A Therapeutic Jurisprudence Analysis of the Use of Eminent Domain to Create a Leasehold

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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. These are takings in which the objective 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 as Kelo-type takings in which 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. The conclusion that such Kelo-type takings to create leaseholds should not be allowed was based primarily on public policy considerations. I concluded that the problems created by takings that create private leaseholds are so much worse than those encountered in takings like Kelo, in which government acquires a fee simple from the condemnee then makes a transfer to a

* 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.
private party, so as to disrupt the social contract between government and the people.

Any such conclusion demands reexamination on theoretical grounds. This article does so. It formally extends the jurisprudential philosophy therapeutic justice to eminent domain and specifically to takings to create leaseholds in order to re-examine the question. 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 lease is the most basic form of public-private partnership. 1

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, ALI-ABA Course of Study, Eminent Domain and Land Valuation Litigation, February, 2011 751 [hereinafter, Zeiner, Fundamental Differences].

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, Fundamental Differences, supra note 1, at 754. The National Council for Public-Private Partnerships defines a public-private partnership 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.


Although a P3 is based on a contract, this author would revise that definition for those P3’s 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, rather than the contract governing it, that is the objective of the partnership.

There has been tremendous growth in the use of public-private partnerships in recent years. The author predicts that public-private partnerships will continue to grow in popularity as government seeks to shrink itself or to privatize certain services. Many public-private partnerships involve a
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.\textsuperscript{4}

If 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.\textsuperscript{5} It is an area with potential both for good and for abuse. Guidance from case law is scant and literature, except for my own writings, is almost non-existent.\textsuperscript{6} It makes sense to provide guidance on the 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.

\textsuperscript{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, pay rent for short-term leases, buy supplies, pay for utilities, fuel and other day-to-day operating expenses. 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 a building that then needs to be maintained on an on-going basis.

\textsuperscript{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, \textit{i.e.}, 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. This is not surprising because “[t]he courts have held that the deprivation of the [condemnee(s)] rather than the accretion of a right or interest to the sovereign constitutes the taking.” \textit{U.S. 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.

\textsuperscript{6} Carol L. Zeiner, \textit{Establishing a Leasehold Through Eminent Domain: A Slippery Slope Made more Treacherous by Kelo}, 56 CATH. L. REV. 503 (2007) [hereinafter Zeiner, \textit{Leasehold Through Eminent Domain}]. The few other works that mention the topic have assumed, in conclusory terms, that leaseholds could be created by eminent
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 help to fill the gaps.\textsuperscript{7} It examines, based on the
jurisprudential theory of therapeutic jurisprudence,\textsuperscript{8} and ultimately
confirms, that \textit{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 \textit{Kelo} itself continues to remain on the
books.

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\item \textit{Leasehold Through Eminent Domain}, supra note 6, 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 and asserted that, based on public policy, \textit{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. The purpose of Zeiner, \textit{Fundamental Differences}, note 1, was
threefold: to familiarize the practicing eminent domain bar with my prior work
on takings to create leaseholds so that those ideas could be implemented; to
introduce therapeutic jurisprudence to that segment of the practicing bar; and 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. Thus, it sowed the seeds for this
article.
\item The paper, Zeiner, \textit{Fundamental Differences}, supra note 1, was the first time that
therapeutic jurisprudence had been extended to eminent domain. Email to
author from David B. Wexler. Copy on file with author
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I. BACKGROUND
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I. BACKGROUND
   A. Therapeutic Jurisprudence Described.

   Therapeutic Jurisprudence is a jurisprudential philosophy, or way of thinking about, studying and analyzing law. 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 also sees it as absorbing and reflecting the political, economic and social forces of the culture in which it exists. Following the modern trend, it is interdisciplinary, and seeks to be empirical. It is related to “law and...
psychology and law social science in law [in that it] looks at law with tools of the behavioral sciences.” It also 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.

Therapeutic jurisprudence, or “TJ,” as it is sometimes referred to by practitioners and scholars who work in the field, was developed in the late 1980’s or early 1990’s by its founders, Professors David Wexler and Bruce Winick, to analyze mental health law. It was never intended to be merely a theoretical philosophy. It was intended to guide practical application of mental health law.

Since its creation, 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. It finds practical application in analyzing laws, counseling clients, resolving disputes, designing sentences, the functioning of civil experimentations in the legal system, however, can only rarely use true randomization.”).

13 Winick, TJ Applied, supra note 10, at 3.

14 See generally, Amy D. Ronner, Law, Literature and Therapeutic Jurisprudence 3–41 (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 (2000) (citing David B. Wexler, Reflections on the Scope of Therapeutic Jurisprudence, 1 PSYCHOL., PUB. POL. & L. 220, 225 (1995)).

15 See Wexler, Two Decades of TJ, supra note 11, at 17; see also Winick, TJ Applied, supra note 10, at 11.

The first full length book to use the approach of therapeutic jurisprudence was Wexler/Winick, Essays in TJ, supra note 11, written in 1981, which contains a series of essays mainly in the area of mental health law.

16 Wexler/Winick, Essays in TJ, supra note 11, at x.

17 See Wexler/Winick, Essays in TJ, supra note 11, at x (explaining how therapeutic jurisprudence probably has application across the entire legal spectrum); see Winick, TJ Applied, 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).
courtrooms, and practicing preventative law in many areas of practice.\textsuperscript{18} It guides the work of problem solving courts.\textsuperscript{19} It is also international in scope.\textsuperscript{20}

Therapeutic jurisprudence has a more narrow focus than law and psychology and social science it law.\textsuperscript{21} Unlike those disciplines, “it does not seek generally to examine law in order to test its assumptions or measure its impact. . . . [Rather,] therapeutic jurisprudence seeks to apply social science to examine law’s impact on the mental and physical health of the people it affects.”\textsuperscript{22} It recognizes that, “legal procedures. . . constitute social forces that, whether intended or not, often produce therapeutic [positive] or antitherapeutic [negative] consequences”\textsuperscript{23} on the persons involved. “It posits that positive therapeutic effects are desirable and should generally be a proper aim of law, and that


\textsuperscript{19} Bruce J. Winick, Therapeutic Jurisprudence and Problem Solving Courts, 30 FORDHAM URB. L.J. 1055, 1064 (2003) (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 Gregory Baket & Jennifer Zawid, The Birth of Therapeutic Courts Externship Program: Hard Labor but Worth the Effort, in REHABILITATING LAWYERS, at 279, 281 (2008) (“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”).


\textsuperscript{21} Winick, TJ Applied, supra note 10, at 3.

\textsuperscript{22} Winick, TJ Applied, supra note 10, at 3.

\textsuperscript{23} Wexler/Winick, Essays in TJ, supra note 14, at 8. See Winick, The Jurisprudence of TJ, note 9, at 185; See also, 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. (cited by Amy D. Ronner and Bruce J. Winick in Therapeutic Jurisprudence: Issues, Analysis, and Applications: Silencing the Appellant’s Voice: The Antitherapeutic Per Curiam Affirmance, 24 Seattle U. L. Rev. 499, 499) [hereinafter Ronner/Winick, PCA].
antitherapeutic effects are undesirable and should be avoided or minimized.”24 Since it suggests what is good and “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.25 However, it also values social science’s consequentialist practices because it suggests that we ought to study the extent to which therapeutic ends are actually furthered in practice.26 Therapeutic jurisprudence holds that a sensitive policy analysis of law calls for a systematic study of law’s therapeutic or antitherapeutic effects.27

Normative jurisprudential philosophies value something; for example, law and economics values enhancing efficiency and wealth maximization.28 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.29 Therapeutic jurisprudence recognizes that these are not the only effects worth studying or advancing; however, it insists that they should not be ignored.30 “Accomplishing positive therapeutic consequences or eliminating or minimizing antitherapeutic consequences [is] an important objective in any sensible law reform effort.”31

Therapeutic jurisprudence has been referred to as “radical” in the context of common-law systems because it holds “that there is no reason

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24 Winick, Jurisprudence of TJ, note 9, at 188; Winick, TJ Applied, supra note 10, at 4.
25 Winick, TJ Applied, supra note 10, at 5; see, Wexler & Winick, New Approach, supra note 20, at 982 (“Legal decision making 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.”)
26 Winick, TJ Applied, supra note 10, at 4; See Winick, Jurisprudence of TJ, supra note 9, at 188.
28 See Richard A. Posner, Are We One Self or Multiple Selves: Implications for Law and Public Policy, 3 LEGAL THEORY 23, 24 (1997) (opining that a normative economic analysis rests on two critical assumptions: rational choice and wealth maximization); Jeffrey L. Harrison, LAW AND ECONOMICS IN A NUTSHELL 28 (3rd ed. 2003) (explaining that efficiency is associated with accomplishing an outcome at the lowest possible cost).
29 Zeiner, Fundamental Differences, supra. note 1, at 767.
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.”

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. "Voluntary participation" is the first, and the most important of what are sometimes referred to as the “three V’s:” “voluntary participation,” “voice” and “validation.”

Obviously, none of: the defendant in a criminal trial; the juvenile whose alleged criminal acts are being adjudicated; one who is the subject of commitment proceedings; the condemnee in eminent domain - or for that matter, any defendant in litigation -- is a “voluntary participant” in those proceedings, 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 treats the participant with fairness, respect and dignity.

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, his story. Together, voice and validation produce a “sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive.” 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

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32 Des Rosiers, supra note 14, at 55 (2000). Des Rosiers says that the adversarial system could be said to be predicated on the assumptions that people should not want to resort to the legal system, that it should be a last resort, and that people should find the experience unpleasant. Id., at 55, n. 9.

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

34 Ronner, Songs, supra note 33, at 94.

35 Ronner, Songs, supra note 33, at 92.

36 Ronner/Winick, PCA, supra note 23, at 505.

37 Ronner, Songs, supra note 33, at 94.

38 Ronner, Songs, supra note 33, at 94, elaborated at Id. at 92-95.
the outcome. "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." Fairness respects the litigant’s dignity and personhood. In my opinion, fairness seems to be especially important in eminent domain; and, the condemnees’ and public’s perception of the lack of fairness were 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 to legal analysis in a formal way, the dignity and value of the individual human being. As such, it is 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 although 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.

I therefore posit that therapeutic jurisprudence provides a useful jurisprudential lens for examining eminent domain law. Therapeutic jurisprudence adds a recognized jurisprudential and philosophical basis that legitimizes, as well as an analytic framework for examining, values of human dignity – values that, either consciously or unconsciously, have

39 Ronner, Songs, supra note 33, at 95.
40 Ronner, Songs, supra note 33, at 95.
41 Zeiner, Fundamental Differences, supra note 1, at 768.
42 Winick, TJ Applied, supra note 10, at 4 (Emphasis added by the author.).
been of concern to property and eminent domain scholars, jurists and practitioners for years.\textsuperscript{43}

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 about that term. 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.

The terms “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 the term “value” is more akin to “accord respect;” something that is “valued” in therapeutic jurisprudence is something that is “considered important.”

C. The Use of Eminent Domain to Create a Leasehold

The power of eminent domain has been described as inherent to the power of a sovereign.\textsuperscript{44} The Takings Clause of the United States Constitution reads: “Nor shall private property taken for public use, without just compensation.”\textsuperscript{45} The federal Takings Clause applies to the states through the Due Process clause of the Fourteenth Amendment.\textsuperscript{46} Most state constitutions also contain a takings clause.\textsuperscript{47}

\textsuperscript{43} Cf. Oliver Wendell Holmes, \textit{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.” \textit{Id.} at 477.

\textsuperscript{44} Dana & Merrill, \textit{supra} note 6, at 3.

\textsuperscript{45} U.S. CONST. amend. V.

\textsuperscript{46} U.S. CONST. amend. XIV; see also Chi., Burlington & Quincy R.R. v. City of Chi.,
The United States’ Takings Clause, as well as the Takings Clauses of state constitutions, act as limitations on governments’ takings power. They come into play 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. 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. Some states adopted more restrictive limitations in response to the publically reviled case, *Kelo v. City of New London.*

Any type of property – real, personal, tangible or intangible -- can be the subject of a taking. Government decides the amount of property

166 U.S. 226, 238-239 (1897).

47 See, e.g., FLA. CONST. art. X, § 6; G.A. CONST. art III, § 5, pt. 1; I.L CONST. art. II, § 2; A.Z. CONST. art II, § XVII.


49 *Kelo*, 545 U.S. at 469 (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 *Kelo*, 545 U.S. at 469 (land or an interest in land); Maritrans Inc. v. United States, 342 F.3d 1344, 1351 (Fed. Cir. 2003) (tangible personal property may be the subject of takings claims); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1004 (1984) (trade secret is property protected by the Fifth Amendment Taking Clause); City of Oakland v. Oakland Raiders, 646 P.2d 834, 840 (Cal. 1982) (en banc) (a football franchise); Lynch v. United States, 292 U.S. 571, 579 (1934) (valid contracts are property within meaning of the Taking Clause). United States v. Gen. Motors Corp., 323 U.S. 373, 377-8 (1945) (“‘[P]roperty’. . denote[s] the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, us and dispose of it.”).
and the interest in property that it will take for any particular public purpose.\textsuperscript{52} However, government should not take more land or a greater interest in land than it needs for the particular public use.\textsuperscript{53}

A leasehold is one “stick” in the “bundle of rights”\textsuperscript{54} that constitutes real property. Thus it seems logical that government can use the takings power to create a leasehold - either by acquiring a pre-existing 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. A full analysis is provided in Establishing a Leasehold Through Eminent Domain: A Slippery Slope Made More Treacherous by Kelo.\textsuperscript{55}

To summarize, courts and commentators generally cite to a series of cases from the World War II era in the few references that exist on the topic of using eminent domain to create a leasehold. Most notable among these few cases are United States v. General Motors, Corp.,\textsuperscript{56} Kimball Laundry Co. v. United States,\textsuperscript{57} and United States v. Petty Motor Co.\textsuperscript{58} Despite the age of these decisions, they are still good law. They are relied upon in current cases involving regulatory takings, most notably the Supreme Court cases First English Evangelical Lutheran Church v. County of Los Angeles,\textsuperscript{59} and Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regulatory Planning Agency.\textsuperscript{60} In General Motors, a case involving government acquisition, for wartime purposes, a portion of a pre-existing leasehold, it was said,

That interest [in which the government substitutes itself in relation to the physical thing in place of the condemnee]

\textsuperscript{52} 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN SECTION 9.02[2] (rev. 3d ed. 2003) (“[T]he legislature . . . has the sole power to determine what shall be taken both as to quantum and quality of estate.”).
\textsuperscript{53} Presault v. U.S., 100 F.3d 1525, 1535 (Fed. Cir. 1996).
\textsuperscript{54} JESSE DUKERMINER ET AL., PROPERTY 81 (6th ed. 2002)(explaining that the “bundle of rights” includes: “the right to possess, the right to use, the right to exclude, the right to transfer”); 2 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN SECTION 5.01[5][a] (rev. 3d ed. 2003).
\textsuperscript{55} Zeiner, Leasehold Through Eminent Domain, supra note 6.
\textsuperscript{56} Gen. Motors, 323 U.S. at 373.
\textsuperscript{57} Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).
\textsuperscript{59} First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).
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.

Similarly, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, a more recent case dealing with a temporary regulatory taking, it was said, “[C]ompensation is mandated when a leasehold is taken and government occupies the property for its own purposes, even though that use is temporary.” Thus, the conclusion is that government can use condemnation proceedings to create a leasehold in any situation in which eminent domain would be allowable.

**II. ANALYSIS**

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

There are many good reasons for government to lease premises rather than purchasing a fee simple: short-term need; the constitutional limitation of not taking a greater interest in property than needed; the smaller outlay of funds needed to lease as compared to ownership of 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 of carrying, maintaining or disposing of real property that is no longer needed.

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. And, because of that, the problems can become complex very quickly.

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64 *Presault*, 100 F.3d at 1535.
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. The landowner/condemnee remains an involuntary landlord connected to the government in a forced relationship. The inherent problems manifest themselves on both practical and philosophical grounds. The problems are illustrated best through examples. Since this work is a continuation and reexamination of earlier work, the same examples are used.

1. Situation 1.

The situation is less complicated if government was already the 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. In this instance, the terms of the business lease likely are 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 were shorter than the new tenant’s leasehold, the situation would be very similar to that in General Motors. Under such

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68 Cf. Jesse Dukeminier 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.

69 Zeiner, Fundamental Differences, supra note 1, at 5.

70 Zeiner, Fundamental Differences, supra note 1, at 5 – 13.

71 The author suggested this approach when she served as general counsel to a public college that had the power of eminent domain. The situation is a matter of public record. Ultimately, a lease extension was negotiated.

72 In Gen. Motors, supra note 51, 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.
circumstances, just compensation calculated as provided in *General Motors*,73 would be paid to the tenant, or possibly to the landlord if so provided in the condemnee tenant’s lease.74

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*,75 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.”76 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 determination of the market price under such circumstances.77 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. I believe that it is highly unlikely that any formulaic measurement of just compensation could accommodate all the possible situations78 that arise in the business of leasing. And, ultimately, it is the business of leasing under the relevant facts and circumstances that determines market value rent. Therefore, one should utilize a “willing lessor/willing lessee” standard analogizing to the “willing seller/willing buyer” standard

74 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 *Gen. Motors*, 323 U.S. at 382-3.
75 For discussion of *Kimball Laundry*, see, *infra* in this Part II.
76 *Gen. Motors*, 323 U.S. at 382.
77 *Id.* at 382-3.
78 *Zeiner, Fundamental Differences*, *supra* note 1, at 2, n.3.
applicable to eminent domain, generally, while recognizing that a number of factors, including, but not limited to, factors applicable to the "condemnee/lessor’s" situation, the uses for which the space is being "leased," and factors applicable to the locale and the specific space itself, will come into play in arriving at "willing lessor/willing lessee fair market value rent.\footnote{4 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN SECTION 12.02[1] (rev. 3d ed. 2003) ("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.").}

In analyzing the impact of Situation 1 on the condemnee based on therapeutic jurisprudence, it is obviously antitherapeutic to the condemnee’s mental health to wrest the condemnee’s possessory right to his property from him, against his will, especially when he has done nothing wrong to deserve this treatment.\footnote{However, it must be noted that "[p]roof of value peculiar to the respondent, or the value of good-will 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.} Far too often in eminent domain, the legal system pays hollow homage to the condemnee whose land is to be taken\footnote{There is an argument that 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.} -- while government labels him a “hold out,” a pejorative for someone who is annoyingly “in the way”\footnote{See e.g., Kelo, 545 U.S. at 489 (“In affirming the City’s authority to take petitioners’ properties, we do not minimize the hardship that condemnations entail, notwithstanding the payment of just compensation.”).} – then rolls over him with all the compassion of a steamroller.\footnote{Cf. Examples from Berliner, supra note 83: (“Emboldened by Kelo, cities have aggressively threatened owners with takings for private development.” Id. at 2);}

\footnote{84 See Inst. for Just., Dreher & Echeverria: Disinformation & Errors on Eminent Domain 6 - 8 (2007) (describing what the Institute sees as routinely arrogant derision of those who decline to sell.); see also Dana Berliner, Opening the Floodgates, Eminent Domain Abuse in the Post-Kelo World, 5 Inst. For Just. (2006) (describing 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.”); see e.g., Berliner, at 26.}
law as currently perceived by condemnees, therapeutic jurisprudence attaches genuine importance to the dignity and value of the individual human being\textsuperscript{85} 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 at least in part ameliorate the condemnee’s situation.\textsuperscript{86} 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 could be identified and set aside for use by other building tenants, and the government tenant could pay for the needed parking attendant to enforce the parking regulations. However, as previously stated, therapeutic jurisprudence does not mandate that antitherapeutic impact on the condemnee be the determinative litmus test for the case and deny government the right to take if the antitherapeutic impact cannot be avoided or ameliorated.\textsuperscript{87} Rather, therapeutic jurisprudence calls for recognition of this

\textsuperscript{85} Zeiner, \textit{Fundamental Differences}, supra note 1, at 768.

\textsuperscript{86} It is important to note that in other areas of law, many judges and lawyers have been acting in accord with the principles of therapeutic jurisprudence for years without knowing the jurisprudential label that describes their philosophies. It would not be impossible to incorporate this into eminent domain. In fact I am familiar with at least one project involving the prospective taking of a fee simple, the files of which are now public records, in which after hearing the prospective condemnee’s concerns, government had its architect redesign the project to avoid a taking of the condemnee’s land. The project was redesigned so that the former condemnee’s square footage could later be added into the project when and if a consensual sale could be accomplished.

\textsuperscript{87} Winick, \textit{TJ Applied}, supra note 10, at 4, as set forth in text accompanying note 42.
antitherapeutic consequence for what it is\textsuperscript{88} -- an affront to an important normative value\textsuperscript{89}--to enable a more precise consideration of competing normative values.\textsuperscript{90} The competing normative value in Situation 1 is the rights granted to government under the Constitution of the United States, or the particular state constitution that is the constitution governing the case. As Professor Winick said, “there are other consequences that should count, and sometimes count more.”\textsuperscript{91} Provided that all the other constitutional, statutory, regulatory and judge-made requirements have been fulfilled, Situation 1 is a case in which the competing constitutional normative value should count more and the taking would be allowed, despite the antitherapeutic impact on the condemnee.\textsuperscript{92}

What then, would therapeutic jurisprudence do for this condemnee participant in a legal proceeding who will be condemned to being an unwilling lessor? First, because of the court and preliminary processes grounded in therapeutic jurisprudence, the condemnee has had “voice” through a genuinely participatory preliminary process;\textsuperscript{93} 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 as one that “treats the participant with fairness, respect and dignity.”\textsuperscript{94}

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 this situation. Therapeutic jurisprudence also would recognize that there is another participant in this proceeding, the government entity that will be using the “leased” space, and more

\textsuperscript{88} Unlike the platitudinous, mechanical recitations often offered by the condemnor and the court in condemnation proceedings.

\textsuperscript{89} Positive therapeutic effects on a participant to a legal proceeding are desirable and should generally be a proper aim of law, and antitherapeutic effects are undesirable and should be avoided or minimized. (Cf. Winick, \textit{Jurisprudence of TJ}, \textit{supra} note 9, at 188; Winick, \textit{TJ Applied}, \textit{supra} note 10, at 4.)


\textsuperscript{91} Winick, \textit{TJ Applied}, \textit{supra} note 10, at 4.

\textsuperscript{92} This deference to constitutional power is more easily recognized, and therefore respected by the condemnee and the public, if government itself or a private party acting as an agent for government is to use the leasehold to perform government functions. Further discussed at Part II.B. Situation 4, infra.

\textsuperscript{93} As differentiated from a sham process in which the prospective condemnee “has his say,” but it is merely a procedural right to be heard to which no one \textit{truly} listens and there is no genuine possibility of modification of the project.

\textsuperscript{94} Cf. Ronner/Winick, \textit{PCA supra} note 23, at 505.
indirectly, the taxpayers who will be paying for it, one of whom is the condemnnee.\textsuperscript{95} 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\textsuperscript{96} should do justice to the situation so that both direct participants, and taxpayers, 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 condemnnee and why the condemnnee does not wish to extend the lease. Perhaps the government lessee made a greater volume of use on the elevators, escalators, restroom 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 has absorbed more than its share of the undesignated public parking. Perhaps government consistently has been a “slow pay” 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 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.\textsuperscript{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 condemnnee with dignity. Government would be paying a just rent for the leasehold that it is to acquire (rather than “just some compensation,”

\textsuperscript{95} If the condemnnee is a not-for-profit exempt from ad valorem taxes, those who it is able to serve by virtue of its tax exempt status are likely taxpayers or members of the public to whom government owes its duties.

\textsuperscript{96} In this Situation 1.

\textsuperscript{97} It should be noted that, as is currently the case under existing law absent therapeutic jurisprudence considerations, therapeutic jurisprudence would not monetize a condemnnee’s subjective attachments to his property.
which can be the equivalent of a financial mugging, exacerbating the antitherapeutic impact).\textsuperscript{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 the social contract between citizen and government has been preserved, which is the goal of “voluntary participation” in therapeutic jurisprudence. Government would not have conducted itself like a bully delivering a human dignity degrading blow that exacerbated the antitherapeutic impact of the taking. Nor would government have been a patsy for a property owner’s “get rich quick scheme”\textsuperscript{99} to overinflate the situation, or his theatrics in an attempt 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.\textsuperscript{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

\textsuperscript{98} Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVT. 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.”); *Gen. Motors*, 323 U.S. at 382 (“[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* 90 in *EMINENT DOMAIN USE AND ABUSE: KEL0 IN CONTEXT*. (Dwight H Merriam & Mary Massaron Ross Eds.) (2006) (“[L]andowners whose lands were taken often bear considerable uncompensated losses.”).

\textsuperscript{99} Referrred to as “monopolistic behavior” by law and economics.

\textsuperscript{100} See, e.g., Fla. Stat. Sec. 83.06(1) (2011).
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 constitutional interests 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 above, therapeutic jurisprudence would require a thorough analysis with meaningful attention to the variety of losses to be suffered by the condemnee/involuntary landlord. A taking that dispossesses the condemnee landowner of all of the premises for a temporary period directly confounds his business operations and objectives. 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. It may also have an impact on 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

101 The problems could become even more complicated if the short-term taking was of 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 has been 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 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.
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.

These outcomes will be particularly galling because at the same time that the condemnee is suffering these losses, he may be required to provide maintenance and services for the condemnor/lessee who directly caused those losses. This continuing coerced relationship is the most troubling aspect of a taking that creates a leasehold. It is also one of the more antitherapeutic. 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, he must vacate and then provide services satisfactory to the entity that ousted him. This is a great affront to the dignity and the personhood of the condemnee that is not present 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 in which the condemnee simply collects the compensation and refrains from interfering with the easement. However, a building is different than 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.\textsuperscript{103} So, either way the situation is distasteful. If the landlord maintains the property, he is in a situation

\textsuperscript{103} Moreover, a governmental tenant typically must go through a time-consuming bidding process before it can undertake work costing more than certain monetary thresholds. This can delay necessary repairs and exacerbate deterioration.
that “rubs his nose in” the taking because he must also provide services to the satisfaction of his adversary. On the other hand, if the government provides the maintenance, the landowner condemnee must trust his adversary to protect his investment. If the condemnor/lessee fails to maintain the premises properly, or in timely fashion, the condemnee/lessee is limited in his remedies. He cannot put the breaching lessee in default and terminate the lease; he is left with the expense of turning to the court for equitable relief or performing the work himself and seeking further compensation through the courts.

*General Motors*\textsuperscript{104} and its progeny, *Kimball Laundry Co.*,\textsuperscript{105} provide some guidance, although not complete, for just compensation in this situation. Interestingly, 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. The federal government created a sublease for itself through its taking. 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, filed [sic] with his commodities, and presumably to be reoccupied and used, as before . . . on the termination of the Government’s use.”\textsuperscript{106} It answered in the affirmative. It found that the long-term rental value of vacant space was not the sole measure of the value of the short-term occupancy; if that were so, government would have found a way “to defeat the Fifth Amendment’s mandate for just compensation in all condemnations except those . . . requiring the taking of fee simple title.”\textsuperscript{107} Although not so labeled by the court, this conclusion treats the condemnee with dignity, fairness and respect, and is as therapeutic to the condemnee’s mental and physical health as was possible under the circumstances. It guides us to the conclusion that such treatment of condemnees – one that keeps government from defeating the purposes 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

\[ \text{[not to be ascertained] by treating what is taken as an empty warehouse to be leased for a long term, but [by] what would be the market rental of [such a building in} \]

\textsuperscript{104} See generally *Gen. Motors*, 323 U.S. 373.
\textsuperscript{105} See generally *Kimball Laundry*, 338 U.S. 1.
\textsuperscript{106} *Gen. Motors*, 323 U.S. at 380.
\textsuperscript{107} *Gen. Motors*, 323 U.S. at 381.
use] on a lease by the long-term tenant to the temporary occupier. The Court went on find that

[s]ome 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.

Although the condemnee in General Motors was a long term tenant of the premises, it is logical that General Motors’ measurement of just compensation is to be applicable even if the condemnee were the fee owner who is using the premises, rather than a tenant.

In addition, the Court in General Motors was particularly concerned that the taking of less than a fee simple not become a means by which government could so shrink the compensation payable as to, in effect, nullify the constitutional obligation of just compensation. 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.

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108 Gen. Motors, 323 U.S. at 382.
110 Cf. Zeiner, Leasehold Through Eminent Domain, supra note 6, at 513, where it is noted that there is risk that takings that create leaseholds could replace takings of the fee simple.
111 Gen. Motors, 323 U.S. at 382.
Several important points flow from this cautionary and highly instructive language, especially when combined with the language previously quoted above. First, it provides strong support for the contention made in the text accompanying Situation 1 that a number of situation-specific factors must come into play in the measurement of just compensation when the government creates a leasehold using its power of eminent domain. It is necessary that situation specific-factors be used in order to avoid the impermissible results described by the Court. While the just compensation to be paid is market value, it is market value for like circumstances. Thus, General Motors provides direction as to how those additional factors impact the measurement of just compensation. Second, it directs that the diminution of the usefulness of the remainder to the condemnee cannot be ignored. If it cannot be ignored in the context of just compensation, then it must be considered in connection with just compensation. One of the ways that this can be accomplished is through a measurement of just compensation that considers what market rent would be under fact specific factors like those impacting this particular condemnee. I strongly believe that this is exactly what the Court is directing in this case. Third, this language implicitly recognizes that although takings are allowed, financial abuse of the condemnee is not allowed, 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 there is an antitherapeutic point beyond which takings should not go as such abuse of the people is neither the “takings” nor the “just compensation” contemplated by the Fifth Amendment. 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, clearly 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

112 See supra notes 101-103 and accompanying text.
113 Gen. Motors, 323 U.S. at 382 (“This is neither the ‘taking’ nor the ‘just compensation’ the Fifth Amendment contemplates.”).
fixtures and permanent equipment destroyed or depreciated in value by the taking as a separate item of just compensation.\textsuperscript{114}

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.\textsuperscript{115} Essentially, it took all of the condemnee’s business for a temporary period, except for its delivery trucks and its customer base, typically known as goodwill or going-concern value but referred to as trade routes in that laundry business case. The Court confirmed that going-concern value is not compensable under federal law when government takes the fee simple.\textsuperscript{116} 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 . . . .”\textsuperscript{117} It goes on to state that the Government must pay the transferrable value of the temporary use of the condemnee’s trade routes (i.e., the temporarily destroyed value of goodwill).\textsuperscript{118}

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.

Based upon the above analysis, in Situation 2, in which the landowner is occupying the premises for his own business purposes when the government carves out a leasehold via its taking, 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 following. A landowner would not lease out the premises from which she were operating her business unless the rent

\textsuperscript{114} Gen. Motors, 323 U.S. at 383–4. 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.

\textsuperscript{115} Kimball Laundry, 338 U.S. at 3.

\textsuperscript{116} Kimball Laundry, 338 U.S. at 11-12; see Gen. Motors, 323 U.S. at 379.

\textsuperscript{117} 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 of alternatives open to the condemneree that it substantially increases the condemnor’s obligation to him. It is a difference in degree wide enough to require a difference in result.” \textit{Id.}

\textsuperscript{118} Kimball Laundry, 338 U.S. at 16.
received from the lease was sufficient to: pay for replacement premises on terms that match those of the government’s lease; 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.\textsuperscript{119} In addition, the condemnee will be entitled to compensation for fixtures and permanent equipment destroyed or depreciated in value by the taking.\textsuperscript{120} It should be noted that the list of elements provided in \textit{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 \textit{Kimball Laundry} is instructive, but perhaps should not be wholly determinative as to whether the condemnee in Situation 2 is to be 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.\textsuperscript{121} The language in \textit{Kimball Laundry} as to the unfairness of not awarding just compensation for damage to goodwill in that particular case\textsuperscript{122} also includes a sentence in which the Court states that “the Government has taken the temporary \textit{use} of such property, . . . ”\textsuperscript{123} Obviously, 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” of the or merely “occupancy”? In the Court’s view, there was something special about the circumstances in \textit{Kimball Laundry} that merited compensation for the diminution of goodwill. The condemnee in \textit{Kimball Laundry} was put out of business for the duration of the taking. The Court says that the “temporary interruption [in occupancy] as opposed to the final severance of occupancy so narrows the 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.”\textsuperscript{124} In fee simple eminent domain cases, unless governed by state law that differs on the treatment of goodwill, damages to goodwill seem to be awarded only under limited circumstances in which the condemnee’s

\textsuperscript{119} It would not include the condemnee’s subjective attachment to the property which is the subject of the taking.
\textsuperscript{120} \textit{General Motors}, 323 U.S. at 383-4.
\textsuperscript{121} \textit{Kimball Laundry}, 338 U.S. at 11-12.
\textsuperscript{122} \textit{Kimball Laundry}, 338 U.S. at 12-15.
\textsuperscript{123} \textit{Kimball Laundry}, 338 U.S. at 15 (emphasis added).
\textsuperscript{124} \textit{Kimball Laundry}, 338 U.S. at 15.
business cannot be relocated. For example, that was the situation in Michigan State Highway Commission v. L & L Concession Co. in which the condemnee’s business was destroyed by the taking of the racetrack at which it had the concession to sell food and souvenirs.\textsuperscript{125} 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 as to takings of a fee simple would respond in the negative; indications are that the answer is the same as to a temporary taking. But, for the reasons described above, perhaps 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.\textsuperscript{126}

Regardless of the answer to those questions under current law for which there are few precedents involving a government leasehold of a part or all of the structure from which a condemnee operates her business, I would urge that, based on therapeutic jurisprudence, the condemnee in Situation 2 be awarded damages, as an additional element of just compensation, for loss in goodwill attributable to the temporary transfer. When comparing the antitherapeutic impacts, Situation 2, is much more akin to Kimball Laundry than it is to the taking of the fee simple, because in the latter case, the goodwill could be transferred on a permanent basis to the condemnee’s new permanent premises. No so, in a taking that creates a leasehold in the condemnor; in fact, in this situation, another diminution of goodwill likely will occur upon the condemnee’s return to the original premises when the taking ends. The condemnee should be compensated for both losses to goodwill, if the amounts are not too speculative to be determined. 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 therapeutic jurisprudence. I have

\textsuperscript{126} See supra note 102 and the accompanying and following text.
already argued that these costs are factors that ought to impact market value rent.127 Are services more costly from a vendor who is not inclined to enter into bargaining for them—obviously 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 against his will. Note that this affront to dignity is very different from the uncompensated “subjective attachment” of a condemnee 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. This particular antitherapeutic impact, affront, is not capable of being monetized. The calculation of just compensation recommended above has addressed the physical, mental health and associated financial harms to the condemnee about as much as is practical. Although this particular dignitary affront is different than the subjective value that one places upon his property, I would recommend that, 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.

Even as so limited, this situation and the application of therapeutic jurisprudence to it, leave much room for interpretation by both skillful counsel and the courts, which interpretations may vary depending on the precise facts and circumstances of the particular case.


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 Situation 2 are also present in

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127 See supra Situation 1.
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.\(^{128}\) 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 simple 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, negotiations in which the fee owner/prospective landlord was unwilling to rent because of the limiting covenants in the other leases, government filed eminent domain proceedings to create the government leasehold because of the convenient location of the mall. 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 last increment of the mall’s space opens for business. Instead, the unemployed government invitees will be without discretionary income at their disposal 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

\(^{128}\) 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.
presence may well trigger economic nervousness among shoppers, directly diluting the fun, free spending, “I am above it all,” “not-a-care-in-world” mood that the mall has worked to engender. The mall may not be as attractive as 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 government vacates. Here, the unanswered questions are almost without limit. To what extent 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 unit(s) covered by the government lease, alone, is/are considered the “property” that is taken, or whether those units are treated as part of a larger whole.129 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.130 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”131 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? None of their physical property was taken132 – or are the

129 The general principle is easy to state: consequential damages to properties not taken do not produce recoverable damage. 4A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN SECTION 14.01[3] (emphasis added). 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 sub-rules can be controversial.

130 Severance damages are a standard element of damages for a partial taking. 8A ROHAN & RESKIN, NICHOLS ON EMINENT DOMAIN SECTION 16.02[1] (rev. 3d ed. 2003) (“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.”).

131 Gen. Motors, 323 U.S. at 382.

132 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. 4A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN SECTION 14.01[3] (rev. 3d
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 regulations, or if the government 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 that 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.133

4. Two More Problems in Takings to Create Leaseholds.

Before moving on to a final step in complexity, it is necessary to make a couple of 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 ed. 2003).

133 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.
reasons. Here are two. 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 pressure the prospective landlord with threats thereof, when a lease cannot be negotiated in time. That is not the role that was intended for the Fifth Amendment.134

The second risk is as follows. Although takings to create a leasehold are rare at the moment, what is there to keep government from preferring leaseholds to takings of the fee 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

134 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 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. I surmise that this particular variety of abuse would 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. URBAN L. 862, 891-892 (1975), quoted in S. Cary Gaylord, et al. Condemnation Blight C730 ALI-ABA 189, 191 (1992) (defining condemnation blight as a “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.”). See also Beaux Arts Properties, Inc. v. United Nations Development Corp., 68 Misc. 2d 785 (N.Y. 1972), order aff’d, 39 A.D.2d 844, 332 N.Y.S.2d 1008 (1st Dep’t 1972) (“Condemnation blight […] properly refers to the diminution in value of the property caused by the acts of the condemning authority between the time of the announcement of the projected taking and the de jure vesting of title”).
possibility when it spoke of evading the requirements of the Fifth Amendment by chopping the interest of the condemnee to bits.

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 a leaseholds will be limited to situations that are truly appropriate.

5. Situation 4.

The final step in complexity is what I refer to as a *Kelo*-type leasehold in which government creates a leasehold through its power of eminent domain then transfers the leasehold to a private party for private use. 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. The second is one in which the condemnee’s property is not available for rent or sale, but the private party wants it anyway. 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, the condemnee could have entered into a lease with that private party. Thus, this is simply a situation in

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135 By “private use,” I mean 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.
136 This is somewhat like Situations 1 and 3 above but with a coerced private party lessee.
137 This is somewhat like Situation 2 above but with a coerced private party lessee.
138 Or pose risks that the landowner considers unacceptable, for instance certain private profit-making uses that pose greater risks of environmental contamination.
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 would 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 landlord/condemnee/prospective landlord -- for the private, presumably profit-making (for the private party) use that had been rejected by the condemnee. The result: the condemnee has this unacceptable or unwanted private party as a tenant anyway.\(^\text{139}\) Essentially, government has acted as a lessee’s broker of last resort, but one to whom a lessor cannot say “No.”\(^\text{140}\) The outcome is the same – the condemnee has the unwanted, unacceptable tenant – even if the property was not on the market for lease or for sale.\(^\text{141}\) 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

\(^{139}\) While Florida’s constitutional amendment, F.L. 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, Carol L. Zeiner, *Eminent Domain wolves in Sheep’s Clothing: Private Benefit Masquerading as Classic Public Use*, 28 Va. ENVTL. L.J. 1 (2010); see generally, CASTLE COALITION, 50 STATE REPORT CARD, TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE Kelo (2007) (discussing whether the amendments in 42 states would deal with the problem of condemnation blight or prevent transfers such as that in *Kelo*).

\(^{140}\) Cf. Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C., 768 N.E. 2d 1, 13 (Ill. 2002) (finding unconstitutional the taking the land of a metal recycling company for transfer to a privately owned raceway for expansion of its parking, because 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 interpretations of “public use”).

\(^{141}\) However, the shock and displeasure to the condemnee might be greater because he was not even looking for a tenant before becoming an unwilling lessor.
benefit more attenuated than when government or its agent will occupy the premises.

In my prior work, I had opined that 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. Although the forced tenancy of government or a 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 be forcing a coerced tenancy for private purposes on a landowner, absent an overriding government interest such as that underlying the Fair Housing Act. I recommended that such Kelo-type leaseholds created via eminent domain be prohibited as violating public policy. In essence I concluded that such coerced private leaseholds so “offended the conscience” as to be outside the bounds of what is allowable conduct for government.

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 the extent to which Kelo-type forced private leaseholds “offend the conscience.” In the process, it becomes clear that therapeutic jurisprudence is a useful tool for analyzing and litigating eminent domain, and for formulating more just outcomes.

Under current modes of analysis, only the well-being of the community is considered in Kelo style takings of the fee simple -- and then only to the extent needed to establish the public purpose(s) of the

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143 “Public purpose” or “public benefit” are currently considered under federal law sufficient to meet the Fifth Amendment’s “public use” element for eminent domain. See Kelo, 545 U.S. at 480 (stating that this 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 75 in EMINENT DOMAIN USE AND ABUSE: KEO IN CONTEXT (Dwight H Merriam & Mary Massaron Ross Eds.) (2006) (“The U.S. Supreme Court’s past precedents have broadly equated ‘public use’ with ‘public purpose.”’); 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN SECTION 7.01[1] (rev. 3d ed. 2003) (defining public use as furthering public good or general welfare or some public benefit.); 2A
taking. Once public purpose is established based on a standard that is highly deferential to legislative determinations,\textsuperscript{144} consideration of the impacts on people ends. The legislative determination of public use for takings of the fee simple for later transfer to a private party is often based on studies that provide highly speculative tax revenue and job creation prognostications.\textsuperscript{145} The likelihood of fulfillment of those prognostications is not to be considered by the court under current federal law.\textsuperscript{146} Without therapeutic jurisprudence, the analysis of a taking to create a \textit{Kelo}-type leasehold would be much the same.

Yet, we are a government “of the people, by the people, and for the people.”\textsuperscript{147} 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 \textit{Kelo} situations. The therapeutic jurisprudence analysis of a taking that creates a \textit{Kelo}-type leasehold in a private party focuses particular attention on the therapeutic or antitherapeutic impacts on all the parties to the legal proceeding – the condemnee, and the public to be benefitted thereby. In addition, I see no reason that the impacts on the private party to which the leasehold is to be transferred cannot be examined as well. This would allow discovery of the “incidental”\textsuperscript{148} benefits anticipated by the private party. And, a thorough analysis would enable discovery of the “back

\textsuperscript{144} \textit{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”).

\textsuperscript{145} \textit{Kelo}, 545 U.S. at 483 (explaining that the economic development plan “will provide appreciable benefit to the community, including but by no means limited to - new jobs and increased tax revenue.”).

\textsuperscript{146} \textit{Kelo}, 545 U.S. at 470 (rejecting petitioners’ argument that “for takings of this kind the Court should require a “reasonable certainty” that the expected public benefits will actually accrue”).

\textsuperscript{147} President Abraham Lincoln, Address at Gettysburg (Nov. 19, 1863).

\textsuperscript{148} \textit{Kelo}, 545 U.S. at 485-86 (explaining that although a private party may be benefited or may even be the most direct beneficiary of a taking, this is not determinative so long as the legislative entity has determined that the project serves a public purpose).
story” which, as in Kelo, may tend to reveal the politics of power. 149
Under therapeutic jurisprudence, the 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, I examine those on the condemnee first. While it can be said that
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 restart 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, may have to provide
extensive services at qualitative levels satisfactory to the taker. The
impact is dramatically worse when a private party for private gain, rather
than government, is the lessee under the forced lease. Obviously, a
condemnee/lessor is better able 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. 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.
Neither voluntary participation, nor its substitutes, voice and validation
is present. Such affronts damage the dignity, the self-respect and even
the deny the personhood of the condemnee. Moreover, because the

149 JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE
(2009). The discoverability of the back-story may have a beneficial, cautionary
impact. The likelihood of the exposure of the back-story in a court of law may
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.
antitherapeutic result was forced on him by the legal system, the condemnnee has nowhere to turn for redress. The perceived unfairness and disrespectfulness of the proceeding results in the condemnnee/landlord having less respect for the law and government.150

Turning to the next affected party, the public, members of the public who see themselves as in a similarly vulnerable situation 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 cannot help but generate 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. This therapeutic jurisprudence analysis explains the public outrage directed toward the Court following its decision in Kelo. It also explains the diminution of respect for the Court, law and government in general, that was reflected in the public reaction to that case.

This 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. Obviously, government would not engage in the latter taking unless government had decided that it is important that the particular government services be provided from this site. The public depends on government for a variety of services; availability of the services from this 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.

Continuing with the examination of impacts on the general public, the ultimate public participants, are the taxpayers.151 Therapeutic...

150 In most instances, there will be little difference if fee simple title is held in the name of an individual or an artificial entity. Even if the condemnnee is an artificial entity, real human beings operate the entity, and identify with the entity and its problems. Therefore, the emotional and physical health of human beings are impacted, regardless of the form in which fee simple title to the premises is held.

151 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
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 ought to include consideration of the likelihood of benefits to the magnitude predicted and examination of the risks involved. 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. In fee simple takings in the nature of Kelo, the public 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, however well-founded or speculative, do not come to fruition. The allocation of risk would be likewise as to takings to create private leaseholds. Moreover, this general public is the same group of people who empathize with the abusive treatment of the condemnee and sense themselves to be government imposition.

152 Brett D. Liles, Reconsidering Poletown: In the Wake of Kelo, States Should Move to Restore Private Property Rights, 48 ARIZ. L. REV. 369, 380-1 (2006) (explaining that 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.”).

153 Although I am not aware of formal analysis, news reports of failed projects such as Kelo make it clear that when the project is abandoned, the monetary loss is fully on the taxpayer, not the party to whom the land would have been transferred. Jim Edwards, Pfizer’s R&D Cuts Render Kelo v. New London Eminent Domain Case a Waste of Time, CBS NEWS (Nov. 10, 2009 11:56 AM), 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, THE WASHINGTON TIMES (Sept. 3, 2011, 03:01 PM), http://www.washingtontimes.com/blog/watercooler/2011/sep/3/picket-05-kelo-decision-failure-ct-site-remains-du/; see also, Inst. for Just., supra note 83, at 3; Berliner, supra note 83, at 21. Likewise in situations such as Poletown, the taxpayers bore the entire risk of whether 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. Ralph Nader & Alan Hirsch, Making Eminent Domain Humane, 49 VILL. L. REV. 201, 219 (2004) (explaining that General Motors “cost taxpayers more than $300,000,000 in federal, state and local subsidies.”).

154 Many publicly reviled takings could have been structured as some sort of leasehold.
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 money-making ventures, the antitherapeutic generally greatly outweighs the therapeutic. I believe, the result, even more than in *Kelo*, would be great disrespect of government and the legal system.

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.

Having examined all the impacts more thoroughly using the tools of therapeutic analysis, it is clear that *Kelo*-type takings to create leaseholds in private parties for private use should not be allowed. Thus, the result obtained in the earlier work obtained through a public policy analysis is amplified and confirmed.

The discussion of the development of the law governing just compensation for takings to create leaseholds also comes into the therapeutic jurisprudence analysis of takings to create a leasehold in a private party for private profit-making enterprise. If the law governing just compensation were to develop not as suggested in this article, but so as to leave the condemnee with only scraps, the result will be especially antitherapeutic in takings that create a leasehold in a private party. Not only will 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,” 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 confirmed.

III. WHAT THE SITUATIONS ANALYZED TELL US: SOME CONCLUSIONS.

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155 *See supra* note 111 and accompanying text.
A number of worthwhile findings come 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 based on a traditional public policy analysis.

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 has become obvious 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, it is a useful tool for immediate use by practitioners in as they plan strategies, argue cases, prove just compensation, or resolve disputes short of 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 -- even those situations in which the condemnee/lessor must provide services to the condemnor/lessee -- should be allowed. 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 develop, takings to create leaseholds could be used to leave the condemnee with “chips” of just compensation. The analysis in this article provides an opportunity for the law to develop in ways that enable appropriate use of this sub-type of eminent domain but dis incentives abuse. The situations analyzed in this article provide guidance. The more 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 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 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 emotional and physical health of both the condemnee and the public at large. It appears that 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.