

A THERAPEUTIC JURISPRUDENCE ANALYSIS OF THE USE OF EMINENT DOMAIN TO CREATE A LEASEHOLD

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Abstract

Therapeutic jurisprudence provides an excellent tool to analyze and guide the development of the law on the use of eminent domain to create leaseholds. The objective of these takings is for the condemnor to become a tenant under a “lease,” rather than the fee simple owner.

I am perhaps the only scholar who has written extensively on the topic of takings to create a leasehold. In a previous work, I provided an exhaustive analysis of the conclusion that government can use eminent domain to create a leasehold. That work went on to conclude that there are circumstances in which government should use eminent domain to create a leasehold, but that difficult problems can arise in such takings. They necessitate refinements in arriving at just compensation.

That work also concluded that there is at least one situation in which government should not be allowed to use eminent domain to create a leasehold. I labeled such takings Kelo-type takings, wherein the government uses its power of eminent domain with the objective of creating a leasehold that it will then transfer to a private party for private use. My argument that the use of such Kelo-type takings to create leaseholds should not be allowed was based primarily on public policy considerations. I concluded that the problems arising from takings that create private leaseholds are much worse than those encountered in situations such as Kelo, in which government acquires a fee simple from the condemnee and then makes a transfer to a private party, because the form disrupts the social contract between government and the people.

Any such conclusion demands reexamination on theoretical grounds, which is done in this Article.¹ In order to re-examine the

* © 2013 Carol L. Zeiner. Professor of Law, St. Thomas University School of Law, Miami Gardens, Florida. This Article is dedicated to the late Professor Bruce J. Winick, one of the founders of therapeutic jurisprudence. He was a very caring person and a dedicated scholar who enhanced the law. I will remember him for both. I also thank my research assistants, Kathleen (“Katie”) Winkler and Tina M. Trunzo-Lute. I am grateful to St. Thomas University School of Law for a summer research stipend that enabled this project.

¹ This Article expands upon a paper written for presentation at an ALI-ABA course, Carol L. Zeiner, *The Fundamental Differences Between Taking a Fee Simple and Creating a Leasehold via Eminent Domain*, in *EMINENT DOMAIN AND LAND*

question, it formally extends the jurisprudential philosophy of therapeutic justice to eminent domain in general and specifically to takings to create leaseholds. The principles underlying therapeutic jurisprudence, as well as the illuminating insights derived from its application, confirm the prior conclusion.

INTRODUCTION

Government often leases premises from landowners. A voluntarily negotiated lease² is the most basic form of public-private partnership.³ More importantly for the purposes of this Article, leasing is a cost-effective way to fulfill a short-term need for space. It is logical that government entities may turn to leasing more frequently, rather than acquiring a fee simple to fulfill their needs for premises as they grapple with budgetary shortfalls.⁴

VALUATION LITIGATION 751 (A.L.I.-A.B.A. Course of Study, Feb. 17–19, 2011), available at SS035 ALI-ABA 751 (Westlaw).

² The author takes the position that a lease negotiated under the specter and pressure of eminent domain is not a voluntary lease because of the coercion involved.

³ Zeiner, *supra* note 1, at 754. The National Council for Public-Private Partnerships defines a public-private partnership, sometimes referred to as a PPP or P3, as

a contractual agreement between a public agency (federal, state or local) and a private sector entity. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or facility.

How PPPs Work, NAT'L COUNCIL FOR PUB.-PRIVATE P'SHIPS, <http://www.ncppp.org/howpart/index.shtml#define> (last visited Oct. 30, 2012).

Although a P3 is based on a contract, the author believes this definition should be revised for those P3s that are more complicated than a basic landlord-tenant arrangement as a “contractual *relationship* between . . .” because it is the relationship that results in provision of the services. The contract merely creates and governs the relationship, but it is the relationship itself that is key.

There has been tremendous growth in the use of public-private partnerships in the United States in recent years. They have been employed extensively in Europe for years. Public-private partnerships will likely continue to grow in popularity as government seeks to both shrink itself, and to privatize certain services.

Many public-private partnerships involve a lease at some level. However, part of the beauty of public-private partnerships is that they are voluntary arrangements. This Article looks at involuntary leaseholds that are created through condemnation proceedings.

⁴ Governmental entities often differentiate between *capital funds* that are used to buy land, build buildings, and invest in similar long-term capital projects and *operating funds* that are used to pay employees' salaries, to pay rent for short-term leases, to buy supplies, and to pay for utilities, fuel, and other day-to-day operating expenses.

If the government determines that it needs to lease a particular site but cannot successfully negotiate a lease, it can use its eminent domain power to create the leasehold.⁵ It is an area with potential for both good and abuse. Guidance from case law is scant, and literature is almost non-existent.⁶ It is prudent to provide guidance on the subject before it becomes the source of widespread problems. In this way, government can create leaseholds that it genuinely needs, yet the public can be protected from improvident use of eminent domain. This Article joins my earlier works to provide guidance and fill in the gaps.⁷ It examines, based on the theory of

Government tends to think of projects in their own distinct capital, or operating, budget categories very separately. However, it is becoming increasingly clear that government must cut its total expenditures. Once government grasps that fundamental financial reality, it will likely realize that paying rent, even though it utilizes operating funds, is cheaper, at least on a short-term basis, than buying land and constructing buildings that then need to be carried and maintained on an ongoing basis.

⁵ When either “eminent domain” or “taking” is mentioned in the same sentence as “leasehold,” practitioners, jurists, and scholars alike think first of the comparatively common situation in which all or part of a tenant’s interest in real property is eliminated. In other words, the lease is terminated as government uses eminent domain to take fee simple title to the landlord’s realty. In the course of such condemnations, both landlord and tenant fall into the category of condemnee. “[C]ourts have held that the deprivation of the [condemnee(s)] rather than the accretion of a right or interest to the sovereign constitutes the taking.” *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

There is, however, another context for the phrase “taking a leasehold.” Eminent domain can also be used to create a leasehold in government. Here, government uses its power of eminent domain to carve a leasehold for itself out of the condemnee’s interest, leaving the condemnee with a reversion. This is the distinct subject analyzed in this Article.

⁶ Only works by the author have discussed the topic in detail. *See, e.g.*, Carol L. Zeiner, *Establishing a Leasehold Through Eminent Domain: A Slippery Slope Made More Treacherous by Kelo*, 56 CATH. U. L. REV. 503 (2007). The few other works that mention the topic have assumed, in conclusory terms, that leaseholds could be created by eminent domain. However, none of these works confirm such an assumption. *See* DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 183 (2002); ROBERT MELTZ ET AL., *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION* 124–25 (1999); 4A JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 14.01 (rev. 3d ed. 2012); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 605 (1972).

⁷ This Article differs from my previous pieces as follows. My Article, *Establishing a Leasehold Through Eminent Domain: A Slippery Slope Made More Treacherous by Kelo*, supplied the thorough analysis that until then was missing from the scholarly literature to establish the viability of using eminent domain to create a leasehold interest in government. It then went on to examine, on practical and public policy grounds, situations in which such takings should and should not be utilized. It asserted that, based on public policy, *Kelo*-type takings—in which government uses its power of eminent domain to create a leasehold for transfer to a private party for private use—should not be allowed. It is this conclusion that is being re-examined on the basis of jurisprudential theory in this Article. *See Zeiner, supra* note 6.

therapeutic jurisprudence,⁸ and ultimately confirms that *Kelo*-type takings—takings in which government uses its power of eminent domain for the purpose of creating a leasehold that it will then transfer to a private party for private use—should not be allowed, regardless of whether *Kelo* itself remains good law.

I. BACKGROUND

A. Therapeutic Jurisprudence Described

Therapeutic Jurisprudence is a jurisprudential philosophy, or way of thinking about, studying, and analyzing law.⁹ As is the case with most modern jurisprudential philosophies, it goes beyond viewing law as a set of formal principles that direct human behavior, and sees it as absorbing and reflecting the political, economic, and social forces of the culture in which it exists.¹⁰ Following the modern trend, it is interdisciplinary and seeks to be empirical.¹¹ It is related to “law and psychology and social science in law [in that it] looks at law with the tools of the behavioral sciences.”¹² Therapeutic jurisprudence also

The purpose of my Article *The Fundamental Differences Between Taking a Fee Simple and Creating a Leasehold via Eminent Domain*, was threefold: (1) to familiarize the practicing eminent domain bar with prior work on takings to create leaseholds so that those ideas could be implemented; (2) to introduce therapeutic jurisprudence to that segment of the practicing bar; and (3) to show how therapeutic jurisprudence might be helpful in arguing eminent domain cases by beginning, in a very preliminary way, to apply therapeutic jurisprudence to takings that create leaseholds. See Zeiner, *supra* note 1.

⁸ Zeiner, *supra* note 1, at 766 (extending therapeutic jurisprudence to eminent domain for the first time); see also E-mail from David B. Wexler, Professor of Law and Dir. Int’l Network on Therapeutic Jurisprudence, Univ. of P.R. Sch. of Law, to author (May 13, 2011) (on file with author).

⁹ Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL’Y & L. 184, 185 (1997) (explaining that therapeutic jurisprudence “is the study of the role of the law as a therapeutic agent”).

¹⁰ BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 3 (1997).

¹¹ See, e.g., DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE 8 (1991) (explaining that the ultimate task of therapeutic jurisprudence is to empirically examine the relationship between legal arrangements and therapeutic outcomes); WINICK, *supra* note 10, at 3; Winick, *supra* note 9, at 185, 196 (“[Therapeutic jurisprudence] is an interdisciplinary enterprise The best type of research is the ‘true experiment,’ with random assignment of identical populations to an experimental and a control group to isolate the variable under investigation. Experimentation in the legal system, however, can only rarely use true randomization.”); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 24 (2008) (“[Therapeutic jurisprudence] actively sought out other disciplines and sought to become truly interdisciplinary.”).

¹² WINICK, *supra* note 10 at 3.

can be described as having ties to law and literature because it focuses on the impact of law on the human condition, which is often reflected in both classical and modern literature.¹³

Therapeutic jurisprudence, or “TJ,” as it is sometimes referred to by practitioners and scholars who work in the field, was developed in the 1980s by its founders, Professors David Wexler and Bruce Winick, to analyze mental health law.¹⁴ It was never intended merely to be a theoretical philosophy. It was intended to guide practical application of mental health law.¹⁵

Since its creation, the application of therapeutic jurisprudence has expanded across a spectrum of fields of law that includes family law, juvenile justice, criminal law, torts, and trusts and estates, among others.¹⁶ It finds practical application in analyzing laws, counseling clients, resolving disputes, designing sentences, the functioning of civil courtrooms, and practicing preventative law in many areas of practice.¹⁷ It guides the work of problem-solving courts.¹⁸ It is also international in scope.¹⁹

¹³ See generally AMY D. RONNER, LAW, LITERATURE, AND THERAPEUTIC JURISPRUDENCE 3–41 (2010) (describing therapeutic jurisprudence as well as its connection with other jurisprudential philosophies, particularly law and literature). Therapeutic jurisprudence is critical of some of the assumptions underlying traditional perspectives of the law and in this respect joins “feminist and race theory or class analysis” of the legal system. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 CT. REV. 54, 55 n.9 (2000).

¹⁴ See Wexler, *supra* note 11, at 17; WINICK, *supra* note 10, at 11. The first full-length book to use the approach of therapeutic jurisprudence was Professors Wexler and Winick’s, *Essays in Therapeutic Jurisprudence*, written in 1981, which contains a series of essays mainly in the area of mental health law. See WEXLER & WINICK, *supra* note 11.

¹⁵ See WEXLER & WINICK, *supra* note 11.

¹⁶ See *id.* (explaining how therapeutic jurisprudence probably has application across the entire legal spectrum); WINICK, *supra* note 10, at 12. Therapeutic jurisprudence has now been applied to correctional law, sexual orientation law, disability law, evidence law, personal injury law, labor arbitration law, commercial law, workers’ compensation law, probate law, and the legal profession.

¹⁷ See David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work*, A.B.A. J., May 2003, at 54, 56.

¹⁸ Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1064 (2003); see Gregory Baker & Jennifer Zawid, *The Birth of Therapeutic Courts Externship Program: Hard Labor but Worth the Effort*, 17 ST. THOMAS L. REV. 711, 714 (2005) (“Therapeutic Jurisprudence is one of the major ‘vectors’ of a growing movement in the law towards a common goal of a more comprehensive, humane, and psychologically optimal way of handling legal matters.”) Problem-solving courts are specialized tribunals established to deal with specific problems, often involving individuals who need social, mental health, or substance abuse treatment services. See Winick, *supra*, at 1065.

¹⁹ EDNA EREZ ET AL., THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES ix, xi (Edna Erez et al. eds., 2011) (explaining

Therapeutic jurisprudence has a more narrow focus than the disciplines of either law and psychology or social science in law.²⁰ Unlike those disciplines, “it does not seek generally to examine law in order to test its assumptions or measure its impact. . . . [Rather, t]herapeutic jurisprudence seeks to apply social science to examine law’s impact on the mental and physical health of the people it affects.”²¹ It recognizes that “law as a social force . . . may produce therapeutic [(positive)] or antitherapeutic [(negative)] consequences”²² on the persons involved. “Therapeutic jurisprudence suggests that . . . positive therapeutic effects are desirable and should generally be a proper aim of law, and that antitherapeutic effects are undesirable and should be avoided or minimized.”²³ Because it suggests what is good and what “ought to be,” rather than merely observing, categorizing, and reporting “what is,” as is typical of social science and law, therapeutic jurisprudence is a normative philosophy.²⁴ However, it also values social science’s consequentialist practices because it suggests that “scholars should study the extent to which [therapeutic] ends actually are furthered in practice.”²⁵ Therapeutic jurisprudence holds that “[a] sensitive policy analysis of law . . . calls for a systematic study of law’s therapeutic or antitherapeutic effects.”²⁶

Normative jurisprudential philosophies value something: for example, law and economics values enhanced efficiency and wealth maximization.²⁷

that TJ has “crossed international boundaries”); David B. Wexler and Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979, 981–82 (1991).

²⁰ WINICK, *supra* note 10, at 3.

²¹ *Id.*

²² WEXLER & WINICK, *supra* note 11, at 8; *see also* Winick, *Jurisprudence of Therapeutic Jurisprudence*, *supra* note 9, at 185 (“Legal rules . . . constitute social forces that . . . often produce therapeutic or antitherapeutic consequences.”); Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant’s Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499, 499 n.5 (2001) (citing Dennis P. Stolle et al., *Integrating Preventative Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 17 (1997) (“Therapeutic jurisprudence is an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects.”)).

²³ Winick, *supra* note 9, at 188; WINICK, *supra* note 10, at 4.

²⁴ WINICK, *supra* note 10, at 4–5; *see also* Wexler & Winick, *supra* note 19, at 982 (“Legal decisionmaking should consider not only economic factors, public safety, and the protection of patients’ rights; it should also take into account the therapeutic implications of a rule and its alternatives.”).

²⁵ WINICK, *supra* note 10, at 4; *see also* Winick, *supra* note 9, at 188.

²⁶ WINICK, *supra* note 10, at 4.

²⁷ *See* JEFFREY L. HARRISON, *LAW AND ECONOMICS IN A NUTSHELL* 28 (3d ed. 2003) (explaining that efficiency is associated with accomplishing an outcome at the lowest possible cost). *See generally* Richard A. Posner, *Are We One Self or Multiple*

Accordingly, law and economics proposes that law should be structured to incentivize these values. “Therapeutic jurisprudence ‘values’ . . . the dignity of the individual human being and therapeutic (i.e., positive) impacts of law and legal proceedings on the physical and mental health of the individuals it affects.”²⁸ Therapeutic jurisprudence recognizes that “these are not the only effects worth studying” or advancing; however, it insists, “they should not be ignored.”²⁹ “Accomplishing positive therapeutic consequences or eliminating or minimizing antitherapeutic consequences . . . [is] an important objective in any sensible law reform effort.”³⁰

Therapeutic jurisprudence has been referred to as “radical” in the context of common law systems because it holds “that there is no reason why people should feel ‘worse’ after dealing with the justice system. In fact, if at all possible, they should feel better. . . . It should try to minimize the damage that it does and aspire to help, not destroy, people who come in contact with it.”³¹

Among the predominant principles of therapeutic jurisprudence is that one should feel that he or she is a voluntary participant in the legal process because this produces more therapeutic outcomes.³² Voluntary participation is the first, and the most important, of what are sometimes referred to as the three V’s:³³ voluntary participation, voice, and validation.³⁴

Neither the defendant in a criminal trial, the juvenile whose alleged criminal acts are being adjudicated, the person who is the subject of commitment proceedings, the condemnee in eminent domain, nor, for that matter, any defendant in litigation, is a voluntary participant in the usual sense of those words. Therefore, it is necessary to seek substitutes for voluntary participation. Social science has found that some of the characteristics of voluntariness—a participant who is at peace with the outcome of the proceeding and emerges with respect for the law and legal authorities—can be achieved through a system that

Selves?: Implications for Law and Public Policy, 3 LEGAL THEORY 23 (1997) (opining that a normative economic analysis rests on two critical assumptions: rational choice and wealth maximization).

²⁸ Zeiner, *supra* note 1, at 767.

²⁹ WINICK, *supra* note 10, at 4.

³⁰ *Id.*

³¹ Des Rosiers, *supra* note 13, at 55. Des Rosiers says that the “adversarial system could be said to be predicated on the assumption that people should not want to resort to the legal system, that they should do so in last resort, and that they should find the experience unpleasant.” *Id.* at 55, n.9.

³² Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 95 (2002) (“In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.”).

³³ *Id.* at 94.

³⁴ *Id.* at 92.

treats the participant with fairness, respect, and dignity.³⁵ Voice, the chance to tell one's story to a decision maker, generates a sense of validation if the "litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant[']s story."³⁶ Together, voice and validation produce a "sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive."³⁷ The participant senses that she has been treated with fairness, respect, and dignity because of her "voluntary" participation. As a result, the litigant is more at peace with the outcome.³⁸

"In the area of therapeutic jurisprudence, scholars have pointed out that when individuals participate in a judicial process, what influences them the most is not the result, but their assessment of the fairness of the process itself."³⁹ Fairness respects the litigant's dignity and personhood. Fairness seems to be especially important in eminent domain, as evidenced by the condemnees' and public's perception of the lack of fairness that was critical in the overwhelmingly negative public reaction to the Supreme Court's decision in *Kelo*. This will be discussed further in Part II.

Boiled down to its most essential element, therapeutic jurisprudence adds the dignity and value of the individual human being to legal analysis in a formal way.⁴⁰ By doing so, it becomes what seems to be an excellent tool for examining and expressing the human impacts of eminent domain. It is critical to note, however, that therapeutic jurisprudence does not place therapeutic consequences as the ultimate goal of law. It holds that:

[A]lthough in general positive therapeutic consequences should be valued and antitherapeutic consequences should be avoided, there are other consequences that should count, and sometimes count more. There are many instances in which a particular law or legal practice may produce antitherapeutic effects, but nonetheless may be justified by considerations of justice or by the desire to achieve various constitutional, economic, environmental or other normative goals *Therapeutic jurisprudence therefore does not suggest that therapeutic considerations should outweigh other normative values that the law may properly seek to further. [It does not end the conflict when other normative values are in conflict]. Rather, it calls for an awareness of [therapeutic and antitherapeutic consequences to enable] a more precise weighing of sometimes competing values.*⁴¹

³⁵ See Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 504–05 (2001).

³⁶ Ronner, *supra* note 32, at 94.

³⁷ *Id.* at 95.

³⁸ *Id.* at 94–95.

³⁹ *Id.* at 93.

⁴⁰ Zeiner, *supra* note 1, at 768.

⁴¹ WINICK, *supra* note 10, at 4 (emphasis added).

This Article posits that therapeutic jurisprudence provides a useful jurisprudential lens for examining eminent domain law. Therapeutic jurisprudence adds a recognized jurisprudential and philosophical basis that legitimizes and provides an analytic framework for examining values of human dignity—values that, either consciously or subconsciously, have been of concern to jurists, practitioners, and scholars of property and eminent domain for years.⁴²

B. Clarification of the Term “Value” as Used in Therapeutic Jurisprudence Versus Its Use in Eminent Domain

“Value” is a term used in both the law of eminent domain and therapeutic jurisprudence. However, it has a very different meaning in each of these fields. Some clarification is needed to avoid confusion. The term “value” in eminent domain is connected to the financial term “valuation.” In eminent domain, a monetary value is placed upon something compensable so that its “value” can be included in just compensation.

“Value” and “values” are terms that are also intrinsic to therapeutic jurisprudence. However, in the context of therapeutic jurisprudence, they have a different meaning than in eminent domain. In therapeutic jurisprudence “value” is more akin to “accord respect.” Something that is valued in therapeutic jurisprudence is something that is considered important.⁴³

C. The Use of Eminent Domain to Create a Leasehold

The power of eminent domain has been described as being inherent in the power of a sovereign.⁴⁴ The Takings Clause of the United States Constitution reads, “[N]or shall private property be taken for public use, without just compensation.”⁴⁵ The federal Takings Clause applies to the states through the

⁴² Cf. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476–77 (1897) (discussing adverse possession). I note in particular the observation,

A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.

Id. at 477.

⁴³ See Baker & Zawid, *supra* note 18 at 712–13.

⁴⁴ DANA & MERRILL, *supra* note 6, at 3.

⁴⁵ U.S. CONST. amend. V.

Due Process Clause of the Fourteenth Amendment.⁴⁶ Most state constitutions also contain a takings clause.⁴⁷

Both the federal Takings Clause and the takings clauses of state constitutions act as limitations on governments' takings power.⁴⁸ They are applicable whenever government takes private property. Government can engage in a taking only if it is for "public use" and only if the government pays "just compensation" to the owner who is deprived of the private property.⁴⁹ Considerable case law and scholarship exist as to each of these requirements. States can have limitations on state takings power that are more restrictive than the federal government.⁵⁰ Some states adopted these more restrictive limitations in direct response to the publicly reviled case, *Kelo v. City of New London*.⁵¹

Any type of property—real, personal, tangible, or intangible—can be the subject of a taking.⁵² Government decides the amount of property and the interest in property that it will take for any particular public purpose.⁵³ However,

⁴⁶ See *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 238–39 (1897).

⁴⁷ See, e.g., FLA. CONST. art. X, § 6; GA. CONST. art. I, § I, ¶ 1; ILL. CONST. art. I, § 2; ARIZ. CONST. art. II, § XVII.

⁴⁸ *Kelo v. City of New London*, 545 U.S. 469, 487 n.19 (2005) (citing *E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part)).

⁴⁹ See *DANA & MERRILL*, *supra* note 6 at 5.

⁵⁰ *Kelo*, 545 U.S. at 489 (Justice Stevens states in the majority opinion that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline.").

⁵¹ See CASTLE COALITION, 50 STATE REPORT CARD, TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE KELO (2007) (summarizing the public reaction to *Kelo*, and describing and grading the post-*Kelo* reforms of 42 states). Some states did so by amendment to the state constitution, e.g., FLA. CONST. art. X, § 6 (amended Nov. 7, 2006), while others did so by statute, e.g., 2007 Md. S.B. 3 (enacted). Others, including Michigan's state constitution, had been interpreted more restrictively prior to the Supreme Court's decision in *Kelo*. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 770 (Mich. 2004)).

⁵² *Kelo*, 545 U.S. at 482–83 (land or an interest in land); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984) (trade secret is property protected by the Fifth Amendment Taking Clause); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945) ("[P]roperty . . . denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (valid contracts are property within meaning of the Taking Clause); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1351 (Fed. Cir. 2003) (tangible personal property may be the subject of takings claims); *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 840 (Cal. 1982) (en banc) (a football franchise).

⁵³ 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 9.02[2] (rev. 3d ed. 2003) ("[T]he legislature . . . has the sole power to determine what will be acquired both as to quantum and quality of estate.").

government should not take more land or a greater interest in land than it needs for the particular public use.⁵⁴

A leasehold is one stick in the bundle of rights⁵⁵ that constitutes real property. Thus it seems logical that government can use the takings power to create a leasehold by acquiring a preexisting leasehold, or by carving a leasehold out of the condemnee's larger interest in real property. Interestingly, the analysis needed to prove this statement is more complex and detailed than one might initially suppose.⁵⁶

When discussing government use of eminent domain to create a leasehold, courts and commentators generally cite a series of cases from the World War II era. Most notable among these cases are *United States v. General Motors Corp.*,⁵⁷ *Kimball Laundry Co. v. United States*,⁵⁸ and *United States v. Petty Motor Co.*⁵⁹ Despite the age of these decisions, they are still good law. They have been relied on in current cases involving regulatory takings, most notably the Supreme Court cases *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*⁶⁰ and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.⁶¹ In *General Motors*, a case involving government acquisition of a portion of a pre-existing leasehold for wartime purposes, the Court said:

That interest [over which the government exercises eminent domain] may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years," as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.⁶²

Similarly, in *Tahoe-Sierra Preservation Council, Inc.*, a more recent case dealing with a temporary regulatory taking, it was said that "compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary."⁶³ The conclusion is that

⁵⁴ *Preseault v. United States*, 100 F.3d 1525, 1534–35 (Fed. Cir. 1996).

⁵⁵ JESSE DUKEMINIER ET AL., *PROPERTY* 83 (7th ed. 2010) (explaining that the bundle of rights includes "the right to possess, the right to use, the right to exclude, [and] the right to transfer"); 2 SACKMAN, *supra* note 53, § 5.01[5][a].

⁵⁶ For a full analysis, see *Zeiner*, *supra* note 6.

⁵⁷ 323 U.S. 373 (1945).

⁵⁸ 338 U.S. 1 (1949).

⁵⁹ 327 U.S. 372 (1946).

⁶⁰ 482 U.S. 304 (1987).

⁶¹ 535 U.S. 302 (2002).

⁶² 323 U.S. at 378 (alteration to original).

⁶³ 535 U.S. at 322.

government can use condemnation proceedings to create a leasehold in any situation in which eminent domain would be allowable.⁶⁴

II. ANALYSIS

A. *Good Reasons for Using Eminent Domain to Create a Leasehold*

There are many good reasons for a government to lease premises rather than purchase a fee simple: short-term need; the constitutional limitation of not taking a greater interest in property than needed;⁶⁵ the smaller outlay of funds needed to lease as compared to own the fee; the distinctions made between capital funds and operating funds in government accounting when the latter is more accessible; the willingness of the landowner to enter into a lease sufficient for the government need, but unwillingness to sell the fee simple; and avoidance of political fallout as well as the cost to carry, maintain, and dispose of real property that is no longer needed.⁶⁶

There are also problems inherent in the use of eminent domain to create leaseholds. These problems arise out of the primary difference between taking a fee simple and using eminent domain to create a leasehold—the latter leaves at least one reversion,⁶⁷ and, therefore, problems can become complex very quickly.⁶⁸

B. *Problems Inherent in Using Eminent Domain to Create a Leasehold: Illustrative Situations and a Therapeutic Jurisprudence Analysis*

When government uses eminent domain to create a leasehold, the taking leaves at least one reversion.⁶⁹ The landowner/condemnee remains an involuntary landlord connected to the government in a forced relationship, and the inherent problems in this arrangement are manifest on both practical and philosophical

⁶⁴ See Zeiner, *supra* note 6, at 512–22.

⁶⁵ Preseault v. United States, 100 F.3d 1525, 1535 (Fed. Cir. 1996).

⁶⁶ Zeiner, *supra* note 1, at 754–55.

⁶⁷ Zeiner, *supra* note 1, at 757.

⁶⁸ *Id.*

⁶⁹ Cf. JESSE DUKEMINER ET AL., PROPERTY 226 (6th ed., 2002) (stating that a reversion is an interest that remains vested in the transferor when a transfer of property is made to another, which is less than a fee simple). Since a leasehold is less than a fee simple, the transferor retains a reversion when he does not provide who is to take the property when the leasehold expires.

If the taking carves the leasehold out of a pre-existing leasehold, as in *United States v. General Motors Corp.*, 323 U.S. 373 (1944) and *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), there are two reversions: one in the lessee who was deprived of part of its leasehold, and the other in the fee owner.

grounds.⁷⁰ The problems are illustrated best through examples. Because this work is a continuation and reexamination of earlier work, the same examples are used.⁷¹

1. *Situation 1*

The situation is less complicated if government is the current tenant under a lease that is expiring. If the landlord and the government tenant cannot agree to an extension of the lease, government can force an extension through eminent domain.⁷² In this instance, the terms of the business lease are likely uncomplicated. They likely remain the same as in the prior lease with the duration of the extension to be determined by government and just compensation to be decided by the jury. Of course, if the premises had already been leased to another tenant and the government leasehold was shorter than the new tenant's leasehold, the situation would be very similar to that in *General Motors*.⁷³ Under such circumstances, just compensation calculated as provided in *General Motors*⁷⁴ would be paid to the tenant, or possibly to the landlord if so provided in the condemnee tenant's lease.⁷⁵

Because a taking that creates a leasehold involves at least one reversion (a fundamental difference from a taking of the fee simple), refinements to just compensation are needed. The case law, particularly *General Motors* and *Kimball Laundry Co.*,⁷⁶ begins to describe those refinements. For example, the Court stated that the market value rent for a long-term lease of vacant space would not be an adequate measure under the factual situation involved in *General Motors*; the correct measure "would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier."⁷⁷ The Court went on to describe various additional costs that would be incurred by the condemnee—not as additional items of compensation, but to aid in the

⁷⁰ Zeiner, *supra* note 1, at 757.

⁷¹ *Id.* at 757–65.

⁷² See Zeiner, *supra* note 6, at 524–26; *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3 (1949).

⁷³ In *General Motors*, 323 U.S. 373, the condemnee was a long-term tenant of the premises. Government took, for wartime purposes, short-term occupancy carved out of the tenant's leasehold (i.e., a sublease).

⁷⁴ *Id.* at 379–84.

⁷⁵ If the lease contains provisions, as many do, that specify which party is to receive what portion of the just compensation for eminent domain, the just compensation would be distributed in accordance with the lease—provided that the relevant lease provisions are interpreted to cover takings to create a leasehold as well as takings of a fee simple. If the lease does not specify otherwise, the just compensation would be paid to the lessee as described in *General Motors*, 323 U.S. at 382–83.

⁷⁶ For discussion of *Kimball Laundry Co.*, see *infra* Part II.

⁷⁷ 323 U.S. at 382.

determination of the market price under such circumstances.⁷⁸ This suggests that the facts of the particular situation—facts about the condemnee’s situation—will make a difference. It also seems likely that facts about the condemnor/lessee’s situation, like the use to which the leased premises are to be put, ought to make a difference in market value rent. However, because there is little case law, the Court has not spoken definitively on all the details, and the guidance is thus incomplete. It is highly unlikely that any formulaic measurement of just compensation could accommodate all possible situations⁷⁹ that arise in the business of leasing. In addition, it is the business of leasing under the relevant facts and circumstances that ultimately determines market value rent. Therefore, a willing-lessor/willing-lessee standard analogous to the willing-seller/willing-buyer standard applicable to eminent domain should be utilized generally.⁸⁰ It must also be recognized that a number of factors, including, but not limited to, the condemnee/lessor’s situation, the uses for which the space is being leased, the locale, and the specific space itself, will come into play in arriving at the willing-lessor/willing-lessee fair market value rent.⁸¹

In analyzing the impact of Situation 1 on the condemnee based on therapeutic jurisprudence, it is antitherapeutic to the condemnee’s mental health to wrest the condemnee’s possessory right to his property from him, against his will, when he has done nothing to deserve this treatment.⁸² Far too often in eminent domain, the legal system pays hollow homage to the condemnee whose land is taken:⁸³ government officials label him a holdout, a pejorative for someone who is annoyingly in the way,⁸⁴ then roll over him with all the

⁷⁸ *Id.* at 382–83.

⁷⁹ Zeiner, *supra* note 1, at 754 n.3.

⁸⁰ 4 SACKMAN, *supra* note 53, § 12, at 61–67. (“The term ‘fair market value’ means the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it, taking into consideration all uses for which the land was suited and might be applied.”).

⁸¹ However, it must be noted that “proof of value peculiar to the respondent, or the value of goodwill or of injury to the business of the respondent which, in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning.” *Gen. Motors*, 323 U.S. at 383.

⁸² One may argue the government’s choice to exercise its power of eminent domain by seeking to create a leasehold is less antitherapeutic than taking the fee simple because the condemnee continues to own the fee and will be able to regain possession at the end of the involuntary leasehold. Whether this is actually less antitherapeutic to the condemnee depends on the condemnee’s situation. This is made more clear in Situations 2 through 4. *See infra* Parts II.B.2–5.

⁸³ *See, e.g., Kelo v. City of New London*, 545 U.S. 469, 489 (2005) (“In affirming the City’s authority to take petitioners’ properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation.”).

⁸⁴ *See* INST. FOR JUSTICE, DREHER AND ECHEVERRIA: DISINFORMATION & ERRORS ON EMINENT DOMAIN 6–8 (2007) (describing what the Institute for Justice sees as routinely arrogant derision of those who decline to sell); *see also* DANA BERLINER,

compassion of a steamroller.⁸⁵ Unlike eminent domain law as currently perceived by condemnees, therapeutic jurisprudence attaches genuine importance to the dignity and value of the individual human being⁸⁶ and eschews treatment that leaves the litigant feeling as if he has just been squashed under the wheels of progress. At a minimum, the court, and a prior pre-litigation process based on therapeutic jurisprudence, would genuinely listen to and validate the condemnee's situation and encourage the parties to seek a solution that would, to the extent possible, ameliorate the adverse impacts of a condemnee's situation.⁸⁷ For example, if overuse of parking in Situation 1 were the concern, perhaps a compromise could be reached in which a certain number of spaces were identified and set aside for use by other building tenants, and the government tenant paid for the needed parking attendant to enforce the parking regulations. However, as previously stated, therapeutic jurisprudence does not mandate that the antitherapeutic impact on the condemnee be the determinative litmus test for the case and deny the government's right to take if the antitherapeutic impact cannot be avoided or ameliorated.⁸⁸ Rather, therapeutic jurisprudence calls for recognition of this antitherapeutic consequence for what it is,⁸⁹ an affront to an

OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-*KELO* WORLD 5, 26 (2006) (explaining that “[l]ocal officials love to say that eminent domain is used only ‘as a last resort’ . . . [b]ut in reality, [the phrase refers to anyone who] refuse[s] to sell ‘voluntarily’” and describing Florida businesses condemned as a “last resort” to make way for a new boardwalk which would generate higher taxes).

⁸⁵ Cf. BERLINER, *supra* note 84, at 2 (“Emboldened by *Kelo*, cities have aggressively threatened owners with takings for private development.”). “[I]n practice, cities show no sympathy and seem to make it as difficult as possible [for the condemnee] to stay in business.” *Id.* at 17 (describing that a city threatens a taking, provides ineffective relocation assistance, then refuses to issue a permit for new location found by condemnee despite approval from neighbors). Cf. *Sw. Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C.*, 768 N.E.2d 1, 13 (Ill. 2002) (describing that landowner was given ten days to respond to government offer made after government knew that the appraisal ordered by the landowner likely would not be received until the end of the ten-day period, or shortly thereafter; government filed condemnation proceedings against the landowner on the eleventh day).

⁸⁶ Zeiner, *supra* note 1, at 768.

⁸⁷ In other areas of law, many judges and lawyers have been acting in accord with the principles of therapeutic jurisprudence for years without using the jurisprudential label “therapeutic jurisprudence” to describe their philosophies. It would not be impossible to incorporate this into eminent domain. There is at least one project involving the prospective taking of a fee simple, the files of which are now public records, where the government architect redesigned the project to avoid a taking of the condemnee's land after hearing the prospective condemnee's concerns. The project was redesigned so the former condemnee's square footage could later be added into the project when and if a consensual sale could be accomplished.

⁸⁸ WINICK, *supra* note 10, at 4; *see supra* text accompanying note 41.

⁸⁹ Unlike the seemingly rote, mechanical recitations often offered by the condemnor and the court in condemnation proceedings.

important normative value,⁹⁰ to enable a more precise consideration of competing normative values.⁹¹ The competing normative value in Situation 1 is the government's power of eminent domain as limited under the Constitution of the United States, or the particular state constitution governing the case. As Professor Winick said, "[T]here are other consequences that should count, and sometimes count more."⁹² Provided that all the other constitutional, statutory, regulatory, and judge-made requirements have been fulfilled, Situation 1 is a case in which the normative value of sovereign power and constitutional limits should count more than the competing norms derived from therapeutic jurisprudence, and therefore, the taking would be allowed, despite the antitherapeutic impact on the condemnee.⁹³

What then, would therapeutic jurisprudence do for this condemnee participant in a legal proceeding who will be forced to be an unwilling lessor? First, because of the preliminary processes and court proceedings grounded in therapeutic jurisprudence, the condemnee has had voice through a genuinely participatory preliminary process,⁹⁴ followed by court proceedings in which the court has truly listened to and heard his story. Thus, therapeutic jurisprudence would have this newly developing area of eminent domain law—leaseholds—develop into one that treats the participant "with fairness, respect and dignity."⁹⁵ Would therapeutic jurisprudence simply throw some extra money at the condemnee to make him feel better? No. Just compensation may or may not be greater in the recommended therapeutic approach. Therapeutic jurisprudence also would recognize another participant in this proceeding—the government entity that will be using the leased space, and more indirectly, the taxpayers who will be paying for it, one of whom is the condemnee.⁹⁶ Therapeutic jurisprudence would say that all these participants are to be treated with fairness, respect, and dignity. The initial guidelines for just compensation enunciated above should do justice to the situation so that the two direct participants—the condemnee and

⁹⁰ Positive therapeutic effects on a participant to a legal proceeding are desirable and should generally be a proper aim of law. Antitherapeutic effects are undesirable and should be avoided or minimized. *See* Winick, *supra* note 9, at 188.

⁹¹ *See* WINICK, *supra* note 10, at 4.

⁹² *Id.* at 6.

⁹³ This deference to constitutional power is more easily recognized, and therefore respected by the condemnee and the public, if government, or a private party acting as an agent for government, uses the leasehold to perform government functions. This is discussed further in Situation 4. *See infra* Part II.B.5.

⁹⁴ This is differentiated from a sham process in which the prospective condemnee "has his say," but it is merely a procedural right to be heard; no one *truly* listens and there is no genuine possibility of modification of the project.

⁹⁵ *See* Ronner & Winick, *supra* note 22, at 501, 505–07.

⁹⁶ If the condemnee is a tax-exempt entity, those who it is able to serve by virtue of its tax exempt status may be taxpayers.

government—the taxpayers, as well as the private party beneficiary, are treated with fairness, respect, and dignity in this involuntary lease situation.

More specifically, there are usually reasons why a commercial landlord no longer wishes to lease to a particular tenant. The court would hear precisely how the extended government lease would impact the condemnee and why the condemnee does not wish to extend the lease. Perhaps the government lessee made greater use of the elevators, escalators, restrooms, and common areas of the facility that caused greater wear and tear and inconvenience to other tenants than originally anticipated by the landlord. Perhaps government use absorbed more than its share of the undesignated public parking. Perhaps government has consistently been slow when it comes to paying the rent. Maybe the government lessee's presence interferes with the landlord's desire to change the usage and image of the building. Just compensation as described above can take these factors into consideration in arriving at the market rent for the premises. If the government tenant has created greater-than-anticipated demands upon the common elements and parking, these can be considered in arriving at market rent. The market would consider the slow pay history of a lessee in arriving at the rent to be charged for a renewal. The market may not be able to monetize the landlord's desire to change the character and tenant mix of the building if the prospects for success for that venture are too speculative to be valued, but the more thorough willing-lessor/willing-lessee standard should take into account all the factors that can be monetized.⁹⁷ In short, such an approach to just compensation provides a comprehensive evaluation in order to arrive at just compensation that is fair and treats the condemnee with dignity. Government would be paying a just rent for the leasehold that it is to acquire, rather than paying just some compensation, which can be the equivalent of a financial mugging, thereby exacerbating the antitherapeutic impact.⁹⁸ Fair treatment would leave the condemnee, although possibly still unwilling to lease to the particular government condemnor, with a sense that he has been heard, validated, and treated fairly. Thus, respect for the law and government have been preserved, which are goals of the voluntary participation aspect of therapeutic jurisprudence.

⁹⁷ As is currently the case under existing law, therapeutic jurisprudence would not monetize a condemnee's subjective attachments to his property.

⁹⁸ See Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 111 (2002) ("The most striking feature of American compensation law—even in the context of formal condemnations or expropriations—is that just compensation means incomplete compensation."); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945) ("[The condemnee] must [endure] whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh."); Steven J. Eagle, *A Resurgent "Public Use" Clause Is Consistent with Fairness*, in *EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT* 89, 90 (Dwight H. Merriam & Mary Massaron Ross eds., 2006) ("[L]andowners whose lands were taken often bear considerable uncompensated losses.").

Government would not have conducted itself like a bully delivering a degrading blow to human dignity that exacerbated the antitherapeutic impact of the taking. Nor would government have been victimized by a property owner's ploy⁹⁹ to overinflate the situation, or by his theatrics to obtain excessive public dollars. If the lawyers, court, and jury do their respective jobs, government will pay, and the condemnee/landlord will be able to recover a fair rent under the existing circumstances. Interestingly, in most circumstances this amount ought to be less rent than the condemnee could have charged under a double rent hold-over provision in the landlord-tenant statutes of jurisdictions that have such provisions.¹⁰⁰

2. *Situation 2*

The next incremental step in complexity is a situation in which government wants a leasehold for its own use in premises that are being used by the landowner in his business. Unlike Situation 1, the condemnee, not government, is using the premises at the time of the condemnation.

In this situation, the antitherapeutic impacts on the condemnee are greater than in Situation 1, yet under a therapeutic jurisprudence analysis, the outcome of the competing normative values would be the same on the issue of whether the taking could proceed. The sovereign power/constitutional interest would outweigh avoidance of the antitherapeutic impacts to the condemnee, and government would be allowed to take the premises for its use.

The question then becomes one of just compensation. As discussed in Situation 1, therapeutic jurisprudence requires a thorough analysis with meaningful attention to the variety of losses suffered by the condemnee/involuntary landlord. A taking that dispossesses the condemnee landowner of all or a significant portion of the premises for a temporary period directly confounds his business operations and objectives.¹⁰¹ The condemnee must vacate, remove his business fixtures, and relocate his business, if possible, for the duration of the taking. This has an impact on goodwill that is different in degree from that in a permanent taking.¹⁰² It may also have an impact on the

⁹⁹ Referred to as "monopolistic behavior" by law and economics.

¹⁰⁰ See, e.g., FLA. STAT. ANN. § 83.06(1) (West 2004).

¹⁰¹ The problems could become even more complicated if the short-term taking was only part—but a significant part—of the condemnee's business premises.

¹⁰² The relocation cannot help but have an adverse impact on the condemnee's business goodwill that is associated not only with this business, but also with the location from which that business was operating. No matter how hard he tries to inform his customers of the temporary relocation, some customers will show up at the old location and others will not be able to find his temporary location. Others will choose to take their business elsewhere rather than follow him. Still other customers will stop using the business when he returns to his original premises, frustrated by the repeated changes in location. Only the last of these is different from a taking of a fee simple, yet the

market value rental of the leasehold being created in government. For example, if the government leasehold includes rights to extend or terminate its leasehold and the condemnee intends to return to the premises when the government leasehold ends, the condemnee will have to negotiate similar terms for his temporary replacement premises. Although the government can choose the durational terms of its taking to include broad rights to extend or terminate, the condemnee does not have such power and must negotiate such terms with its temporary landlord. If coordinating terms are available at all, it is likely that the condemnee will have to pay handsomely for them. If just compensation were determined without taking this factor into consideration, the condemnee could find himself with a reversion, but insufficient funds to acquire replacement property on appropriate terms. Thus, market rent must take these factual circumstances into account.

If government has rights to extend or terminate its leasehold, the indeterminate duration of a temporary relocation will be particularly damaging to the goodwill associated with the condemnee's business. The condemnee cannot arrange a transition of goodwill to the temporary location with any certainty. He cannot even answer the customers' question, "How long will this last?" or make business decisions and commitments that are location specific. This seems to make his business and associated goodwill at least partially non-relocateable, meaning that it is being "transferred" (taken/destroyed) by government.¹⁰³

These outcomes will be particularly galling not only because the condemnee will suffer a loss of his premises and other property rights, but because he may also be forced to provide maintenance of the very premises that were taken from him. This coerced relationship is the most troubling aspect of a taking that creates a leasehold. It is also one of the more antitherapeutic aspects. The condemnee did nothing inappropriate or illegal by refusing to rent to the condemnor/lessee. He simply owned and was using for his own purposes well-situated land and premises that the government wanted. Yet, a taking forces him to vacate the premises and then provide satisfactory services to the entity that ousted him. This is a great affront to the dignity and personhood of the condemnee that does not occur in the taking of a fee simple. If the transaction were structured so that the condemnor/lessee is to supply all maintenance and services, the transaction would be more akin to a temporary construction easement for storage of materials. Under a temporary easement, the condemnee simply collects the

difference is significant. In a permanent taking, the condemnee can permanently relocate the business to which its goodwill is attached. The condemnee cannot do so in a taking that creates a leasehold unless the condemnee has the financial wherewithal to accomplish a permanent move while still carrying the property that is the subject of the temporary taking. Therefore, a second involuntary relocation (back to the original premises) with the associated further diminution of goodwill is inevitable. The continuing discussion in the text points out additional distinctions from a taking of the fee simple.

¹⁰³ See Zeiner, *supra* note 1, at 759; Carol L. Zeiner, *Eminent Domain Wolves in Sheep's Clothing: Private Benefit Masquerading as Classic Public Use*, 28 VA. ENVTL. L.J. 1, 21 n.108 (2010).

compensation and refrains from interfering with the easement. However, a building is different from vacant land. If not properly maintained, a building will deteriorate. A lessee is not motivated to maintain premises with the same care as the property owner.¹⁰⁴ So, either way, the situation is distasteful. If the landlord maintains the property, he is in a situation that rubs his nose in the taking because he must provide services to the satisfaction of his adversary. On the other hand, if the government provides the maintenance, the landowner must trust the government to protect his property. If the condemnor fails to maintain the premises properly, or in a timely fashion, the condemnee is limited in his remedies: he is left with the choice of costly litigation in the hopes of equitable relief, or performing the work himself and seeking compensation through the courts.

United States v. General Motors and its progeny, *Kimball Laundry Co. v. United States*, provide some guidance, although not complete, for just compensation in this situation. At least a portion of that guidance is in accord with the principles of therapeutic jurisprudence. In *General Motors*, the condemnee was a long-term tenant, and the federal government created a sublease for itself through the taking.¹⁰⁵ The Court asked whether “a different measure of compensation [shall] apply where that which is taken is a right of temporary occupancy of a building equipped for the condemnee’s business, filled with his commodities, and presumably to be reoccupied and used, as, before . . . on the termination of the Government’s use?”¹⁰⁶ The Court answered in the affirmative; it found long-term rental value of vacant space was not the sole measure of the value of the short-term occupancy.¹⁰⁷ If long-term rental value were the sole measure, the government would have found a way “to defeat the Fifth Amendment’s mandate for just compensation in all condemnations except those . . . requir[ing] the taking of fee simple title.”¹⁰⁸ Although not so labeled by the Court, this conclusion treats the condemnee with dignity, fairness, and respect. This decision is also therapeutic to the condemnee’s mental and physical health. The Court’s reasoning demonstrates that upholding the purpose of the Fifth Amendment is of special concern in takings that create a government leasehold.

The Court found that the value of the government’s occupancy, and therefore the just compensation, was not to be determined “by treating what is taken as an empty warehouse to be leased for a long term, but [by] what would be the market rental of [such a building in use] on a lease by the long-term tenant

¹⁰⁴ Moreover, if the anticipated cost of the work exceeds certain thresholds, a governmental tenant typically must go through a time-consuming bidding process before it can undertake the work. This can delay necessary repairs and exacerbate deterioration.

¹⁰⁵ 323 U.S. at 375.

¹⁰⁶ *Id.* at 380.

¹⁰⁷ *Id.* at 382–83.

¹⁰⁸ *Id.* at 381.

to the temporary occupier.”¹⁰⁹ This would more closely approximate the value of the government’s taking. The Court went on to find:

Some of the elements which would certainly and directly affect the market price agreed upon by the tenant and sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. In addition, it might also include the storage of goods against their sale or the cost of their return to the leased premises. Such items [are not to be] independent items of damage but [are] to aid in the determination of what would be the usual—the market—price which would be asked and paid for *such temporary occupancy*¹¹⁰

Although the condemnee in *General Motors* was a long-term tenant of the premises, it is logical that *General Motors*’s measurement of just compensation is applicable even if the condemnee were the fee owner.

In addition, the Court in *General Motors* was particularly concerned that government not be allowed to circumvent the constitutional obligations of just compensation by taking less than a fee simple interest.¹¹¹ It said:

It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the “market rental value” for the use of the chips so cut off. This is neither the “taking” nor the “just compensation” the Fifth Amendment contemplates.¹¹²

Several important points flow from this cautionary and highly instructive language, especially when combined with the language previously quoted.¹¹³ First, it provides strong support for the contention made in the text accompanying Situation 1—that a number of situation-specific factors must be considered in order to determine just compensation when government creates a leasehold using its power of eminent domain in order to avoid the impermissible results described by the Court in *General Motors*. While the market value sets just compensation, it is market value *for like circumstances*. Thus, *General Motors* provides

¹⁰⁹ *Id.* at 382.

¹¹⁰ *Id.* at 383 (emphasis added).

¹¹¹ *Cf. Zeiner, supra* note 6, at 532 (noting holding in *General Motors* and discussing why issues surrounding just compensation should not be a bar to the government’s use of eminent domain to establish leaseholds).

¹¹² *Gen. Motors Corp.*, 323 U.S. at 382.

¹¹³ *See supra* notes 101–104 and accompanying text.

direction as to how those additional factors impact the measurement of just compensation. Second, it directs that the government must consider the diminution of the reversion's usefulness to the condemnee when calculating just compensation. One way that the government could account for diminution is by considering what market rent would be under the specific factors impacting the particular condemnee. This Article argues that this fact-specific analysis is exactly what the Court is directing in *General Motors*. Third, this language implicitly recognizes that although takings are allowed, financial abuse of the condemnee is not, and that financial impacts carry with them possible harms to a citizen's personhood. Here, the Court is implicitly recognizing concepts similar to antitherapeutic impacts as used in therapeutic jurisprudence. As will be discussed in connection with Situation 4, the Court also implicitly recognizes that, at some point, the antitherapeutic impacts of the taking go beyond the bounds of the Fifth Amendment.¹¹⁴ Most importantly, this language establishes that, although takings are constitutionally permitted, the takings power does not justify treating condemnees with contemptuous financial disrespect that devalues the landowner as a human being. Based on this language, there are limitations on the maneuverings—even in wartime—that can be accomplished in takings that create a government leasehold.

As an aside, in order that it not be overlooked in this analysis, the Court found that the condemnee was entitled to compensation for fixtures and permanent equipment destroyed or depreciated in value by the taking as a separate item of just compensation.¹¹⁵

Kimball Laundry partially addresses the matter of goodwill. In that case, government took the condemnee's real property and equipment and operated a laundry business for the military on the condemnee's premises.¹¹⁶ Essentially, it took all of the condemnee's business for a temporary period, except for its delivery trucks and its customer base. A business's customer base is typically known as goodwill or going-concern value, but was referred to as trade routes in this laundry business case. The Court confirmed that going-concern value is not compensable under federal law when government takes the fee simple.¹¹⁷ However, when government takes the temporary use of business property, "it would be unfair to deny compensation for a demonstrable loss of going-concern value"¹¹⁸ It goes on to state that government must pay the transferrable

¹¹⁴ *Gen. Motors Corp.*, 323 U.S. at 382 ("This is neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates.").

¹¹⁵ *Id.* at 383–84. Although outside the scope of this Article, the determination of just compensation for used equipment that, when in place, was perfectly suitable for the condemnee's business, is a problematic issue that could also benefit from a therapeutic jurisprudence analysis.

¹¹⁶ *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3 (1948).

¹¹⁷ *Id.* at 11–12; see also *Gen. Motors Corp.*, 323 U.S. at 379.

¹¹⁸ *Kimball Laundry*, 338 U.S. at 15. The Court went on to say that "[t]he temporary interruption as opposed to the final severance of occupancy so greatly narrows the range

value of the temporary use of the condemnee's trade routes (i.e., the temporarily destroyed value of goodwill).¹¹⁹

In addition to goodwill, the Court in *Kimball Laundry* held that the excess wear and tear (above normal wear and tear) on the condemnee's equipment was to be an additional item of compensation.¹²⁰

Based upon the above analysis in Situation 2, when the government takes a leasehold from a landowner who is occupying the premises for his own business purposes, just compensation for that taking should include the items set forth in *General Motors*. To do otherwise would defeat the Fifth Amendment's mandate for just compensation whenever there is a taking of less than fee simple title. Based on *General Motors*, just compensation in Situation 2 should include, at least, the amount sufficient to (1) pay for replacement premises on terms that match those of the government's lease; and (2) remove the landowner's goods from the condemned premises and provide whatever services to the lessee as are called for in the lease. Market rent would be the rent charged under like circumstances.¹²¹ In addition, the condemnee would be entitled to compensation for fixtures and permanent equipment destroyed or depreciated in value by the taking.¹²² It should be noted that the list of elements provided in *General Motors* is not intended to be exclusive.

The Court's explanation of its decision to award loss of goodwill as an additional element of just compensation in *Kimball Laundry* is instructive. However, this explanation should not be wholly determinative as to whether the condemnee in Situation 2 is awarded just compensation for the proven diminution of its goodwill caused by the taking. First, the court indicates that goodwill typically is not awarded when a leasehold is created through a taking.¹²³ In *Kimball Laundry*, the Court states that "the Government has taken the temporary use of such property"¹²⁴ when explaining the unfairness of not awarding just compensation for damage to goodwill.¹²⁵ That particular case was one in which government was to operate the condemnee's laundry. Does the word "use" in that sentence mean temporary "operation/destruction" or merely "occupancy"? In the Court's view, there was something special about the circumstances in *Kimball Laundry* that merited compensation for the diminution of goodwill. The condemnee in *Kimball Laundry* was put out of business for the

of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him. It is a difference in degree wide enough to require a difference in result." *Id.*

¹¹⁹ *Id.* at 16.

¹²⁰ *Id.* at 7.

¹²¹ It would not include the condemnee's subjective attachment to the property which is the subject of the taking.

¹²² *Gen. Motors Corp.*, 323 U.S. at 383–84.

¹²³ *Kimball Laundry*, 338 U.S. at 11–12.

¹²⁴ *Id.* at 15 (emphasis added).

¹²⁵ *Id.* at 12–15.

duration of the taking. The Court says that the “temporary interruption [in occupancy] as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor’s obligation to him. It is a difference in degree wide enough to require a difference in result.”¹²⁶

In fee simple eminent domain cases, unless governed by state law that differs on the treatment of goodwill, damages to goodwill are awarded only under limited circumstances where the condemnee’s business cannot be relocated. For example, in *Michigan State Highway Commission v. L & L Concession Co.*, the condemnee’s business was destroyed by the taking of the racetrack where it had the concession to sell food and souvenirs.¹²⁷ Has that difference in degree become wide enough so that, if the condemnee could temporarily relocate his business and prove the reduction in goodwill as a result of the relocations, he would be entitled to the same difference in result as in *Kimball Laundry*? The current status of eminent domain law regarding takings of a fee simple would respond in the negative. Under fee simple acquisition it is assumed the market price excludes loss of goodwill. Court decisions also indicate that the answer is the same as to temporary takings. But, for the reasons described above, this is an issue that ought to be re-examined in light of therapeutic jurisprudence in situations like Situation 2. The argument is even more compelling if the duration of the taking could vary, at the condemnor’s option, thus forcing additional untenable problems on the condemnee.¹²⁸

This Article urges that the condemnee in Situation 2 be awarded damages for the loss of goodwill attributed to the temporary transfer as an additional element of just compensation. When comparing the antitherapeutic impacts, Situation 2 is much more akin to *Kimball Laundry* than it is to the taking of the fee simple. In the taking of a fee simple, the goodwill could be transferred on a permanent basis to the condemnee’s new permanent premises. This is not so in a taking that creates a leasehold in the condemnor. In this situation, another diminution of goodwill likely will occur upon the condemnee’s return to the original premises when the taking ends.¹²⁹ The condemnee should be compensated for both losses to goodwill, if the amounts are not too speculative to be determined.¹³⁰ The loss is even greater if the duration of the taking is subject to change at government’s option. Just compensation based on this description treats the condemnee with the dignity and respect of therapeutic jurisprudence.

The continuing services and maintenance of the premises while being leased to government and the landlord’s costs involved in enforcement of the terms of the involuntary lease are antitherapeutic when viewed through the lens of

¹²⁶ *Id.*

¹²⁷ *Mich. State Highway Comm’n v. L & L Concession Co.*, 187 N.W.2d 465, 470 (Mich. Ct. App. 1971).

¹²⁸ *See supra* note 101 and accompanying and following text.

¹²⁹ *See Zeiner, supra* note 6, at 553.

¹³⁰ *See id.*

therapeutic jurisprudence. This Article has already argued that these costs are factors that ought to impact market value rent.¹³¹

Are services more costly from a vendor who is not inclined to enter into bargaining for them? Yes, but it would seem that the price used to calculate just compensation for services to be provided by this involuntary landlord should nevertheless be limited to market value. This then leaves unaddressed the affront to the dignity of the condemnee by placing him in an involuntary relationship with the adversary who took his property from him. Although it is a type of emotional harm, this affront to dignity is very different from the uncompensated subjective attachment of a condemnee to his property under existing eminent domain law. Nevertheless, therapeutic jurisprudence does not insist that every antitherapeutic consequence be addressed. It says that the therapeutic and antitherapeutic impacts should be *considered* when weighing competing norms. In this instance, the constitutional norm of allowing the taking must prevail over the therapeutic jurisprudence norm. It is arguable whether this particular antitherapeutic impact, or affront, is capable of being monetized. It can be argued that the calculation of just compensation recommended above has addressed the physical health, mental health, and associated financial harms to the condemnee as much as is practical. According to this argument, although the particular dignitary affront is different from the subjective value that one places upon his property, like loss of subjective attachment, this diminution in dignity is part of the constitutional cost of property ownership in the United States when government takes property for its own use. On the other hand, there are arguments that virtually all losses ought to be monetized and even emotional harm could be monetized “using the same mechanism as is currently used to award compensation for emotional harm in tort cases.”¹³²

Even if limited to exclude compensation for dignitary affront, this situation and the application of therapeutic jurisprudence to it leave much room for interpretation by both skillful counsel and the courts. Moreover, interpretations may vary depending on the precise facts and circumstances of the particular case.

3. *Situation 3*

The next incremental step in complexity has government creating a leasehold for itself in part of a multitenant project. The possible factual variations are endless, and eminent domain litigation is very factually oriented. This illustration is designed to show additional problems and areas of complexity not present in Situation 2. Although many of the issues and problems associated with

¹³¹ See *supra* Part II.B.1.

¹³² Brett Talley, *Restraining Eminent Domain Through Just Compensation: Kelo v. City of New London*, 125 *S. Ct.* 2655 (2005), 29 *HARV. J.L. & PUB. POL'Y* 759, 765 (2006).

Situation 2 are also present in Situation 3, they are not repeated here in order to focus on new considerations.

Situation 3 is a government taking to create a leasehold in all or a portion of the remaining vacant retail space in a new, high-end, retail shopping mall. That space was being offered for rent only to retail sales tenants at a base rent plus a percentage of gross receipts. Despite the economy, space in this high-end niche market has been leasing well.¹³³ Given the mall's excellent location, the anchor and smaller tenants were all anticipating high sales volume and their initial results were in accord with those expectations. The landlord was anticipating significant percentage rent that would increase the value of the mall property should the landlord choose to sell. The landlord/fee simple owner is to provide HVAC for all retail spaces except for anchor tenants. The landlord/fee owner is, in addition, obligated to provide HVAC for the indoor pedestrian thoroughfares as well as maintenance, cohesive décor, lighting, security, general advertising for the mall as a whole, and other common area services for the pedestrian thoroughfares, parking areas, common area restrooms, etc. Under the leases, tenants are to pay their proportional share of these costs and services. In addition, the landlord is to enforce the rules and regulations of the mall. The leases provide for escalation of base rent and contain covenants under which both lessor and lessee agree to a tenant mix and to limit the use of all store space within the shopping mall to retail.

After brief, unsuccessful negotiations with the landlord/fee simple owner, wherein the fee owner/prospective landlord was unwilling to rent because of the limiting covenants in the other leases, the government filed eminent domain proceedings to create the government leasehold because of the convenient location of the mall. The government will use the space to provide a high volume of services to local residents who have recently lost their jobs. Their demand for parking will be high. The mall's other tenants, as well as the landlord, are upset about this turn of events. Retail traffic and sales will not increase as this section of the mall's space opens for business. Instead, the unemployed government invitees will be without discretionary income at their disposal and unable to shop at the mall's high-end retail stores. Not only will the government's invitees be unlikely sources of retail sales, their parking usage will make those spaces unavailable for mall shoppers. Their presence may trigger economic nervousness among shoppers, directly diluting the fun, I-am-above-it-all, not-a-care-in-the-world, free-spending mood that the mall has worked to engender. The mall may not be as attractive a shopping spree destination as it would have been absent the up-close-and-personal view of adversity. There is risk that the panache of the mall as a luxury, carefree destination will not recover after the government vacates. Here, the unanswered questions are almost without limit. To what extent

¹³³ This example is not as fanciful as it may at first seem. In some areas of the country, the slow economy has created opportunities for the wealthy to profit, making the rich "richer," resulting in still-strong demand for high-end goods.

are percentage rent, rent escalators, and loss of the related enhancement to the total value of the mall to be considered in arriving at market value rent for purposes of just compensation? The answer turns in part on whether the units covered by the government lease alone are considered the “property” that is taken, or whether those units are treated as part of a larger whole.¹³⁴ There are arguments that some of the possible elements of loss should be considered as elements of market value rent before one even reaches the issue of severance damages.¹³⁵ Even so, there are problems of proof and possibly speculative figures to be overcome if the condemnee is to receive anything more than mere long-term rental for vacant space. How is this problem to be handled so that the condemnee’s interest is not chopped “into bits”¹³⁶ with the result that the Fifth Amendment’s mandate of just compensation is defeated and the condemnee is left with just compensation that is, in effect, a mere token? How are the breaches of the retail leases to be handled? What about the sales volume lost by other tenants? What if total common area expenses increase by virtue of the government use, thereby increasing the dollar amount payable as the proportional share of the non-government tenants of the mall? Though none of their physical property was taken,¹³⁷ are the breached lease covenants to be considered property in this situation? Since the taking is temporary, the fee owner cannot make permanent plans in the face of the taking. Tenants who do not terminate their leases by virtue of their landlord’s breach face the same difficulties. Obviously, an equitable result requires further careful attention to just compensation when a leasehold is created through eminent domain.

As in Situation 2, problems arise when maintenance, services, and enforcement of the mall’s rules and regulations are considered. Many of the services involve subjective elements of quality. Again, the condemnee must reasonably satisfy his adversary who, in this situation, is making a different use of the mall than that for which it was designed. Enforcement of rules and regulations is especially problematic. If the government violates the rules and

¹³⁴ The general principle is easy to state: consequential damages to *properties not taken* do not produce recoverable damage. See 4A SACKMAN, *supra* note 53, § 14.01[2]. Thus, the determination of what constitutes the property that is subject to the taking becomes critical. From that point on, the issues can become complicated and application of the subrules can be controversial.

¹³⁵ Severance damages are a standard element of damages for a partial taking. 8A SACKMAN, *supra* note 53, § 16.02[1] (“Severance damages may be defined as damages or diminution in the value of the remainder resulting from the taking of a portion of a tract of land. Such consequential damages are awarded in addition to the value of the land actually taken.”).

¹³⁶ *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945).

¹³⁷ The general rule for takings of the fee simple is that nearby owners, whose property is not part of the proceedings, are not entitled for compensation for the diminution of the value of their property due to the taking of nearby property. See 4A SACKMAN, *supra* note 53, § 14.01[2].

regulations, or if it does not require its invitees to abide by that portion of the rules and regulations applicable to them, how is the condemnee/involuntary landlord to achieve enforcement? Once again, the threat of lease default is not available. The condemnee, who likely characterizes himself as an unwilling victim, is without reasonable means of enforcement. Unlike Situation 2, the condemnee/landlord's failure to enforce the rules and regulations of the mall as to the government tenant or its invitees can cause difficulties, either specifically under the leases, or relationally, with other tenants of the mall. The more one considers the situation, the more issues appear.

The purpose of providing Situation 3 is not to repeat any of the analysis in preceding Situations 1 and 2. Rather, it is to make the point that the problems for the condemnee, and others, when government creates a leasehold through eminent domain, can be infinitely greater in number, and often in complexity, than in takings of the fee simple.¹³⁸

4. *Two More Problems in Takings to Create Leaseholds*

Before moving on to a final step in complexity, it is necessary to make a few additional points. While the introduction to this paper cited a number of instances in which it would be advisable for government to enter into a lease rather than acquiring the fee, there are risks that government might use eminent domain to do so for the wrong reasons. First, it can be very time-consuming to negotiate a business lease. As a general rule, the more complex the leasing arrangement, the more time-consuming it is to negotiate, memorialize, and finalize it. As government becomes leaner in the face of budget problems, there are likely to be fewer government employees to perform the necessary tasks. This might be an incentive for government to put off leasing until the last minute and resort to a taking, or to pressure the prospective landlord with threats of a taking when a lease cannot be negotiated in time. That is not the role that was intended for the Fifth Amendment.¹³⁹ Second, although takings to create a leasehold are rare at

¹³⁸ If government were to take the fee simple in a part of a shopping mall, the problems arising from that situation would be numerous and complicated as well.

¹³⁹ There is another potential abuse that is the flip side of this coin if government is in no hurry to obtain occupancy in an identified property. Government could threaten eminent domain, but not proceed in a timely fashion with proceedings, thus causing a type of condemnation blight—destroying the rental market for the property—as a strategy to obtain the space at a lower rent. This particular variety of abuse would likely be limited to situations in which government's objective is a long-term lease for which occupancy is not yet needed. Condemnation blight in connection with fee simple acquisitions is described in Gideon Kanner, *Developments in Eminent Domain: A Candle in the Dark Corner of the Law*, 52 J. URB. L. 861, 891–92 (1975). See also S. Cary Gaylord & Lorena Hart Ludovici, *Condemnation Blight*, in *INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY*, 189, 191 (A.L.I.-A.B.A. Course of Study, May 7, 1992), available at C730 ALI-ABA 189 (Westlaw) (“Condemnation blight . . . [is a]

the moment, what is to keep the government from preferring leaseholds to fees and from engaging in takings of leaseholds to the exclusion of takings of the fee? What is now the exception, and a very problematic exception at that, might become the rule. Moreover, if an overworked, lazy, or ill-intentioned government condemnor could get away with paying mere token just compensation by taking a leasehold for government use—or simply if it becomes a modern trend—why not do so? The Court in *General Motors* foresaw this possibility when it spoke of evading the requirements of the Fifth Amendment by chopping the interest of the condemnee to bits.¹⁴⁰

The further development of the law governing just compensation for takings that create leaseholds can address both problems. If the law governing just compensation develops as I have outlined in this Article, guided by the concerns expressed in constitutional case law and the principles of therapeutic jurisprudence, it is more likely that the use of eminent domain by government to create leaseholds will be limited to situations that are truly appropriate.

5. *Situation 4*

The final step in complexity is a *Kelo*-type leasehold in which the government creates a leasehold through its power of eminent domain and then transfers the leasehold to a private party for private use.¹⁴¹ From the perspective of therapeutic jurisprudence, this is the most antitherapeutic of all the situations described in this Article. This is because the lessee is not government, or an agent of government, providing a public service as in the previous situations, but is a private party operating a private business venture on the condemnee's premises, against the condemnee's will. There are two possible variations. The first is one in which the condemnee's property is available for rent, but the condemnee/lessor had chosen not to lease to this particular prospective tenant.¹⁴² The second is one in which the condemnee's property is not available for rent or

'term applied somewhat imprecisely to the detrimental conditions that befall land slated for public acquisition. Either the project is undesirable and depresses values for some distance around its proposed boundaries, or, whatever the nature of the project, the affected land will surely be taken (or so the market believes) and hence, becomes virtually useless to the private sector of the market.'" (quoting Kanner, *supra*, at 891–92)); *Beaux Arts Props. Inc. v. United Nations Dev. Corp.*, 328 N.Y.S.2d 16, 22 (Sup. Ct. 1972), *aff'd*, 332 N.Y.S.2d 1008 (App. Div. 1972) ("Condemnation blight . . . properly refers to the diminution in value of the property of the condemnee, caused by acts of the condemning authority between the time of the announcement of the projected taking and the *de jure* vesting of title.").

¹⁴⁰ *Gen. Motors*, 323 U.S. at 382.

¹⁴¹ "Private use" is defined as use for the private gain of a private party—not for the provision of services that would otherwise be the responsibility of government or a common carrier, but are outsourced instead.

¹⁴² This is somewhat like Situations 1 and 3 above but with a coerced private party lessee.

sale, but the private party wants it anyway.¹⁴³ In the first situation in which the premises are available for rent, clearly, had the lessee been a desirable tenant on acceptable terms that would not cause a breach of other leases in the project and would not thwart the landowner's plans for his property,¹⁴⁴ the condemnee could have entered into a lease with that private party. Thus, this is simply a situation in which private sector voluntary bargaining did not result in agreement. The condemnee did nothing illegal or even remotely wrongful by refusing that private tenant. Nonetheless, in a *Kelo*-type leasehold taking, government could use condemnation to create a government leasehold in the fee owner's property, then transfer the leasehold to the private party that had been rejected as a lessee by the landowner/condemnee/prospective landlord—for the private, presumably profit-making (for the private party) use that had been rejected by the condemnee. This results in the condemnee having this unacceptable or unwanted private party as a tenant anyway.¹⁴⁵ Essentially, government has acted as a lessee's broker of last resort, but one to whom a lessor cannot say no.¹⁴⁶ The outcome is the same, even if the property was not on the market for lease or for sale—the condemnee has the unwanted, unacceptable tenant.¹⁴⁷ The same problems that exist in Situations 2 and 3 regarding maintenance and services exist in Situation 4, as do the issues of the condemnee's powerlessness to enforce the lease, and the issues involved in providing services at a qualitative level satisfactory to the intruder. Again, this private intruder's presence can also cause the landlord to be in breach of her lease covenants with other tenants and create the same knot of issues as described in Situation 3 when the government is the lessee through eminent domain. But, when a private lease is coerced, the affront is much greater and the public benefit more attenuated than when government or its agent will occupy the premises.¹⁴⁸

¹⁴³ This is somewhat like Situation 2 above, but with a coerced private party lessee.

¹⁴⁴ Or pose risks that the landowner considers unacceptable, for instance certain private profit-making uses that pose greater risks of environmental contamination.

¹⁴⁵ While Florida's constitutional amendment, FLA. CONST. art. X, § 6, adopted to counter the result in *Kelo*, would prohibit such a transfer, it would not be prevented by the anti-*Kelo* laws that were passed in many of the 43 states that enacted laws to address the problems presented by *Kelo*. See Zeiner, *supra* note 1; see generally CASTLE COALITION, *supra* note 51 (discussing whether the amendments in 42 states would deal with the problem of condemnation blight or prevent transfers such as that in *Kelo*).

¹⁴⁶ Cf. Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 8–12 (Ill. 2002) (finding unconstitutional the taking of the land of a metal recycling company for transfer to a privately owned raceway for expansion of its parking, because the government was acting as a broker of last resort for a private user. This case was one of several in which state courts adopted a more narrow interpretation of "public use").

¹⁴⁷ However, the shock, displeasure, and antitherapeutic impacts on the condemnee might be greater because he was not even looking for a tenant before becoming an unwilling lessor.

¹⁴⁸ It is explained in *Kelo* that while the private party transferee is directly benefitted in a private-to-private taking of the fee simple, the public use element of the Fifth Amendment is met because of the predicted *indirect* public benefits of anticipated new

The forced continuing nature of the relationship between the condemnee and a private party in a leasehold created through eminent domain is so significant as to distinguish this situation from that in *Kelo*, and render it untenable.¹⁴⁹

Although the forced tenancy of a government or private entity providing government-type or common carrier service can be considered a part of the price of property ownership in the United States, it is quite another thing for government to force a coerced tenancy for private purposes on a landowner, absent an overriding government interest such as that underlying the Fair Housing Act. This author has argued that such *Kelo*-type leaseholds created via eminent domain should be prohibited as violating public policy,¹⁵⁰ and that such coerced private leaseholds have so offended the conscience as to be outside the bounds of what is permitted governmental conduct.

Therapeutic jurisprudence facilitates a more precise and nuanced analysis, beyond simply the clear sense that a *Kelo*-type leasehold goes too far—so far as to be prohibited on public policy grounds. Therapeutic jurisprudence yields the same conclusion, but on far more thorough and insightful jurisprudential grounds. It helps us understand why, and to what extent, *Kelo*-type forced private leaseholds offend the conscience. It helps us formulate more just outcomes. In the process, one can also foresee that therapeutic jurisprudence may provide a useful tool for analyzing and litigating eminent domain in general.

Under current modes of analysis, only the community's well-being is considered in *Kelo*-type takings of the fee simple interest, and even then, only to the extent needed to establish the public purpose(s)¹⁵¹ of the taking. Once public

jobs and increased tax revenue. The direct benefit to the private party is obvious. The public benefits are less obvious, even if they occur, because they are derivative, at best. Moreover, they may or may not be generated.

¹⁴⁹ Zeiner, *supra* note 6, at 552–53.

¹⁵⁰ *See id.*

¹⁵¹ “Public purpose” or “public benefit” are currently considered sufficient under federal law to meet the Fifth Amendment’s “public use” element for eminent domain. *See Kelo v. City of New London*, 545 U.S. 469, 480 (stating that the Court “embraced the broader and more natural interpretation of public use as ‘public purpose’”); Alice M. Noble-Allgire, *Poletown Overruled: Recent Michigan Case Tightens the Reins on the Public Use Requirement, Property Scholars Take Up Eminent Domain*, in EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT, *supra* note 98, at 73, 75 (“The U.S. Supreme Court’s past precedents have broadly equated ‘public use’ with ‘public purpose.’”); 2A SACKMAN, *supra* note 53, § 7.01[1], at 7-18 (defining public use as “furthering the public good or general welfare, or securing some public benefit”); DANA BERLINER, *PUBLIC POWER, PRIVATE GAIN* 4 (2003) (explaining that in 1954 “public use” became synonymous with “public purpose”); DICK M. CARPENTER II & JOHN K. ROSS, *VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN ABUSE* 3 (2007) (“[T]he trend of broadening the definition of ‘public use’ to ‘public purpose’ to ‘public benefit’ culminated in *Kelo*.”). This judicial interpretation of “public use” to include “public purpose” was consistent with earlier Court rulings that interpreted “public use” broadly and gave deference to legislative determinations. *See* Alice M. Noble-

purpose is established, based on a standard that is highly deferential to legislative determinations,¹⁵² judicial consideration of the impacts upon people is outside the scope of courts' analyses. The legislative determination of public use for takings of the fee simple interest for subsequent transfer to a private party is often based on studies that provide highly speculative tax revenue and job creation prognostications.¹⁵³ Judicial assessment of the likelihood that those prognostications will be realized is outside the scope of judicial review under current federal law.¹⁵⁴ Without therapeutic jurisprudence, the analysis of a taking to create a *Kelo*-type leasehold would be much the same.

Yet, we are a government "of the people, by the people, for the people."¹⁵⁵ When examining the coerced continuing relationship between a condemnee- lessor and the private party tenant that has been forced upon him through eminent domain, consideration of people and human impacts should not be brushed aside quite so quickly in favor of the economic considerations that invariably come to the fore in *Kelo* situations. The therapeutic jurisprudence analysis of a taking that creates a *Kelo*-type leasehold in a private party focuses particular attention on the therapeutic or antitherapeutic impacts on all the parties to the legal proceeding, including the condemnee and the public to be benefitted thereby. Therapeutic jurisprudence also would examine the impacts on the private party receiving the leasehold. This would allow discovery of the "incidental"¹⁵⁶ benefits anticipated by the private party, and as a result, a more comprehensive picture of the economic impacts would emerge. A thorough analysis would enable discovery of the backstory which, as in *Kelo*, may tend to reveal the politics of power.¹⁵⁷ A

Allgire, *Analysis of the Supreme Court's Controversial Decision on the Use of Eminent Domain for Economic Development Purposes*, 20 PROB. & PROP. 9 (2006).

¹⁵² See, e.g., *Kelo*, 545 U.S. at 480–82 (defining the concept of "public purpose" broadly, "reflecting our longstanding policy of deference to legislative judgments in this field").

¹⁵³ *Id.* at 483 (explaining that the economic development plan "will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue").

¹⁵⁴ *Id.* at 487 (rejecting petitioners' argument that "for takings of this kind [the Court] should require a 'reasonable certainty' that the expected public benefits will actually accrue").

¹⁵⁵ President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

¹⁵⁶ See *Kelo*, 545 U.S. at 485–86 (explaining that although a private party may be benefitted or may even be the most direct beneficiary of a taking, this does not violate the public purpose requirement so long as the legislative entity has determined that the project serves a public purpose).

¹⁵⁷ See JEFF BENEDICT, *LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE* (2009). The discoverability of the backstory may have a beneficial, cautionary impact on the governmental entity asserting the eminent domain power for a number of reasons. For instance, it would expose the too-cozy relationship that can exist between government and those with disproportionate political power who would use government for their own purposes. It could expose takings in which the benefit to the public is

therapeutic jurisprudence analysis would also analyze the full range of impacts on government, a key player in eminent domain proceedings. Under therapeutic jurisprudence, analysis of the impacts upon all affected parties ought to be as thorough as possible.

Although the impacts on the parties can be examined in any order, this Article examines those on the condemnee first. Although eminent domain in general tends to have antitherapeutic effects on the condemnee, takings that create leaseholds are especially antitherapeutic because the condemnee is locked in the role of involuntary landlord for the duration of the taking. He cannot decide to forget the past and move on. He cannot make a clean break and start his life anew because he is forced to be a landlord without the usual powers to enforce the lease terms, and depending on the type of leasehold, he may have to provide extensive services at qualitative levels satisfactory to the taker. The impact is dramatically worse when a private party seeking private gain, rather than government, is the lessee under the forced lease. A condemnee/lessor is likely better situated to see the public purpose, and thus accept the situation as being more just, when the premises are to be used for government or common carrier purposes, than when government power is used to force a private tenant engaged in a private profit generating use upon the unwilling condemnee/landlord. The latter conveys a message to the condemnee/landlord that “you don’t count in the scheme of things.” Inherent in that message is the frustrating and demeaning, “Nothing you have to say counts either. Government is forcing this private tenant upon you despite your objections, regardless of what you say, and regardless of its impact on you.” At the same time, it is obvious that the private party on whose behalf government is employing its vast power counts a lot, enough for government to use its extreme power of eminent domain on its behalf. The dichotomy shocks the condemnee’s sense of fairness and justice. It delivers a gut-level blow to the personhood and the human dignity of the condemnee. When examined from the standpoint of the three V’s of therapeutic jurisprudence, the condemnee/landlord—an involuntary participant in eminent domain—is denied a voice and the validation that comes from having a voice in the takings process. Neither voluntary participation nor its substitutes (voice and validation) is present. These affronts damage the dignity, the self-respect, and even the personhood of the condemnee.¹⁵⁸ Moreover, because the antitherapeutic result was forced on him by the legal system, the condemnee has nowhere to turn for redress. Therefore, the sense of disrespect and unfairness that the

incidental to the private gain. The likelihood of exposure of the backstory in a court of law may even assist government officials in resisting the efforts of politically powerful private parties to get government to use its power of eminent domain for private benefit.

¹⁵⁸ See Amanda W. Goodin, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. Rev. 177, 191 (2007) (suggesting states could limit takings of certain property “that is particularly important to an individual’s sense of personhood”); Ronner & Winnick, *supra* note 22, at 505; Zeiner, *supra* note 1, at 768.

condemnee/landlord is likely to perceive in the proceeding may result in his reduced respect for the law and government generally.¹⁵⁹

In addition, members of the public who see themselves as similarly vulnerable identify with the “You don’t count, but someone else counts a lot” message, and interpret government’s use of its power as highly coercive, inherently unfair, disrespectful, and abusive. They can easily grasp the disrespectful, intrusive nature of the government’s action. The public can just as easily see the purportedly incidental benefit to the private party. The situation necessarily generates resentment of suspected misuse of political influence. The message is much the same to all members of the public, regardless of whether they own real property. Therapeutic jurisprudence analysis suggests a possible explanation for the public outrage directed toward the Court following its decision in *Kelo*.¹⁶⁰ It may also suggest an explanation for the diminution of respect for the Court, the law, and government in general that was reflected in the public reaction to that case.¹⁶¹

The public reaction to takings that create private leaseholds for private profit is likely very different from the reaction to takings that create a leasehold for actual government use, or for use by an agent of government to provide government services. Government is not inclined to engage in the latter taking unless it has decided that it is important that the particular government services be provided from the site. The public depends on government for a variety of services; availability of the services from the site would be therapeutic for the general public in most instances. The public likely would not become disrespectful either of government or of the law if government sincerely needed to engage in a taking of a government or government-agent leasehold in order to provide the needed services.

The ultimate public participants are the taxpayers.¹⁶² Therapeutic jurisprudence’s analysis of the therapeutic and antitherapeutic financial impacts goes further than recitation of the public benefits that form the basis of the legislative determination. It includes consideration of the likelihood of benefits to

¹⁵⁹ In most instances, there will be little difference between fee simple titles held in the name of an individual and those held by an artificial entity. Even if the condemnee is an artificial entity, real human beings operate the entity, and identify with the entity and its problems. Therefore, the emotional and physical well-being of human beings is impacted, regardless of the form in which fee simple title to the premises is held.

¹⁶⁰ See CASTLE COALITION, *supra* note 51; Kenneth R. Harney, *Eminent Domain Ruling Has Strong Repercussions*, WASH. POST, July 23, 2005, at F1 (“To call it a backlash would hardly do it justice. Calling it an unprecedented uprising to nullify a decision by the highest court in the land would be more accurate.”).

¹⁶¹ A full therapeutic jurisprudence analysis of *Kelo* is needed to examine these suggestions.

¹⁶² As used here, this term means everyone who pays any sort of public tax or fee: sales tax, income tax, property taxes, tolls, and every sort of user fee or government imposition.

the magnitude predicted¹⁶³ and an examination of the risks involved.¹⁶⁴ This includes analysis of the allocation of risk if the magnitude of benefits is less than predicted, as well as who is to bear what proportional amount of the risk if the project does not come about.¹⁶⁵ In fee simple takings in the nature of *Kelo*, the public typically bears the entire risk if the project is not completed or the results are not as glowing as projected. The taxpayers fund the acquisition and the taxpayers take the loss if the project fails or if the predictions of public benefit, whether well-founded or speculative, do not come to fruition. The allocation of risk for taxpayers is analogous in settings in which takings create private leaseholds.¹⁶⁶ Moreover, this general public is the same group of people who empathize with the condemnee and sense themselves to be similarly vulnerable to what they perceive as heavy-handed government tactics. Thus, while there are both therapeutic (based on the legislative findings) and antitherapeutic impacts to the general taxpaying public from takings to create leaseholds for private ventures, the antitherapeutic impacts generally greatly outweigh the therapeutic.

¹⁶³ See Brett D. Liles, Note, *Reconsidering Poletown: In the Wake of Kelo, States Should Move to Restore Private Property Rights*, 48 ARIZ. L. REV. 369, 380–81 (2006) (“[In *Poletown*, Detroit] was promised 6000 jobs and the opportunity to receive millions in tax receipts. . . . [However, the] actual benefits from the new GM plant were much less than promised. Instead of keeping 6000 people employed, GM reduced its goal to 3000 and even then only if ‘economic conditions’ permitted.”).

¹⁶⁴ This would not be part of the constitutional analysis which presently eschews such considerations. It nonetheless would be part of the therapeutic jurisprudence analysis of the impacts. Analysis of the full range of therapeutic and antitherapeutic impacts is the objective of therapeutic jurisprudence. Thus, that which was excluded under current constitutional analysis is allowed to “come in” under the therapeutic jurisprudence analysis.

¹⁶⁵ Anecdotal analysis of news reports regarding failed projects, such as *Kelo*, suggest that typically when the project is abandoned, the monetary loss is almost fully borne by the taxpaying public, not the party to whom the land would have been transferred. See Jim Edwards, *Pfizer’s R&D Cuts Render Kelo v. New London Eminent Domain Case a Waste of Time*, CBS NEWS, Nov. 10, 2009, http://www.cbsnews.com/8301-505123_162-42843438/pfizers-r038d-cuts-render-kelo-v-new-london-eminent-domain-case-a-waste-of-time/; Kerry Picket, *’05 Kelo Decision a Failure; CT Site Remains a Dump*, WASH. TIMES, Sept. 3, 2011, <http://www.washingtontimes.com/blog/watercooler/2011/sep/3/picket-05-kelo-decision-failure-ct-site-remains-du/>; INST. FOR JUSTICE, *supra* note 84, at 3; BERLINER, *supra* note 84, at 21. As here, in *Poletown* the taxpayers bore the entire risk of whether or not the General Motors plant would provide the projected number of jobs. When the jobs did not materialize, the cost to the taxpayers remained the same; General Motors suffered no consequences. See Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 219 (2004) (explaining that General Motors “cost taxpayers more than \$300,000,000 in federal, state and local subsidies”).

¹⁶⁶ Many publicly reviled takings could have been structured as some sort of leasehold.

In this context, the level of public distrust and antipathy toward government and the law would likely be even greater than observed in the aftermath of *Kelo*.

By contrast, the private party beneficiary of the leasehold is able to decide its involvement before the inception of the transaction and would not be involved if it had not gauged its involvement to be therapeutic, i.e., profitable or otherwise advantageous.

Government would also be impacted. Because government in the United States governs with the consent of the governed, anything that undermines the faith of people in their government, at some level, undermines government itself. Obviously, the electorate influences government, and it should. However, if government, through its elected officials or non-elected public officials, allows those with disproportionate political influence to use government as a pawn—or even if officials’ conduct creates the appearance of such impropriety—government itself has been sullied. Even if the project were an overwhelming success, government has apparently misused its power.

Finally, the discussion of just compensation presented earlier also impacts therapeutic jurisprudence analysis. If the law governing just compensation were to develop, not as suggested in this Article, but as to leave the condemnee with only scraps,¹⁶⁷ the result would be especially antitherapeutic in takings that create a leasehold in a private party. Not only would the condemnee/landlord in this coercive situation be told, “You and your rights don’t count and we don’t care how you feel or what you say; they are irrelevant, the favored party gets the leasehold,” but the measurement of just compensation would convey the further message, “You count so little that we are not going to pay a fair rental but will force you to give the privileged party a bargain rent as compared to what you would demand and consider as fair in an arm’s length transaction. Thus, we are not even going to pay you a fair price for the leasehold as it is ripped from your possession and transferred to the more favored party.” The exacerbation of antitherapeutic impacts is obvious. The desirability of enhanced just compensation for the remaining, non-*Kelo*-type, permitted leaseholds is also clear.

Examination of all the impacts under therapeutic analysis suggests that *Kelo*-type takings to create leaseholds in private parties for private use should not be permitted. Thus, the result obtained through a therapeutic jurisprudence analysis amplifies and confirms the results obtained through earlier work grounded in general public policy analysis.

¹⁶⁷ *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945) (stating it is “neither the ‘taking’ nor the ‘just compensation’ the Fifth Amendment contemplates” when the government leaves a property owner with that “which may be altogether useless to him”).

III. WHAT THE SITUATIONS ANALYZED TELL US: SOME CONCLUSIONS

A number of worthwhile findings flow from the foregoing analysis. First and foremost, the analysis provided in this Article establishes that, based on a thorough therapeutic jurisprudence analysis, eminent domain must not be used by government to create a leasehold in a private party for private purposes. This confirms the conclusion reached through traditional public policy analysis.

However, the findings grounded in therapeutic jurisprudence do not stop here. In the process of using therapeutic jurisprudence to analyze the as yet uncommon use of eminent domain to create government leaseholds, it seems that therapeutic jurisprudence is well suited to the law of eminent domain in general. Not only will it enable more insightful future study by scholars, but it is also a useful tool for immediate use by practitioners as they plan strategies, argue cases, prove just compensation, or resolve disputes without litigation.

There are situations in which government use of eminent domain to create a leasehold for the provision of government services is a good alternative, especially in times when funds are in short supply. Despite their highly antitherapeutic impact, takings that create leaseholds for use by government, a common carrier, or a private entity that is providing service on behalf of government from the premises should be allowed—even in those situations where the condemnee/lessor must provide services to the condemnor/lessee. In these instances, sovereign power and constitutional considerations overrule therapeutic jurisprudence values. Yet it should be noted that, in takings governed by state laws that probe further into the necessity for the taking, the highly antitherapeutic characteristics may focus further attention on the question of necessity.

Not only are there appropriate situations for the use of eminent domain to create a leasehold in government, there is also potential for abuse. Such takings could be used to circumvent traditional lease negotiations, and, depending on how the law of such takings and just compensation develops, takings to create leaseholds could be used to leave the condemnee with “chips” of just compensation. The illustrative situations and analysis in this Article provide an opportunity for the law to develop in ways that enable appropriate use of this sub-type of eminent domain, while simultaneously serving as a disincentive to abuse. The extensive factors to be taken into consideration in arriving at just compensation, as recommended by this Article, are likely to result in more precise, and generally enhanced, compensation for takings that create leaseholds in government, or in those agents providing services on behalf of government. Ultimately, this enhanced and more nuanced just compensation would be useful and therapeutic for two equally important reasons. First, it would more fully compensate the economic harms suffered by the condemnee, so that the antitherapeutic practical and dignitary harms would not be exacerbated further by the financial burdens to be borne. Second, appropriate just compensation would

serve as a caution and disincentive to would-be takers, so that takings that create a leasehold would be discouraged, and the antitherapeutic impacts avoided, except in situations where the public need is sufficiently significant that legislative bodies are willing to bear more of the cost of causing the antitherapeutic consequences. This therapeutic jurisprudence approach would provide a proper balance among many competing interests: public needs, property rights, the proper use (and avoidance of abuse) of the power of eminent domain, the provision of government services at reasonable (but more appropriate) rents that better reflect actual economic costs, and recognition of the therapeutic/antitherapeutic consequences to the reputation of government and the emotional and physical health of both the condemnee and the public at large. Therapeutic jurisprudence has the potential to help the law of eminent domain develop in ways that are more just, both for government and property owners. More therapeutic outcomes can make eminent domain less traumatic for condemnees and for society in general.