for collaborative practice, including contractual agreements among the parties and attorneys not to litigate the action. *Id.* This author refers to this as collaborative with a capital "C," as it promotes the formal behavior model of collaborative law. In essence, there are both formal and informal forms of collaborative practice which can encompass both behavioral and emotional strides. See *id.* While Winick & Wexler were the first to promote and formalize the application of therapeutic jurisprudence to courts and practice, others have followed, applying it specifically to family law; Professor Babb was likely the first scholar to use the term "therapeutic jurisprudence" as applied to resolution of family law issues. See generally Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 798-801 (1997). Winick and Wexler have further advanced the ideals of therapeutic jurisprudence even in the traditional courtroom setting, advocating a "therapeutic justice" framework. See Bruce J. Winick & David B. Wexler, *Introduction to JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE*

that the law can and should be used as a therapeutic agent, not merely for legal resolution but for the emotional betterment of the parties to the action.³³ Despite the acknowledged attributes and benefits of collaborative processes and therapeutic paradigms, many American States, and even more of the judicial circuits within States, continue to practice more reluctance than implementation.³⁴

There is no dearth of voices in the United States today advocating the use of collaborative and therapeutic jurisprudential philosophies and methodologies in a multitude of family law issues. Commentators have long promoted such uses in dependency courts, domestic violence cases and even the child welfare system.³⁵ Judicial conferences recognize the benefits to both participants and the Bench.³⁶ Legal and mental experts alike recognize the benefits, even for families in high-conflict situations.³⁷ Nevertheless, there continues to be a disconnect

COURTS 3, 3–7 (Bruce J. Winick & David B. Wexler eds., 2003). Linda Elrod similarly examines the concepts of collaborative family law and therapeutic jurisprudence, which aims to recognize all the consequences, intended or not, in legal decision-making processes. See LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 1:15 (West 2003–2004).

³³ See Nolan, *supra* note 10, at 211–13.

³⁴ See Wexler & Winick, *Putting Therapeutic Jurisprudence to Work*, *supra* note 5, at 56. The author is involved in a number of organizations supporting and promoting both collaborative and therapeutic ideals in family law resolution. Nevertheless, it is not uncommon to find that many of the practitioners espousing such support have never actually done a collaborative case, no doubt for a multitude of reasons. Unfortunately, many of these reasons remain significant blocks to the actual widespread implementation of such programs. See generally Freeman, *Florida Collaborative Family Law*, *supra* note 11.

³⁵ See generally Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach*, 5 PSYCHOL. PUB. POL'Y & L. 951, 953 (1999); Jaclyn Jean Jenkins, *Listen to Me!: Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. 163, 165–66, 171–73 (2008), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/119422412/PDFSTART>; Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33, 33–34 (2000). To be sure, there are legitimate concerns regarding the use of these methodologies in certain areas of the law, such as when the accountability of an abuser may be unsuitably reduced in an effort to move the proceedings to a larger overall settlement. See, e.g., Julia Weber, *Domestic Violence Courts*, 2 J. CTR. FOR FAM., CHILD. & CTS. 23 (2000), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/023weber.pdf>.

³⁶ See Conference of Chief Justices & Conference of State Court Administrators, *CCJ/COSCA Joint Resolution in Support of Problem-Solving Courts*, 2 J. CTR. FOR FAM., CHILD. & CTS. 2 (2000), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/cover.pdf>.

³⁷ See generally Lyn R. Greenberg et al., *Effective Intervention With High-Conflict Families: How Judges Can Promote and Recognize Competent Treatment in Family Court*, 4 J. CTR. FOR FAM., CHILD. & CTS. 49 (2003), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/049Greenberg.pdf>; Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 FAM. L.Q. 617, 618 (1999). See also Mary E. O'Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 529 (2006), available at

between the ideal and the application in American courts and there is a practice that does not exist elsewhere in the world, particularly in Western nations.

The question is, why are other nations able to forge past the problems and reluctance that continues to plague many of States, and accomplish what most practitioners, judges and mental health experts worldwide agree is the best alternative for resolution of family issues?

Other nations, perhaps because of their age, their perspective of right and wrong, their experiences with what we as a young nation are still learning, or maybe it is simple humility are better able to recognize the benefits of collaborative law and therapeutic jurisprudence on a far wider scale. While some have described these processes as having a huge impact in both the United States and Canada, observation shows that it is far more accepted and widely used by our northern neighbor than in the United States. The Canadian Department of Justice in 2001 commissioned a long-term study of what was described as a “rapidly growing phenomena” that had achieved a “meteoric rise” in Canada.³⁸ The study, conducted by Professor Julie Macfarlane and concluded in 2005, found that collaborative law was found in “virtually every state and province in’ the United States and Canada” and used extensively in family law.³⁹ While technically true in the United States, the sheer fact is that the vast majority of American family law attorneys, even in areas where it is more accepted,⁴⁰ have still never had a collaborative law case.⁴¹ The opposite appears to be true in Canada, a nation where traditional trial and sentencing techniques are generally replaced by

<http://www3.interscience.wiley.com/cgi-bin/fulltext/118591816/PDFSTART> (advocating encompassing the therapeutic jurisprudential paradigms in law school teaching). The author was a signatory to this report. *See id.* at n.3 (citation omitted).

³⁸ Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer’s Toolkit*, 20 U. FLA. J.L. & PUB. POL’Y 113, 116–18 (2009).

³⁹ *Id.* at 118 n.34.

⁴⁰ A number of Florida judicial circuits have Administrative Orders requiring the use of Collaborative methods in family law cases. Administrative Order granting Mediation Of Family Law Cases, S-2008-163 (2008), available at <http://www.fljud13.org/AO/DOCS/2008-163.pdf> (“The Family Diversion Program has been established as a court program under Mediation and Diversion Services to implement an equitable and expeditious alternative dispute resolution process for family law cases.”). *See also* Administrative Order *In re: Authorizing the Collaborative Process Dispute Resolution Model in the Eleventh Judicial Circuit of Florida*, No. 07-08 (2007), available at http://reports.jud11.flcourts.org/Administrative_Orders/1-07-08-Collaborative%20Process.pdf.

⁴¹ Based on conversations with family law attorneys involved in collaborative law groups, as well as a teleconference with the Broward county Florida Family Law Committee, many attorneys still have no actual experience utilizing collaborative law, although Broward county is generally regarded as being a leader in collaborative family law.

collaborative family conferencing in an effort to effectuate results that take into account the needs of all and attempts to best arrive at a satisfactory solution.⁴² While the United States is still very much in the debate and promotes collaborative family law, Canada can be considered a model for family law resolution.⁴³ Part of this process includes assessments to determine the best interests and results in post-divorce situations involving parenting issues.⁴⁴ Assessments are frequently made by social workers, not psychologists, in order to create a more factual than theoretical framework within which to work; and those who do the assessments often do only a few a year, focusing the rest of the time on therapeutically-oriented practices.⁴⁵ By contrast, American states, like Florida, which has long supported non-litigious family law,⁴⁶ require psychologists or psychiatrists to do parenting plan evaluations.⁴⁷

Although therapeutic processes, including restorative justice,⁴⁸ are used widely in the United States in cases involving juvenile offenders,⁴⁹ they are used far more widely by other nations, including Canada, in juvenile and in many adult offender cases.⁵⁰ While therapeutic jurisprudence has been widely accepted in theory in both the United States and Canada,⁵¹ it is far more widely practiced in Canada, including in family law. In many cases, family "circles," or conferences,

⁴² Daicoff, *supra* note 4, at 30.

⁴³ *See id.*

⁴⁴ *See* Nicholas Bala, *Assessments for Postseparation Parenting Disputes in Canada*, 42 FAM. CT. REV. 485, 485, 495 (2004), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/118817162/PDFSTART>.

⁴⁵ *Id.* at 487-89.

⁴⁶ The Florida Supreme Court, in a 2000 decision, held that family courts should be unified and one judge would preferably hear all issues involving the family members. The goal was not only to centralize for practicality and efficiency all actions that might affect the members, but also to draw in outside resources to help the family members in more than just a legal resolution. *See generally In re* Report of Family Court Steering Committee, 794 So. 2d 518 (Fla. 2001).

⁴⁷ FLA. FAM. LAW R. P. 12.360, 12.363.

⁴⁸ Restorative justice generally refers to the idea of making all the parties whole, not just the victim, in legal and societal settings. Elmar G.M. Weitekamp, *The History of Restorative Justice*, in RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 75 (Gordon Bazemore & Lode Walgrave eds., 1999). The term has also been used extensively by Bruce Winick and David Wexler in their numerous writings on therapeutic jurisprudence. *See, e.g.*, Bruce J. Winick, Symposium, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 433, 438 (2005).

⁴⁹ Daicoff, *supra* note 4, at 30. *See also* Paula A. Nessel, *Youth Court: A National Movement*, 17 A.B.A. DIV. FOR PUB. EDUC. TECHNICAL ASSISTANCE BULL. 1, 8 (2000) (detailing information on teen courts in different states as well as rates of recidivism).

⁵⁰ Daicoff, *supra* note 4, at 30.

⁵¹ *Id.*

replace court procedures entirely to resolve the family law issues at hand in a far more collaborative method.⁵²

Restorative justice has become normative in Canada, while it is still in the developmental stage in the United States.⁵³ Stu Webb, the originator of formalized collaborative family practice in the United States, spotlights the success of such methods in a small area of Canada, noting that in a community of about 50,000, sixteen of the seventeen family practitioners attended collaborative trainings.⁵⁴ Within a year, the family court docket had dwindled to almost nothing, and one family court judge was actually reassigned to a different court.⁵⁵ The point is not that collaborative law works better in Canada than in the United States, but simply that it works when accepted and practiced in a far more widespread manner. Indeed, collaborative law had already become so widespread in Canada that authorities authorized a study on its work and effectiveness in 2001.⁵⁶ By contrast, this author has spoken to attorneys in jurisdictions where there are widely known collaborative family law organizations, and has been told that most of the attorneys they communicate with do not even know anyone who has done a collaborative case.⁵⁷ So, while many commentators continue to suggest that collaborative law, especially collaborative family law, is as widespread and accepted in the United States as it is in nations like Canada, the opposite is unfortunately true.⁵⁸ It may be that it is *theoretically* accepted as the better alternative, but the practice of it, except in small enclaves, has yet to successfully compete with litigation or even other forms of alternative dispute resolution such as mediation.

⁵² *Id.*

⁵³ *See id.* (stating that other countries have extended the restorative justice model to adult offenders, whereas the United States mainly uses it for juvenile offenders).

⁵⁴ Stu Webb, *Collaborative Law: A Practitioner's Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIMONIAL LAW. 155, 164 (2008) (observing Medicine Hat, Alberta, Canada).

⁵⁵ *Id.*

⁵⁶ JULIE MACFARLANE, DEPT OF JUSTICE CANADA, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES (2005), available at http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf. *See also* Gary L. Voegele et al., *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 975 (2007).

⁵⁷ Conversation with an attorney from Brevard County, Florida, where there is at least a perception of widespread collaborative law practice.

⁵⁸ Elizabeth K. Strickland, *Putting "Counselors" Back in the Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 994–95 (2006) ("Because collaborative law is new and exists apart from the court system, no cases to date deal directly with collaborative law as a distinct issue. Only a few cases, the majority of which are recent Texas cases, even mention collaboration law as it pertains to divorce.").

Another nation far advanced from the United States in terms of its use of and reliance on collaborative and therapeutic jurisprudential avenues of settlement is Australia. Australia is a land of widely varying geographic, social and cultural influences.⁵⁹ Yet the whole nation has made significant efforts and progress toward building a court system encompassing therapeutic jurisprudence.⁶⁰ Some of the commentary intentionally separates the overview of this system between those courts serving the larger urban cities, and those serving the regional areas of Western Australia with both smaller cities and far more remote towns and villages.⁶¹ Judicial officers are labeled as either specialists (magistrates in the larger cities, exercising jurisdiction over specific functions such as Children's Court, family law, adult criminal cases and even mining cases) and generalists (more likely found in the regional areas, and presiding over all of these functions throughout a week or even a day).⁶² Regional magistrates in the Western part of the continent still have a circuit, as in long-ago America or Canada, where they visit outlying towns on a rotating basis.⁶³

Although they likely have fewer resources available to them, the regional magistrates have the benefit of being less bound by the traditional rules and practices of the larger city courts, and have more room to respond to the needs of their constituents.⁶⁴ It is here where drug courts and domestic violence courts found early growth.⁶⁵ In the cities, such specialist courts are developed at the magistrate levels, rather than as an overall methodology for dealing with cases.⁶⁶ It is more difficult for a philosophy of law, such as therapeutic jurisprudence, to gain wide-scale acceptance when a large number of judicial officers are presiding than it is where one magistrate presides over a wide array of cases.⁶⁷ Just as importantly, because resources are fewer in the regional areas, it has been even more important to establish

59 Michael S. King, *Applying Therapeutic Jurisprudence in Regional Areas—The Western Australian Experience*, MURDOCH U. ELEC. J.L., June 2003, <http://www.murdoch.edu.au/elaw/issues/v10n2/king102.html>.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.* Although this is not common in the United States today, there are still regions where one judge may sit on virtually all types of cases due to geographical and demographic needs. Such a case still exists in South Florida, in a more undeveloped area near Miami-Dade counties.

64 *Id.*

65 *Id.*

66 *Id.*

67 *See id.* Conversely, it would be similarly as easy for it to not be tolerated at all where the one magistrate does not perceive its benefits. *Id.*

judicial processes that promote therapeutic results while relying on fewer multidisciplinary specialists.⁶⁸

In Australia, as elsewhere, the introduction to therapeutic and collaborative methodologies was not without incidence. Aside from the normal concerns over workloads and such, there was also skepticism about whether these philosophies and processes would truly enhance, rather than hurt, the judicial system.⁶⁹ Despite these initial concerns, the use of such methods proved not just successful, but led to specific expectations by some Australian communities.⁷⁰ While the United States remains pensive about the very value and implementation of such schemes, Australia has taken it to the “extreme”—where problem-solving courts are expected to address not just the legal result needed, but to promote the self-confidence and esteem of participants in numerous kinds of cases.⁷¹ For example, certain criminal and drug cases include behavioral contracts, graduation ceremonies and interaction with the magistrate to acknowledge their offenses and discuss strategies to avoid recidivism.⁷² Even re-entry courts—those that supervise released offenders—strive to act from a “strength-based” concept of rehabilitation rather than a focus on at-risk behavior for recidivism.⁷³ Although extreme, certainly by American standards, many offenders are even offered Transcendental Meditation as a means of relieving stress and refocusing their lives.⁷⁴ While many of these

⁶⁸ *See id.*

⁶⁹ *Id.*

⁷⁰ *Id.* (“In advertisements [in Western Australia] for the position of stipendiary magistrate . . . the necessity for qualities such as the ‘capacity to introduce and manage change’ . . . were emphasized.”).

⁷¹ *See King, supra* note 59.

⁷² *See id.* (citing David Wexler, *Robes and Rehabilitation: How Judges Can Help Offenders ‘Make Good,’* 38 *COURT REV.* 18 (2001)). To be fair, there are some comparable programs in the United States, such as Drug Courts for more minor offenses, where offenders are similarly encouraged and rewarded, but there doesn’t seem to be the same widespread community expectation of such processes. *See Daicoff, supra* note 4, at 34. However, the United States Federal Courts have mandated non-rehabilitation sentencing guidelines, which foreclose even the idea of offender rehabilitation and re-acclimation to society. *See, e.g., United States v. Ochoa-Heredia*, 125 F. Supp. 2d 892 (N.D. Iowa 2001) (imposing a mandatory minimum sentence of five years on a defendant that possessed methamphetamine with intent to distribute).

⁷³ *King, supra* note 59. In contrast, the United States parole system is focused on keeping track of offenders and preventing recidivism rather than in “promoting happy and constructive lives” that King discusses. James Wootton, *Truth in Sentencing—Why States Should Make Violent Criminals Do Their Time*, 20 *DAYTON L. R.* 779, 782–84 (1995) (discussing the failure of the U.S. Parole Board in preventing recidivism). The major difference appears to be that in Australia they feel they can successfully do both. *See id.*

⁷⁴ *Id.* (explaining that Transcendental Meditation “is a simple, natural mental technique practiced sitting down with the eyes closed” which in practice, causes mind activity to settle down and produce “a state of inner alertness where the body is deeply rested” and “requires no change in lifestyle or beliefs”).

programs are designed for criminal offenders, Australia offers the same philosophies and practices in its Children's Courts and Family Courts, with an expectation that such programs are needed to help the participants both in the court system and beyond.⁷⁵

While many therapeutically designed programs are aimed at divorcing or separated families, Australia has taken the philosophy further yet. While even the most ardent collaborative law proponents in the United States shy away from using it and other Alternative Dispute Resolution (ADR) methods in domestic violence situations,⁷⁶ Western Australia has jumped what might be called light-years ahead in tackling the subject directly within the collaborative law methodology called the Columbus Pilot Program (Columbus Program).⁷⁷ In 2001, the Columbus Program was begun in an effort to identify, assist and encourage divorced or separated parents to recognize the devastating effects of continuing high conflict between the parents, and to get parents to acknowledge the effects of actual abusive behavior or violence towards their children.⁷⁸ The program was designed as an early intervention stratagem for highly conflicted cases—ones involving multiple allegations of abuse and violence as well as ones with the potential of lengthy litigation.⁷⁹ This program followed an even earlier one, the Magellan project, that sought to case-manage high conflict, abusive relationships—especially those involving child abuse and child sexual abuse—within therapeutic, yet well-defined boundaries.⁸⁰ The Columbus Program broadened this spectrum, motivated by the extensive publications in Australia advocating multidisciplinary approaches to these types of families, as well as the official government responses to their therapeutic methods of case handling.⁸¹ The Columbus Program was designed to encompass a multidisciplinary, holistic approach to allegations of child abuse and domestic violence,⁸² concepts still considered radical in the United States.⁸³ Clearly, the thought was that by

⁷⁵ *See id.*

⁷⁶ Freeman, *Applying the Realities of Therapeutic Jurisprudence*, *supra* note 2, at 222.

⁷⁷ Lisbeth T. Pike, *The Columbus Pilot in the Family Court of Western Australia*, 44 *FAM. CT. REV.* 270, 270 (2006), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/118591792/PDFSTART>.

⁷⁸ *Id.*

⁷⁹ *Id.* at 270.

⁸⁰ *Id.* at 270–71.

⁸¹ *Id.* at 270–72.

⁸² *Id.* at 271.

⁸³ The results appear not to focus as much on whether the specific behaviors changed, but on how the participants saw the process. It is not clear from the results

encompassing all the professionals with a stake in the process as early as possible, far more progress could be made in a more manageable framework.⁸⁴

Whether or not the specific goals of the Columbus Program were met, or even the best methods to apply to such families, it is clear that other nations, among them Australia, have taken therapeutic case management to a level rarely found in the United States. One commentator notes that the Columbus Program shows that Australia is in the forefront of using therapeutic jurisprudence in far more innovative ways than others.⁸⁵ Dealing with such a victimized population will undoubtedly require far more evaluation to determine its overall long-term success, but the very fact that other nations are willing to take this step shows how far ahead of the curve they are in the practice of therapeutic jurisprudence.

Another nation dedicated to the concept of restorative justice is Japan.⁸⁶ There, even criminal prosecutions are looked at in the light of rehabilitation for the offender and restorative justice for the victim.⁸⁷

England has also joined the growing bandwagon of incorporating broader and better results for different kinds of actions, including criminal ones.⁸⁸ New regulations seek to ensure better resolution for both victims and offenders, (although not without criticisms of some of the methodology).⁸⁹ Indeed, as one commentator puts it, even decades ago, while the United States continued to advocate for harsher punishments for criminal offenders, most of Europe debated how to better return the offender back into society with more and better life skills.⁹⁰

whether the use of therapeutic methods within this population is effective as a deterrent to specific behaviors or even assessed correctly whether children who were the victims in these situations felt empowered by the process. *See id.* at 282–83.

⁸⁴ *See id.*

⁸⁵ Andrew Schepard, *Editorial Notes*, 44 *FAM. CT. REV.* 186, 188 (2006), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/118591784/PDFSTART>.

⁸⁶ Richard S. Frase, *David T. Johnson, The Japanese Way of Justice: Prosecuting Crime in Japan*, New York, Oxford University Press 2002, 39 *CRIM. LAW BULL.* 488, 488 (2003) (book review).

⁸⁷ *Id.*

⁸⁸ Adam Crawford, *Governing Through Anti-Social Behaviour: Regulatory Challenges to Criminal Justice*, 49 *BRIT. J. CRIMINOLOGY* 810, 810, 814 (2009), available at <http://bjc.oxfordjournals.org/cgi/reprint/49/6/810>.

⁸⁹ *See id.* at 810.

⁹⁰ *See* Robert B. Goldmann, *Impressions of Correctional Trends in Europe*, 60 *A.B.A. J.* 947, 947 (1974). Compare this method to the U.S. Sentencing Guidelines of 1984, which virtually eliminates the idea of rehabilitation in Federal prisons. *See, e.g.*, *United States v. Hubel*, 625 F. Supp. 2d 845 (D. Neb. 2008) (noting the act in question carries a statutory mandatory minimum sentence).

There are more than one thousand documented restorative justice programs encompassing the nations of North America, and many more in Europe, Australia and New Zealand, with many under creation in South and Central America, Asia and Africa.⁹¹ Yet, while the literature purports to show the United States as being in the mainstream of both collaborative law and therapeutic jurisprudence, especially in family law, the reality is that we are very much behind in the practical aspects of these philosophies.⁹²

Even with a history of support for collaborative family law and therapeutic methodologies in the United States, there are few positive results that can echo the experience of other nations as exemplified by Canada and Australia. In Florida, for example, nine years after the Supreme Court called for a change to a therapeutically focused unified family court system,⁹³ a “Collaborative Process Act” has yet to pass the Legislature, the latest failure coming in 2009.⁹⁴ On a positive note, the American Bar Association responded to concerns by the Colorado Supreme Court regarding specific requirements of collaborative

⁹¹ See generally Paul McCold, *Restorative Justice Practice—The State of the Field 1999*, INTERNATIONAL INSTITUTE ON RESTORATIVE PRACTICES (1999), http://www.iirp.org/library/vt_mccold.html (last visited Feb. 8, 2010) (listing a chronological expansion of restorative justice programs in North America); Restorative Justice Online, *Europe*, <http://www.restorativejustice.org/university-classroom/02world/europe1> (last visited Feb. 8, 2010) (confirming the long standing presence of restorative justice in the European Union); Restorative Justice Online, *Australia*, http://www.restorativejustice.org/university-classroom/02world/pacific1/alldocs/index_html/Australia1 (last visited Feb. 8, 2010) (discussing various forms of restorative justice programs in Australia); Restorative Justice Online, *New Zealand*, http://www.restorativejustice.org/university-classroom/02world/pacific1/alldocs/index_html/newzealand (last visited Feb. 8, 2010) (discussing developments in the restorative justice field in New Zealand); Restorative Justice Online, *Latin America*, <http://www.restorativejustice.org/university-classroom/02world/latam> (last visited Feb. 8, 2010) (discussing the exploration Latin American countries have done in an effort to incorporate restorative justice into their justice systems); Restorative Justice Online, *Asia*, <http://www.restorativejustice.org/university-classroom/02world/asia1> (last visited Feb. 8, 2010) (illustrating the emergence of restorative justice programs, primarily in juvenile cases, in Asia); Restorative Justice Online, *Africa*, <http://www.restorativejustice.org/university-classroom/02world/africa3> (last visited Feb. 8, 2010) (discussing the emergence of restorative justice programs throughout Africa).

⁹² See generally Heather E. Williams, Comment, *Social Justice and Comprehensive Law Practices: Three Washington Examples*, 5 SEATTLE J. FOR SOC. JUST. 411 (2006) (discussing the need for comprehensive law to become more accepted in the United States).

⁹³ *In re: Steering Committee on Families and Children in the Court*, No. AOSC02–31 at 1 (Fla. 2000). The Florida Supreme Court, in a 2000 decision, held that family courts should be unified, in that preferably one judge would hear all issues involving the family members. *Id.* at 1. The goal was to centralize for practicality and efficiency all of the actions that might affect the members, but also to be able to draw in outside resources to help the family members in more than just a legal resolution. *Id.* at 2.

⁹⁴ See H.R. 0395, 2009 Leg., Reg. Sess. (Fla. 2009) (relating to the collaborative process). The bill is supported by the Florida Family Law Section and will presumably be resubmitted in the next legislative session.

agreements by issuing an opinion supporting collaborative law in spite of its departure from some of the traditional legal methods of resolution.⁹⁵ And recently, in what many see as a true move towards a national collaborative law mindset, the National Conference of Commissioners on Uniform State Laws passed a Uniform Collaborative Law Act in 2009.⁹⁶ It is hoped that this long anticipated Act will hasten the collaborative and therapeutic law movements by giving direction and support for uniform standards.

Many lawyers and judges in the United States are finally listening to what the people want, not what those in the system believe is best for them.⁹⁷ But this nation has a long way to go to begin to catch up to those for whom therapeutic goals and collaborative practices are commonplace. With more listening by everyone, including the legislatures, we may yet match the ideal to the reality.

⁹⁵ See generally Colo. Bar Ass'n Eth. Op. 115 (2007). The ABA felt that collaborative law was so important to the practice of family law that it responded with an advisory opinion finding that the clause did not violate the rules. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-447 (2007) (discussing ethical considerations in collaborative law practice). The ABA opinion notes that Colorado was the only State Bar to find that a conflict arose from this collaborative law requirement. *Id.* at n.7.

⁹⁶ See Uniform Collaborative Law Act §§ 4, 6, American Bar Association, National Conference of Commissioners on Uniform State Laws (2009), http://www.law.upenn.edu/bll/archives/ulc/ucla/2009am_approved.htm (last visited Feb. 4, 2010) (establishing minimum terms and conditions for collaborative law participation agreements designed to help ensure that parties considering participating in collaborative law enter into the process with informed consent; describes the appropriate relationship of collaborative law with the justice system; and describes the reasonable expectations of parties and counsel for confidentiality of communications during the collaborative law process by incorporating evidentiary privilege provisions based on those provided for mediation communications in the Uniform Mediation Act).

⁹⁷ See, e.g., Williams, *supra* note 91, at 413.

