

SHOULD THERAPEUTIC JURISPRUDENCE BE USED TO ANALYZE IMPACTS OF LEGAL PROCESSES ON GOVERNMENT?

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ABSTRACT

This article takes the controversial position that despite therapeutic jurisprudence's (sometimes referred to as "TJ") focus on the impact of laws and legal processes on the emotional and related physical well-being of human beings, there can be TJ-like impacts on government, at least in certain circumstances, that can be discovered by making a TJ analysis of the situation. It further contends that these TJ-like impacts on government ought to be examined for a number of important reasons: (1) they provide greater insights into therapeutic and antitherapeutic impacts on humans; (2) the deeper understandings gained through this analysis can then be used to formulate recommendations and solutions to refine and reform the law or government's actions as a legal actor—ultimately for the benefit of human physical and emotional well-being; (3) government, informed by these findings can, in these circumstances, revise its interactions with the governed in order to enhance the likelihood of successful completion of government initiatives through proactively recognizing and addressing antitherapeutic impacts on the persons involved; and (4) use of these TJ findings to revise government conduct can advance both respect for government and law, and encourage voluntary compliance with law and legal processes, all of which are essential to government's ability to fulfill its role in society.

INTRODUCTION

Therapeutic jurisprudence examines the impact of law and legal processes on the physical and emotional well-being of the persons affected by those laws and processes.¹ It recognizes that law and legal procedures

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1. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCH.

are “social forces that, whether intended or not, often produce therapeutic [positive] or antitherapeutic [negative] consequences”² on the persons involved. “Therapeutic jurisprudence suggests that . . . positive therapeutic effects are desirable and should generally be a proper aim of law, and that antitherapeutic effects are undesirable and should be avoided or minimized,”³ “so long as other values, such as justice and due process can be fully respected.”⁴ “Boiled down to its most essential element,

PUB. POL. AND L. 193, 196 (defining therapeutic jurisprudence as “the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects.”); see BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 3 (Carolina Academic Press 1997) [hereinafter WINICK, TJ APPLIED]; see also Michael L. Perlin, “Striking for the Guardians and Protectors of the Mind”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN. ST. L. REV. 1159, 1185 (2013) (explaining TJ’s focus on the law’s influence on “emotional life and psychological well-being.”); David B. Wexler, *Therapeutic Jurisprudence and Legal Education: Where Do We Go from Here*, 71 REV. JUR. U.P.R. 177, 178 (2002). Many sources refer to mental and psychological well-being rather than “mental and physical.” See e.g., Perlin, *supra* (analyzing the emotional life and psychological well-being of the people affected). Most would agree that the reference to “physical health” focuses on the impact of psychological harms on physical health. See generally Wexler, *supra* (denoting the psychological and emotional impact of consequences tied to the application of the law).

2. DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE 8 (1991) [hereinafter WEXLER/WINICK, ESSAYS IN TJ]; Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant’s Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499, 499 n. 5 (2001) [hereinafter Ronner/Winick, PCA] (citing Dennis P. Stolle et al., *Integrating Preventative Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 17 (1997) (“Therapeutic jurisprudence is an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects.”); see also Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCH. PUB. POL’Y & L. 184, 185 (1997) [hereinafter Winick, *Jurisprudence of TJ*] (“Legal rules [...] constitute social forces that [...] often produce therapeutic or antitherapeutic consequences.”).

3. WINICK, TJ APPLIED, *supra* note 1, at 4; Winick, *Jurisprudence of TJ*, *supra* note 2, at 188.

4. David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125 (2000); see also Carol L. Zeiner, *Kelo through the Lens of Therapeutic Jurisprudence*, 6 PHX. L. REV. 857, 861 (2013) [hereinafter, Zeiner, *Kelo, TJ Lens*]. The caveat, “so long as other values, such as justice and due process can be fully respected,” is an important one. See Wexler, *supra*. Likewise, when multiple norms are in conflict, therapeutic jurisprudence does not claim to be the controlling norm:

[A]lthough in general positive therapeutic consequences should be valued and antitherapeutic consequences should be avoided, *there are other consequences that should count, and sometimes count more.* There are many instances in which a particular law or legal practice may produce antitherapeutic effects, but nonetheless may be justified by considerations of justice or by the desire to achieve various constitutional, economic, environmental or other normative goals [TJ] therefore does not suggest that therapeutic considerations should

therapeutic jurisprudence adds the dignity and value of the individual human being to legal analysis in a formal way.”⁵ It is a refreshing change from antiseptic views of law that minimize human considerations.⁶

Although the term “therapeutic jurisprudence,” sounds highly theoretical, and the study can be quite theoretical, the ultimate purpose of therapeutic jurisprudence is intensely practical.⁷ Its goal is to look at, and reform where necessary, both the black letter law and the ways in which law is applied.⁸ It also has an impact on how law is practiced.⁹

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.

Zeiner, *Kelo, TJ Lens*, *supra* (citing WINICK, *TJ APPLIED*, *supra* note 1, at 4) (emphasis added).

5. Carol L. Zeiner, A Therapeutic Jurisprudence Analysis of the Use of Eminent Domain to Create a Leasehold, 2013 UTAH L. REV. 883, 890 (2013) [hereinafter Zeiner, *TJ Leaseholds*].

6. See Susan Daicoff, *Law as a Healing Profession: The Comprehensive Law Movement*, 6 PEPP. DISP. RESOL. L.J. 1, 60 (2006) [hereinafter Daicoff, *Healing Profession*]; Michael L. Perlin, “You Have Discussed Lepers and Crooks”: Sanism in Clinical Teaching, 9 CLINICAL L. REV. 683, 720–21 (2003); Carol L. Zeiner, *Getting Deals Done: Enhancing Negotiation Theory and Practice through a Therapeutic Jurisprudence/Comprehensive Law Mindset*, 21 HARV. NEGOT. L. REV. (forthcoming Spring 2016) [hereinafter Zeiner, *Getting Deals Done*]. Neither therapeutic jurisprudence, nor the other vectors within the movement known as comprehensive law, of which therapeutic jurisprudence is a part, is “feel good law” that substitutes warm, fuzzy pop psychology for incisive legal analysis and the zealous enforcement of legal rights, duties, and obligations. Rather, therapeutic jurisprudence and the various other vectors of comprehensive law add the “rights plus” approach that is more multi-dimensional and multidisciplinary than traditional lawyering. Daicoff, *Healing Profession*, *supra*. All of the disciplines comprising the comprehensive law movement share at least two features in common: (1) a desire to maximize the emotional, psychological and relational wellbeing of the individuals and communities involved in each legal matter; and (2) a focus on more than just strict legal rights, responsibilities, duties, obligations, and entitlements. Zeiner, *Getting Deals Done*, *supra*, at 5 (citing SUSAN DAICOFF, *Afterword: The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement* in PRACTICING THERAPEUTIC JURISPRUDENCE 471 (Dennis P. Stolle, et al. eds., Carolina Academic Press 2000)).

7. See WEXLER/WINICK, *ESSAYS IN TJ*, *supra* note 2, at 8.

8. See WINICK, *TJ APPLIED*, *supra* note 1, at 3; see also Marc W. Patry et al., *Better Legal Counseling through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439, 440 (1998) (citing DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 831 (1996)) (stating that therapeutic jurisprudence is interested in law reform, as well as the impact of the law on the emotional and psychological well-being of those affected).

9. See e.g., Symposium, *Legal Writing, Therapeutic Jurisprudence, and Professionalism*, 3 SUFFOLK U. L. REV. ONLINE 29 (2015) (presentation of Shelley Kierstead focusing on client communications); see also SUSAN SWAIM DAICOFF, *COMPREHENSIVE LAW PRACTICE, LAW AS A HEALING PROFESSION* 165 (2011) (detailing the effects of using collaborative law in a family law non-litigative setting); Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1062 (2003) [hereinafter Winick, *TJ and Courts*]. TJ has produced

Therapeutic jurisprudence's focus is on *human beings*.¹⁰ It is a strong analytic tool that values human well-being, *along with* legal rights, duties, and obligations.¹¹ Consequently, therapeutic jurisprudence "calls for attention to [therapeutic or antitherapeutic] effects [on the human beings affected by the particular laws and legal processes under examination] and a conscious effort, *consistent with legal rights and other important values*, to promote legal consequences that enhance [human] well-being and minimize those that diminish it."¹²

Yet, we live in a world in which government plays an ever-increasing role. This raises interesting questions. Can there be therapeutic or antitherapeutic impact of laws and legal processes on government? Should the principles of therapeutic jurisprudence be used under certain circumstances to examine these impacts on government?¹³

When I first extended the use of therapeutic jurisprudence to eminent domain, the idea of examining the therapeutic and antitherapeutic impacts on the condemning governmental entity did not even enter my mind.¹⁴

problem-solving courts. *See id.* The principles underlying TJ guide a multitude of practices from how attorneys word letters to their own clients, *see* Symposium, *supra*, to the development of collaborative law as a non-litigation approach to resolving divorce and custody actions without a third-party decision-maker, DAICOFF, *supra*.

10. *See generally* Slobogin, *supra* note 1, at 196 (defining therapeutic jurisprudence as "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects."); *see also* Daicoff, *Healing Profession*, *supra* note 6, at 11 (supporting Christopher Slobogin's definition of therapeutic jurisprudence and stating approval of the definition by TJ's founding fathers, David Wexler and Bruce Winick).

11. *See* Daicoff, *Healing Profession*, *supra* note 6, at 6. This "rights plus" focus characterizes all vectors of comprehensive law, a larger movement in jurisprudence and the practice of law, of which therapeutic jurisprudence is one vector. *Id.* Other vectors are: preventative law, procedural justice, creative problem solving, holistic justice, collaborative law, transformative mediation, restorative justice, and problem-solving courts. *Id.*

12. MARJORIE A. SILVER, *THE AFFECTIVE ASSISTANCE OF COUNSEL PRACTICE LAW AS A HEALING PROFESSION*, at xxiv (2007) (emphasis added).

13. *See, e.g.*, Evan R. Seamone, *Sex Crimes Litigation as Hazardous Duty: Practical Tools for Trauma—Exposed Prosecutors, Defense Counsel, and Paralegals*, 11 OHIO STATE J. CRIM. L. 487, 496–99 (2014). Although I am not aware of other works that deal with the topic of therapeutic and antitherapeutic impacts *on* government itself as an entity, other authors have recognized that *individuals* who act on behalf of government can suffer antitherapeutic impacts as a result of their work. *Id.*

The same questions, as to whether there are TJ-like impacts and whether studying them can be productive, could be asked with respect to other artificial entities, for example corporations and limited liability companies that are so prominent in the legal landscape. However, these artificial entities exist for distinctly different purposes than government. They are created by means distinctly different from the means by which governments are created in the United States. Thus, these types of artificial legal persons should be examined separately. Moreover, the answers may not be the same for governmental entities and for non-governmental artificial persons.

14. *See* Zeiner, *TJ Leaseholds*, *supra* note 5, at 889.

Later, when I delved more deeply into the topic by utilizing therapeutic jurisprudence to examine the economic development project that resulted in the infamous U.S. eminent domain case, *Kelo v. City of New London*,¹⁵ it became apparent to me that the project was a disaster for all involved, a disaster that seemed to have TJ, or TJ-like, qualities for all parties.¹⁶ The disaster extended beyond the individuals directly involved and the groups of people more indirectly impacted, all of whom suffered considerable antitherapeutic impacts,¹⁷ to the government entities, the private corporation that would have benefited directly by the project, and the would-be developer. The negative impacts on the artificial entities, *particularly* on the government, seemed TJ-like. It was not simply that the project was a costly financial failure that had especially antitherapeutic impacts on the individual condemnees, their neighbors and other members of the general public.¹⁸ Instead, for government, the negative consequences were directly connected to the public understanding of the role of government and its status vis-à-vis the people. By virtue of its conduct, the government had undermined itself, which had huge implications for individuals' and the public's respect for government, and the social contract between the government and the governed. These negative impacts for the government seemed, in their essence, analogous to antitherapeutic impacts on human core values of personhood, dignity, and respect, which are studied in therapeutic jurisprudence. Moreover, these negative impacts on government seemed to intensify the antitherapeutic impacts on the emotional and related physical well-being of the persons governed. I concluded that the project was a therapeutic jurisprudence disaster for all involved.¹⁹ This finding was not something I had anticipated. It seemed that I had inadvertently found that therapeutic jurisprudence concepts can be used to examine the impact of laws and legal processes of government *on* government itself, at least in this circumstance. Although surprising, it was not at the heart of that particular work; thus, I simply applied the TJ label to the impacts on all parties and moved on. Yet, this was an extremely interesting—and highly edifying—byproduct of my work because it further informed the goals of my work, the understanding of the TJ impacts on persons, and the national furor in

15. *Kelo v. City of New London*, 545 U.S. 469, 476 (2005).

16. *See Zeiner, Kelo, TJ Lens, supra* note 4, at 901.

17. *See id.* at 874–92. The human individuals involved included the condemnees and their neighbors, the general public and the general public in their capacity as taxpayers.

18. *See id.* (explaining the antitherapeutic impact of the *Kelo* project and how it was an economic disaster).

19. *See Zeiner, Kelo, TJ Lens, supra* note 4, at 901.

reaction to the *Kelo* decision.²⁰

When I presented this work using therapeutic jurisprudence to analyze the *Kelo* situation²¹ in July 2013,²² it was obvious from my presentation that I had assumed summarily that the answers to the two questions posed in the penultimate paragraph above²³ were “yes.” Many in the audience of experts seemed comfortable with the idea and nodded in agreement. But, not all of the experts agreed. The strong challenge was, “Can there be therapeutic jurisprudence impacts *on* government, [as distinguished from TJ impacts *by* government in its role as legal actor]?”²⁴ The essence of these experts’ argument was as follows. Therapeutic jurisprudence is all about the impact of laws and legal processes on the emotional well-being of *humans*, especially the individual humans who are involved in legal matters or directly impacted by laws, legal processes, and legal actors in particular settings. Therapeutic jurisprudence highlights the worth and dignity of the individual human being. To say that there can be therapeutic or antitherapeutic impacts on government, not only dilutes therapeutic jurisprudence’s vital focus on the worth and dignity of the individual human being, it also assumes that government has emotional and related physical well-being. This astute question deserves focused attention; the purpose of this article is to provide that focused attention.

Obviously, government does not have emotional and related physical well-being in the same way as a human being. Thus, from a TJ purist’s standpoint, there can be no TJ therapeutic or antitherapeutic impacts on government.²⁵ Yet, I had obtained enlightening insights, especially about

20. *See id.* at 901, 904–05.

21. *See generally* *Kelo v. City of New London*, 545 U.S. 469 (2005) (using the phrase “*Kelo* situation” as used in this article refers to the economic development project involved in the U.S. Supreme Court decision).

22. Carol Zeiner, *Kelo through the Lens of Therapeutic Jurisprudence*, Address at the XXXIII International Congress on Law and Mental Health 30 (July 16, 2013) [hereinafter “Zeiner, *Kelo* Address”].

23. *See supra* text accompanying note 13 (“(1) Can there be therapeutic or antitherapeutic impact of laws and legal processes on government? (2) Should the principles of therapeutic jurisprudence be used under certain circumstances to examine these impacts on government?”).

24. *See* Zeiner, *Kelo* Address, *supra* note 22 and accompanying text. I did not get the experts’ names, but I owe a debt of gratitude, especially to the scholar who began the questioning, because the challenges caused me to focus on this novel issue, rather than assuming a conclusion. *See id.*

25. *See, e.g.,* Slobogin, *supra* note 1, at 193–96 (discussing the different approaches that have caused disagreement and highlighting the pros and cons of each). The founders of TJ, Professors Wexler and Winick, chose not to define that which is “therapeutic,” thus enabling natural expansion of therapeutic jurisprudence to other areas of law and across various cultures. However, there has been disagreement as to whether this is the best approach. It is possible that those favoring a limited definition would characterize my identification of TJ-like impacts to be

government and its relationship with the governed, by performing a therapeutic jurisprudence analysis on all parties—including government—to a highly complex set of transactions permeated with strong social implications. What is it that I had found, what is the connection with TJ, and can it be useful?

The article, *Kelo Through the Lens of Therapeutic Jurisprudence*, was the first application of therapeutic jurisprudence to an actual economic development project that involved eminent domain.²⁶ The objectives of that article were (1) to determine whether therapeutic jurisprudence could provide new, helpful insights into that project's therapeutic and antitherapeutic impacts on the persons directly and indirectly involved, and (2) whether such an analysis could provide insights into the national furor that followed *Kelo v. City of New London*.²⁷ It accomplished those goals—and more. This article focuses directly on the additional findings by directly examining two questions. First, by using therapeutic jurisprudence analysis, can something akin to therapeutic or antitherapeutic impacts of laws and legal process *on* government be identified, at least in certain circumstances? Second, should therapeutic jurisprudence be used to examine the therapeutic and antitherapeutic TJ-like impacts on government in those circumstances, and if so, for what purpose(s)?

Based on my findings in the TJ analysis of the economic development project that formed the basis of the case *Kelo v. City of New London*, I assert that at least in U.S. eminent domain situations, and possibly other circumstances the boundaries of which are yet to be delimited, there can be something akin to TJ impact of laws and legal processes *on* government. I further propose that these TJ-like impacts ought to be examined because they provide greater insights into therapeutic and antitherapeutic impacts on humans. The deeper understandings gained through this analysis can then be used to formulate recommendations and solutions to refine and reform the law or the government's actions as a legal actor—ultimately for the benefit of *human* emotional and related physical well-being. This is the goal of therapeutic jurisprudence. Yet, I assert that there are benefits to government as well. Government informed by the findings of such a TJ analysis can, in these and similar circumstances, revise its interactions with the governed in order to achieve two things: (1) enhance the likelihood of successful completion of the particular project through recognizing and addressing the antitherapeutic impacts on the persons involved, and (2)

the sort of expansive use that they sought to prevent. *See id.* at 207–08.

26. *See* Zeiner, *Kelo, TJ Lens*, *supra* note 4, *in passim*.

27. *See id.* at 857–58.

advance both respect for government and law, and voluntary compliance with law and legal processes. The latter benefit comes full circle because it is a classic desired outcome of law and legal processes guided by therapeutic jurisprudence principles.²⁸ Thus, this article suggests a subtle, but highly significant and useful extension of therapeutic jurisprudence analysis. Moreover, the possible benefits to government are an excellent incentive for practicing attorneys involved in representing the government, and for scholars studying controversial situations involving the government, to become familiar with therapeutic jurisprudence.

BACKGROUND AND ANALYSIS

INTRODUCTORY CAUTION

It is difficult, especially for those steeped in therapeutic jurisprudence, to “get—and keep—your head around”²⁹ the notion of TJ impacts *on* government, as distinguished from TJ impacts *by* government, in its capacity as a legal actor. Virtually all TJ analysis to date has viewed government solely in the role of a “legal actor” that *produces* therapeutic or antitherapeutic impacts on individuals.³⁰ A prime example comes from the TJ analysis to date of the judicial system and the role of judges.³¹ They have been, and continue to be, studied as to their impacts as legal actors on parties to litigation and others appearing before the court.³² As a result,

28. See Ronner/Winick, *PCA*, *supra* note 2, at 501–02 (stating that respect for law and voluntary compliance with law and legal processes are desired outcomes of therapeutic jurisprudence’s “three V’s”).

29. See *Idiom: Get your head around something*, USING ENGLISH, <http://www.usingenglish.com/reference/idioms/get+your+head+around+something.html> (last visited Oct. 21, 2015) (“If you get your head around something, you come to understand it even though it is difficult to comprehend.”).

30. See *supra* text accompanying notes 22–25.

31. Shirley S. Abrahamson, *Therapeutic Jurisprudence: Issues, Analysis, and Applications: The Appeal of Therapeutic Jurisprudence*, 24 SEATTLE U. L. REV. 223, 223–24 (2000) (noting that the goal of federally-funded drug courts is to provide a therapeutic, rather than punitive, alternative for helping individuals struggling with drug addiction); see generally Ronner/Winick, *PCA*, *supra* note 2 (outlining the interplay between TJ and social forces and the consequences associated with that relationship); Winick, *TJ and Courts*, *supra* note 9 (explaining how judges and their courtrooms can practice therapeutic jurisprudence as a means to effectively address the problems of the parties appearing before the court).

32. Compare Winick, *TJ and Courts*, *supra* note 9, at 1056 (stating that the Chicago juvenile court was created in 1899 as an alternative, therapeutic approach to the issue of juvenile delinquency), with Vicki Lens, *Can Therapeutic Judging be applied in mainstream Family/Child Protection Courts?*, WORDPRESS.COM (Oct. 2, 2015), <https://mainstreamtj.wordpress.com> (suggesting that future Family Court judges should be selected based on their ability to provide therapeutic jurisprudence for the benefit of the parties appearing before them in court).

problem-solving courts have been created,³³ and TJ approaches to judging and human interaction are taught in judicial conferences.³⁴

This article's new consideration of the TJ-like impacts *on government* was undertaken primarily *for the well-being of humans*. In most circumstances, government will also be a legal actor in the specific situation under consideration. These facts—that government likely is a legal actor in the situation, and that the first objective of the analysis is for human well-being—can cause the analytic process to go astray. It is easy during the analytic process for one steeped in traditional therapeutic jurisprudence reasoning to slide into thinking that this new analysis is simply another way of looking at TJ impacts *by* government in its role as legal actor. As a result, one can slip into the previous ways of examining only the effects *by* government without separately seeking the effects *on* government itself in the transaction. The distinctions can be very subtle. However, if one resists sliding back into the more standard TJ thinking, but instead follows an analytic path of seeking TJ-like impacts *on* government, perhaps precipitated by government's own actions, new insights can be gained. The analysis below argues that these new, more refined insights from the TJ (or, more properly, TJ-like) impacts on government can be used to more clearly understand the human impacts, and, in turn, inform government action so that it can both enhance the therapeutic and avoid or minimize the antitherapeutic impacts on humans. It can also assist government to better fulfill its critical role in society. The latter may be the most interesting and promising aspect of this new use of therapeutic jurisprudence analysis.

CAN TJ ANALYSIS SHOW TJ-LIKE IMPACTS ON GOVERNMENT, AT LEAST IN CERTAIN CIRCUMSTANCES?

In the United States, the Constitution, laws, culture, tradition, and the public as a group place cherished responsibilities in the hands of government, and place high expectations on, government. Part of the American heritage and tradition, and a core expectation of government, is the ideal that government stands for and is to safeguard “liberty and justice

33. See Winick, *TJ and Courts*, *supra* note 9, at 1055 (2003) (discussing the emergence of courts that specifically deal with social and mental health and substance abuse treatments).

34. E.g., Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Courts and Unified Family Courts*, 65 MD. L. REV. 82, 86–90 (2006) (describing the role of judges in the context of drug courts using therapeutic approaches to rehabilitate the defendant); Judge Michael Jones (Ret.), Procedural Justice, Arizona Annual Judicial Conference (June 27, 2014) (notes on file with author). The presentation included a lecture and exercises involving active listening and advanced empathy *in court hearings*, both of which are characteristics of judging using TJ.

for all.”³⁵ In order to fulfill its responsibilities and these expectations, government has been entrusted with great power. A common assumption inherent in the social compact is the obligation of government to exercise its power with fairness, based on equality, for the good of the people as a group, *and* with respect for the underlying dignity and rights of each individual. This is a part of the public’s understanding of the ideal for the character, ethic, reputation, and even duty, of government in the U.S.³⁶ The perception of government-enabled, court-protected favoritism goes against the grain.³⁷

Importantly, government governs with the consent of the governed in the United States. Voluntary compliance with the law and respect for law and governmental authorities are essential to the functioning of the United States’ system of government. Interestingly, but not surprisingly, voluntary compliance with the law, and respect for law and legal authorities are outcomes that therapeutic jurisprudence considers to be “therapeutic” interactions of individuals in their experiences with the legal system.³⁸ These are interactions in which legal authorities—judges, lawyers, and others having key roles in the process—affirm the dignity of the individual and enable him or her to take greater personal responsibility for his or her well-being. The “three V’s” of therapeutic jurisprudence, “voluntary participation,” “voice,” and “validation,”³⁹ are significant here.

35. 4 U.S.C. § 4 (2013) (“The Pledge of Allegiance to the Flag: I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.”); *see also The Pledge of Allegiance*, US HISTORY, <http://www.ushistory.org/documents/pledge.htm> (last visited Oct. 12, 2015) (quoting the various forms of the Pledge of Allegiance as it has evolved through the years).

36. *See Kelo v. City of New London*, 545 U.S. 469, 494–505 (2005) (O’Connor, J., dissenting). These sorts of expectations, as part of the social compact, underlie Justice O’Connor’s dissent.

37. *See id.* at 469, 503; *see also* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 192 (2007) (declaring that there is a danger for abuse in takings solely for “economic development”); Steven Forbes, *Don’t Junk Property Rights*, FORBES (Dec. 27, 2004), <http://www.forbes.com/forbes/2004/1227/025.html> (zeroing in on the potential for abuse by the wealthy and/or powerful against less powerful private citizens, or against less powerful business competitors.). The potential for manipulation of the political process by the rich and/or powerful, resulting in court-enabled, court-protected favoritism, an abuse of law, and of the social contract is an underlying theme in Justice O’Connor’s dissent to the majority opinion in *Kelo*. *See Kelo*, 545 U.S. 469, 503; Somin, *supra*.

38. *See* Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L. J. 1055, 1062 (2002) (discussing how therapeutic jurisprudence has helped develop successful drug abuse treatment programs).

39. Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94 (2002) [hereinafter Ronner, *Songs*] (referring to the “three V’s” as a sense of voice, validation, and voluntary participation); *see* Perlin, *supra* note 1, at 1186 (citing Ronner, *Songs*, *supra*, at 94).

Therapeutic jurisprudence holds that voluntary participation is the most important of the three.⁴⁰ “In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.”⁴¹ Clearly, an eminent domain condemnee is not a “voluntary participant” in those proceedings, which is where voice and validation come in.

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. The elements of voice and validation achieve that objective. 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 the outcome. “In the area of [TJ], 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.⁴²

The sense that government treats the governed equally and with fairness is critical in gaining and maintaining respect for the law and legal processes, and for upholding respect for government authorities. That sense is also essential for motivating voluntary compliance with law and legal processes.

Thus, in the United States’ system, synergy between therapeutic impacts on the individual, and the benefits to government of enhanced respect for and compliance with the law, is quite possible and achievable. When a person, even one who is an unwilling participant in a legal process, is given a genuine voice and validation, and perceives that he or she has been treated with fairness and as an equal citizen, he or she is likely to be more compliant with the outcome. He or she will come out of the process with respect for the law and legal authorities. As a result, government will enjoy the benefits thereof. Government is more likely to enjoy enhanced

40. See Ronner, *Songs*, *supra* note 39, at 95 (expressing the importance of voluntary participation to lessen coercion and motivate better future behavior).

41. *Id.*

42. Zeiner, *Kelo*, *TJ Lens*, *supra* note 4, at 860 (citing Ronner, *Songs*, *supra* note 39, at 92–95); see Ronner/Winick, *PCA*, *supra* note 2, at 501–02, 505 (stating that a litigant’s voice and validation create voluntary participation).

voluntary compliance with the law from the individual directly affected, and from all who perceive that fair, just processes may impact them in the future.

In order to conduct a therapeutic jurisprudence analysis of the *Kelo* situation, I considered the specifics of the actions of government vis-à-vis the condemnees and their neighbors, in hopes of better understanding the therapeutic or antitherapeutic effects of the process on the condemnees, and others who were impacted.⁴³ The general nature of those interactions is best summed up by two quotations from LITTLE PINK HOUSE.⁴⁴ In the words of reporter Jane Dee, government “[left a lot of] skin on the sidewalk,”⁴⁵ clearly referring to the skin of the condemnees and their neighbors. A rather succinct summation was expressed:

[B]y a newcomer on the scene, Ron Angelo, a representative of [the then new Connecticut] Governor Jodi Rell. Angelo agreed with the new governor that “the city had treated these people unjustly for almost a decade.” He believed that they “had been unnecessarily beaten down. Repeated assaults on the fundamental urge to own a home had caused deep wounds and left nasty scars. Angelo knew that it would take a lot more than a couple of blank checks to make these people feel whole.”⁴⁶

The therapeutic jurisprudence analysis dug deeper and helped better explain the extent of the damage to the emotional and related physical well-being of the condemnees and many of their neighbors. I concluded that government’s treatment of these people was “completely antitherapeutic in some of the worst dignity-crushing, freedom-crushing, soul-crushing ways.”⁴⁷

Beyond that, I also concluded, based on therapeutic jurisprudence analysis, that the *Kelo* situation was antitherapeutic to the general public, in two capacities: (1) as members of the public who saw themselves

43. See generally JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE (2009) [hereinafter LPH]; see *infra* text accompanying note 68.

44. LPH, *supra* note 43.

45. Jane Ellen Dee, *Oh, Claire: You’re a Scholar and Visionary . . . If Only You Could Quit Leaving Skin on the Sidewalk*, HARTFORD COURANT (Feb. 25, 2001), http://articles.courant.com/2001-02-25/news/0102250811_1_african-aids-kitchen-connecticut-college.

46. Zeiner, *Kelo, TJ Lens, supra* note 4, at 886; see also LPH, *supra* note 43, at 299–300. Governor Rowland had resigned shortly before being indicted on corruption charges unrelated to the *Kelo* situation. Lt. Governor Jodi Rell became Governor. She tried to bring the situation that had caused a national uproar to closure. Zeiner, *Kelo, TJ Lens, supra* note 4, at 886 n.238 (citing, *inter alia*, Dwight Merriam, Opening Remarks at the 7th International Conference on Planning, Law, and Property Rights (Feb. 14, 2013)).

47. Zeiner, *Kelo, TJ Lens, supra* note 4, at 886.

potentially similarly situated to the condemnees, or who were outraged by what appeared to be favoritism to the powerful coupled with egregious conduct toward ordinary, law-abiding citizens; and (2) as taxpayers who had to foot the bill.⁴⁸ I had previously concluded in other writings that in private-to-private takings commenced solely for economic development, many members of the public would identify with the condemnees as persons who “didn’t count.”⁴⁹ However, therapeutic jurisprudence analysis revealed the depth of the antitherapeutic impacts. They hit at the core of these people’s sense of personhood due to lack of voice, absence of validation, assault on dignity, perceptions of lack of fairness in both process and outcome, identification with the condemnees’ fear and outrage, and especially, feelings of betrayal.⁵⁰ The analysis contributed to better understanding of the ferocity of the public outrage in reaction to the Court’s decision.

Coincidentally, I recognized that the *Kelo* situation was very negative for government as well. It was not simply that government had to play the role of the “bad guy” condemnor in order to complete the project. It went beyond the conclusion voiced by opponents to the Supreme Court’s decision that government could now—either willfully, or through political manipulation by those with wealth and political influence—use its power to acquire choice land for the private, and profitable, use of the politically powerful/wealthy, based on vague predictions of public benefit for which there was no accountability.⁵¹ It was more than that. Something happened to government in the *Kelo* situation. The core moral principles of government had been harmed, and government had done this to itself—through its own conduct. Interestingly, the negative “things” that happened to government occurred before it was known that the project would be a total failure, leaving empty rubble-filled acreage at a cost of seventy million dollars, or more, to the taxpayers.⁵²

Three entities, together, constituted government in the economic development project and condemnation proceedings that generated the *Kelo* case: the State of Connecticut, the New London Development Corporation

48. *Id.* at 886–92.

49. See Zeiner, *TJ Leaseholds*, *supra* note 4, at 915 (stating that a private to private taking solely for economic development conveys the message that the condemnees “don’t count in the scheme of things.”).

50. See Zeiner, *Kelo, TJ Lens*, *supra* note 4, at 886–92.

51. See *Kelo v. City of New London*, 545 U.S. 469, 503–04 (2005) (O’Connor, J., dissenting); see also Somin, *Controlling the Grasping Hand*, *supra* note 37, at 496–505.

52. See Charlotte Allen, “*Kelo*” Revisited, *THE WEEKLY STANDARD* (Feb. 10, 2014), <http://www.weeklystandard.com/kelo-revisited/article/776021>.

(“NLDC”), and the City of New London.⁵³ Government had not set out to deliver crushingly antitherapeutic blows to the property owners, or anyone else. Government simply had sought to get the deal done as quickly and inexpensively as possible so that whatever benefits were attainable could begin to flow to the city and state.⁵⁴

A brief description of government conduct is necessary here. This summary is taken from *Kelo Through the Lens of Therapeutic Jurisprudence*.⁵⁵ The reader is directed to that article and the numerous sources cited therein, and to LITTLE PINK HOUSE,⁵⁶ for a description of events and the human drama that were part of the *Kelo* economic development project. The law review article provides the initial TJ analysis of the events described by Benedict in LITTLE PINK HOUSE.⁵⁷

Based on what I read, government embarked on a course of conduct toward the condemnees and their neighbors that descended downward. The descending cycle began with an improvident agreement (the letters of

53. Zeiner, *Kelo, TJ Lens*, *supra* note 4, at 900.

54. See *Kelo*, 545 U.S. at 483–84 (depicting the hope for potential economic benefit to the city and the state as considered by the Supreme Court’s opinion); *but see* Zeiner, *Kelo, TJ Lens*, *supra* note 4, at 870 (portraying how author Jeff Benedict believes the then-Governor of Connecticut John Rowland, originally initiated the project as a means of furthering his political career on the national level) (citing LPH, *supra* note 43, at 9–10).

55. See Zeiner, *Kelo, TJ Lens*, *supra* note 4, at 870–902.

56. See *id.* at 878 (relying heavily on LPH for the description of the events as they played out over almost a decade). I, along with others, agree that author Benedict’s sympathies lie with the condemnee Susette Kelo. *Id.* at 869. But, it is not unusual that the author takes sides, “when it comes to *Kelo*—almost everyone who is familiar with the case has an opinion and takes sides.” *Id.* “The book was researched over a period of more than two years and was based on hundreds of interviews and thousands of pages of documents.” *Id.*

[B]ecause of the extensiveness of Mr. Benedict’s research and reliance on interviews given by players on every side of the story—without restrictions—and the way that the events and reactions are corroborated by various participants, . . . author [Zeiner] has treated the book as a generally reliable resource for a description of the [reactions,] emotional and physical[,] . . . [of] the people involved.

Id.

Like every report or compilation of information, it runs the risk of being less than 100% exhaustive or 100% accurate. Every report invariably expresses a viewpoint, if only by virtue of the author’s decisions of which information to include and which information to leave out of the final report. Given the subtitle of the book, “A TRUE STORY OF DEFIANCE AND COURAGE,” its author must have arrived at, or confirmed, a viewpoint as a result of his hundreds of interviews and examination of thousands of pages of written materials. Nevertheless, a reasonably reliable therapeutic jurisprudence analysis can be made on the basis of the material that is provided in the book.

Id. at 869 n.87.

57. See *id.* at 868 (noting Benedict’s book greatly facilitates the TJ analysis, and provides “first-hand accounts, individuals’ personal reactions to the events, references to documents, in-depth coverage, and a comprehensive description of the many facets of the situation as they unfolded.”).

intent) that delegated land use planning responsibilities of government to Pfizer⁵⁸—the right to dictate the future of the Fort Trumbull neighborhood.⁵⁹ In doing so, the government either ignored or chose to subordinate its own character and special role in society in order to solidify a business deal. “Government, acting through the NLDC, continued in [its] disrespectful conduct by condoning, and even authorizing the threatening conduct of the real estate agents—except when caught.”⁶⁰ For almost a decade, government, through its various agents, engaged in condescending and manipulative treatment of the Fort Trumbull neighbors. It pressured them and threatened them. It lied to them. It engaged in moves seemingly calculated to cause emotional, and even physical, suffering.⁶¹ Government’s conduct appeared to become increasingly more aggressive and antitherapeutic to the individuals as time went on. Although not necessarily stated in chronological order, this included delivering notices of condemnation on the eve of Thanksgiving.⁶² “Government failed to timely remove the skeleton of a home that burned,⁶³ yet peremptorily demolished homes as litigation to save the neighborhood was imminent.⁶⁴ Why? To nullify any victory the neighbors might obtain in their litigation? To demoralize? Out of spite?”⁶⁵ According to condemnee Billy Von Winkle, a tenant of Von Winkle’s Fort Trumbull apartment building found himself *locked inside* his apartment. “Someone was padlocking the door from the outside; that ‘someone’ turned out to be government agents in their zeal to take possession.”⁶⁶ “Government blockaded streets making it difficult for residents to reach their homes and unnecessarily made the area look like a

58. *Id.* at 898–99.

59. *See id.* at 871 (stating the future of the Ft. Trumbull neighborhood would include eradication of the existing modest neighborhood and the redevelopment of the land to provide, among other things, a hotel and conference center, extended stay housing, upscale condos and retail space; abandoned Ft. Trumbull would also be turned into a state park); *see also*, LPH, *supra* note 43, at 52–53 (discussing the future proposed for the Ft. Trumbull neighborhood).

60. Zeiner, *Kelo*, *TJ Lens*, *supra* note 4, at 899; *see* LPH, *supra* note 43, at 53–54.

61. *See* Zeiner, *Kelo*, *TJ Lens*, *supra* note 4, at 899.

62. *Id.* at 885; LPH, *supra* note 43, at 204.

63. Zeiner, *Kelo*, *TJ Lens*, *supra* note 4, at 899; *see also* LPH, *supra* note 43, at 119.

An investigation by local government found no wrongdoing in the cause of the fire. The house that burned was located immediately behind Ms. Kelo’s home. Although the NLDC bought the property, the displaced family was too poor to find housing elsewhere and ultimately had to move into a relative’s crowded apartment. The sight of the burned out skeleton was demoralizing and seemed to indicate the low esteem with which government viewed the neighborhood residents. It also further depreciated real estate values in the neighborhood.

Zeiner, *Kelo*, *supra* note 4, at n.299.

64. Zeiner, *Kelo*, *TJ Lens*, *supra* note 4, at 883–84; LPH *supra* note 43, at 179.

65. Zeiner, *Kelo*, *TJ Lens*, *supra* note 4, at 899.

66. *Id.* (citing LPH, *supra* note 43, at 220–21).

'war zone.'⁶⁷ "Government removed street signs and cancelled addresses, which made it difficult for people to both physically locate the condemnees and to correspond with them.⁶⁸ "This seemed to serve no purpose other than to engage in a war of emotional and physical attrition."⁶⁹

When government was under court order not to demolish any more properties, government engaged in blasting near a remaining home, that of the Athenian family.⁷⁰ The blasting damaged the home. Government, through its agent, inexplicably piled dirt in front of that home, filling it with dust. When it rained, the basement and first floor were flooded with mud, knocking out the boiler that served the home. In addition, it became almost impossible for the wheelchair bound resident of the home to access the street through the mud and dirt. Government then refused to provide garbage collection for the home for weeks, allegedly because the residents were unable to meet the requirement that trash containers be placed on the sidewalk—which was impossible because the sidewalk was buried beneath the dirt and mud.⁷¹

"Despite the new governor's request for a moratorium⁷² on all eminent domain actions [in] the state, and the NLDC's statement to the press that it would abide by the moratorium, the NLDC delivered eviction notices to Rich Beyer's⁷³ tenants and plaintiff families Cristofaro and Athenian."⁷⁴ Toward the end, according to Jeff Benedict,⁷⁵ certain government actors even stooped so low as to baselessly smear lead plaintiff Susette Kelo's⁷⁶ reputation.⁷⁷

Obviously, all this was highly antitherapeutic to the condemnees and their neighbors. As the general public and the taxpayers of Connecticut

67. *Id.* at 885 (citing LPH, *supra* note 43, at 289, 307).

68. *See id.* (citing LPH, *supra* note 43, at 289).

69. *Id.* at 885.

70. *Id.* (citing LPH, *supra* note 43, at 289).

71. *See id.* (citing LPH, *supra* note 43, at 288–89).

72. *Id.* (citing LPH, *supra* note 43, at 337); *see also* *Moratorium*, BLACK'S LAW DICTIONARY (10th ed. 2014) (explaining that a moratorium is a waiting period set by an authority).

73. Zeiner, *Kelo, TJ Lens*, *supra* note 4, at 885 (citing LPH, *supra* note 43, at 337). Rich Beyer was a Plaintiff in the case who owned two buildings in the Ft. Trumbull neighborhood.

74. *Id.* "The Governor was furious and sent her chief counsel to demand that the eviction notices be rescinded immediately." *Id.* at n.233.

75. *See supra* notes 43, 56–57 and accompanying text.

76. Zeiner, *Kelo, TJ Lens*, *supra* note 4, at 886 (citing LPH, *supra* note 43, at 333–34); *see generally* *Kelo v. City of New London*, No. KNL-CV-01-0557299-S, 2002 Conn. Super. LEXIS 789, at *1 (Conn. Super. Ct. Mar. 13, 2002). Susette Kelo and her joint plaintiffs sought injunctive relief against the city of New London, Connecticut, from taking their homes under the exercise of eminent domain. *Id.*

77. Zeiner, *Kelo, TJ Lens*, *supra* note 4, at 886 (citing LPH, *supra* note 43, at 333–34).

became aware of the government's plans and conduct, it was antitherapeutic to them as well. Once the Institute for Justice's⁷⁸ media machine went into action, the national public was affected as to both the legal issue, and the government's course of conduct toward the condemnees and the local public.

As I studied the state of affairs, I realized that from the beginning, the government took a hard, aggressive stance toward the Fort Trumbull neighbors, even though it tried initially to paint a more benign picture for public consumption.⁷⁹ Its stance became progressively more hostile. Some of the actions taken by government may have been in reaction to legal, stubborn, or media moves made by (or on behalf of) the Fort Trumbull neighbors—or to moves that the government feared that the Fort Trumbull neighbors or their counsel might make. But, the bottom line is that government voluntarily chose its course of action toward the Fort Trumbull neighbors. That course of action was astonishingly and unmitigatedly harsh. Government chose to pursue its "ends" without considering the consequences of its "means." It seemed to envision the confrontation as a war. Government won the battle—its legal right to "take" the land was confirmed by the highest court in the land, and it ultimately obtained all the land it set out to acquire—but in that war, government suffered some heavy losses.

Government had undermined itself through its course of conduct. The damage done was quite near to core essentials of government in the United States. It seemed that the moral fiber of the government and its officials—with respect to government's conduct toward the governed—had become impaired. By the legal position it argued and its actions toward the Fort Trumbull neighbors, government undermined respect for the law, trust in government, and wholehearted support. In their place, it generated perceptions of unfairness, rising distrust of government, and a sense of betrayal among a large segment of the public.⁸⁰ Thus, despite the Supreme Court decision that government had the power to take the Fort Trumbull

78. *Id.* at 883 (explaining that the Institute for Justice is the public interest law firm from which the resisters sought legal representation).

79. *Zeiner, Kelo, TJ Lens, supra* note 4, at 880. In order to avoid addressing the issue of eminent domain, government representatives said that there were many alternatives and no final plan had been agreed upon. *See, e.g., id.* at 880 nn.174–75 and accompanying text. The press discovered and revealed that government had authorized the relentless, aggressive, and very threatening conduct of the real estate agents who descended on the neighborhood—including their threats of eminent domain. LPH, *supra* note 43, at 63–65.

80. Ilya Somin, *The Limits of Backlash: Assessing The Political Response to Kelo*, 93 MINN. L. REV. 2100, 2109 (2009). Over eighty percent of the public was opposed to the *Kelo* decision. *Id.*

neighborhood solely for economic development, government's decision to do so, and the means by which it chose to do so, harmed government in ways analogous to the TJ essentials of respect for the dignity and personhood of an individual. Here, government undermined respect for the government and law—vitaly needed for government to function in the United States. Thus, I concluded that there had been antitherapeutic TJ impact *on* government, brought about by government itself.⁸¹ In hindsight, through the well-founded critique of my fellow colleagues in therapeutic jurisprudence, those impacts should have been labeled “TJ-like.” Nevertheless, in at least this situation, the analysis showed that TJ *can* be used to discover TJ-like impacts *on* government.

There are additional connections with TJ; one is as follows. In the United States, government can more easily and effectively fulfill its role when it is perceived positively, is trusted, has earned the loyalty and dedication of its citizens, and inspires them to serve their communities, states, and nation. All these correspond to highly therapeutic qualities that affirm a person. In addition, government can more easily and effectively govern when the citizenry believes that government has earned and deserves their cooperation. In the *Kelo* situation, government undermined these qualities as well. Each of them is essential to the “wellbeing” of government in the United States.

Evaluation of the “three V’s” of therapeutic jurisprudence (voluntary participation, voice and, validation) is revealing. Generally, the individual who is the subject of TJ analysis is not the party initiating the legal process.⁸² Thus, his or her participation is not voluntary in the usual sense of the word, and it is necessary to look for voice and validation to find a substitute. In the *Kelo* project, government was the initiator and active agent. Thus, government's actions can be characterized as voluntary. This fact, however, does not render therapeutic jurisprudence analysis inappropriate. There are other legal actions in which therapeutic jurisprudence concepts have been used to great advantage to analyze the impacts on the voluntary actor, as well as the unwilling participant. For example, therapeutic jurisprudence theory has been used in studying divorce.⁸³ Divorce typically has antitherapeutic impact on both the

81. Zeiner, *Kelo, TJ Lens*, *supra* note 4, at 898–900.

82. Zeiner, *Kelo, TJ Lens*, *supra* note 4, at 860.

83. See Dax J. Miller, *Applying Therapeutic Jurisprudence and Preventative Law to the Divorce Process: Enhancing the Attorney-Client Relationship and the Florida Practice and Procedure Form “Marital Settlement Agreement for Dissolution of Marriage with Dependent or Minor Child(ren)”*, 10 FLA. COASTAL L. REV. 263, 265 (2009); see also David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 26–27 (2008); DAICOFF, *supra*

petitioner and respondent; the more vitriolic the divorce, the more antitherapeutic the impacts on both parties. The practice of collaborative divorce⁸⁴ has grown out of the effort to ameliorate the antitherapeutic impacts on participants and their children.

In addition, among the three entities comprising government in the *Kelo* situation, there were differing levels of voluntariness. The state, through its then governor, Republican John Rowland, initiated the project. He revived the NLDC as the vehicle for the project so that he would not be thwarted, nor his success usurped, by the Democrat-controlled city council. The NLDC and the state entered into the letters of intent by which government's land use planning decisions for the Fort Trumbull neighborhood and the surrounding area were, in effect, delegated to Pfizer. Thus, the state and the NLDC were fully voluntary participants—at least at the initiation of the process—and for the NLDC, most of the way through it.

As to voluntariness, the city's situation seemed considerably less voluntary. The city was informed by the state and the NLDC, in essence: if you want New London to be the “hip world-class little city” described by NLDC president Claire Gaudiani; if you want the sewer plant to be fixed to eliminate its awful stench; if you want the other infrastructure improvements associated with the project, all of which will be financed with state money; and, if you want the predicted jobs and tax revenue hoped to be forthcoming, then this is what you must do. You must approve the project just as proposed by us, as previously specified by Pfizer.⁸⁵ Of course, the phrase about Pfizer went unsaid. The scope of the city's voluntary decision-making was narrowed dramatically. Therefore, in this respect, it seemed that the city was something of a pawn of the NLDC and the state. Technically, the city may have had the legal right to refuse to adopt the plan or to revise it, but from a political perspective, it had been

note 9, at 165, 181. The discipline known as “Collaborative Law” focuses on using concepts central to therapeutic jurisprudence to enable divorcing couples to resolve their differences in ways that are less emotionally damaging, less financially costly, and less harmful to family relationships. *Id.*

84. *Collaborative divorce*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“A divorce negotiated in a nonadversarial forum . . . between spouses who, with or without a lawyer, are assisted as needed by a team of neutral experts in law, mental health, and financial matters (such as taxes and real estate.”); see DAICOFF, *supra* note 9, at 165–66.

85. Zeiner, *Kelo*, *TJ Lens*, *supra* note 4, at 871. Pfizer agreed to locate its new facility in an abandoned former mill site next to the City's sewer plant, when the NLDC and state agreed, via letters of intent, to allow Pfizer to dictate the project, including its boundaries and the specifics of how the land would be used. *Id.* Pfizer proceeded to dictate, and at its insistence, the Ft. Trumbull neighborhood of modest homes and small businesses where Susette Kelo lived was targeted for removal as part of the development. *Id.*

presented with what seemed to be a “take it or leave it” proposition, one that was so well-manuevered that the “take it” appeared—especially at first—to be more appealing than the “leave it,” which—especially at first—seemed like a non-option. As a result, not only was the city’s “voluntariness” restricted, to a large extent, city government’s participation in the voice was usurped by the NLDC and the state, which entities delegated it to Pfizer.⁸⁶ There was little respect for, or validation of, the dignity or role of city government in this situation.⁸⁷

Although the Governor and the NLDC may have adeptly maneuvered the project to limit the true voluntariness of the city’s choice, virtually all city officials, including Mayor Beachy,⁸⁸ initially welcomed the project with enthusiasm.⁸⁹ Most continued to genuinely support it, and all, even Mayor Beachy, who became an opponent to the destruction of the Fort Trumbull neighborhood, continued to support Pfizer’s decision to locate its new research and development facility in New London.⁹⁰

Most importantly for the therapeutic jurisprudence analysis, the city’s choice of *how* to proceed against the neighborhood, aggressively and unrelentingly, seemed to be very much the result of a voluntary decision. The city, itself, concurred with the other government entities in the harsh course of action that was so antitherapeutic to the condemnees and their Fort Trumbull neighbors.⁹¹ Likewise, it chose to ignore all opposition and alternate proposals from the larger public of New London.⁹²

86. *Id.* at 893. “Pfizer’s voice was heard and respected by the official decision makers In fact, here, government, the party obligated to make land use planning decisions, allowed Pfizer to be *the voice* that directed its decisions.” Zeiner, *Kelo, TJ Lens, supra* note 4, at 893 (emphasis in the original).

87. *See id.* at 893, n.272.

88. *See Zeiner, Kelo, TJ Lens, supra* note 4, at 881, 884–85.

New London’s mayor, Lloyd Beachy, was not a career politician. He was a former military man who became active in civic affairs after his retirement. Beachy, like Susette Kelo herself and other eventual plaintiffs, welcomed Pfizer and the redevelopment project, but opposed adamantly the destruction of the historic Ft. Trumbull neighborhood and the use of eminent domain against the residents.

Zeiner, *Kelo, TJ Lens, supra* note 4, at 881. Beachy became an activist on behalf of preserving the neighborhood. *Id.* at 885. When the bulldozer showed up to begin demolishing homes, Beachy, his wife, and activist Kathleen Mitchell sat on the steps of the first home in the path of the bulldozer in order to prevent demolition. *Id.* at 884. All three were arrested. *Id.* Mayor Beachy and his wife had to be carried to the police car. *Id.* at 884 (*citing* LPH *supra* note 43).

89. *See* LPH, *supra* note 43, at 58; Zeiner, *Kelo, TJ Lens, supra* note 4, at 881.

90. *See Zeiner, Kelo, TJ Lens, supra* note 4, at 881 (explaining that although Mayor Beachy and Susette Kelo welcomed Pfizer on the nearby vacant former mill site, both opposed the destruction of Susette’s home and neighborhood).

91. *See* LPH, *supra* note 43, at 58; Zeiner, *Kelo, TJ Lens, supra* note 4, at 890.

92. Zeiner, *Kelo, TJ Lens, supra* note 4, at 888.

Government⁹³ followed the steps of an elaborate, formal planning process. The Supreme Court commented favorably upon it.⁹⁴ If in actuality, that process had been perceived by the public to provide genuine voice that government seriously took into consideration, and particularly if government had responded favorably by making changes in response to public concerns and information revealed during the process, the *Kelo* situation may have turned out very differently.⁹⁵ From a TJ perspective, it would have provided true voice and validation, and may have mitigated some of the antitherapeutic emotional impacts. Having attained actual voice and voluntary participation in decision-making, the sense of being denigrated, ignored, and betrayed by government may have been replaced by validation, a sense of self-esteem and civic pride, and respect for government and the legal process. It may have genuinely produced “democracy in action” and “everyone working together for a better city,” the characterization touted by the NLDC president, Claire Gaudiani.⁹⁶

Instead, from the beginning, NLDC President Claire Gaudiani steadfastly took the position that it was too late and too difficult to make any changes to the project, which took shape exactly as specified by Pfizer.⁹⁷ Other government entities adopted the same stance.⁹⁸ Although presentations were made to the public, and hearings were held, members of the community and community organizations stated their strong opposition

93. *Kelo v. City of New London*, 545 U.S. 469, 473 (2005). Here, referring to the three entities, the state, the NLDC, and the city. *Id.*

94. *See id.* at 473–75; Robert G. Dreher & John D. Echeverria, *Kelo’s Unanswered Questions: The Policy Debate Over the Use of Eminent Domain for Economic Development*, *Geo. Envtl. L. & Pol’y Inst.* 1, 10–11 (2006), available at http://www.gelpi.org/gelpi/current_research/documents/GELPIReport_Kelo.pdf (discussing how the “planning” in *Kelo* was key in the Supreme Court’s analysis); *50 State Report Card Tracking Eminent Domain Reform Legislation since Kelo*, CASTLE COALITION, <http://castlecoalition.org/50-state-report-card> (last visited Oct. 12, 2015) (providing a state by state analysis of legislation since *Kelo*); *see generally* Press Release, Inst. For Justice, *One Year After Kelo* (June 20, 2006), <http://ij.org/press-release/one-year-after-kelo/> (discussing the rise of government use of eminent domain for private development since *Kelo*). One of the state level responses, among many, to the public outcry for reform following the *Kelo* decision was to add more “process” before government could move forward with such projects. CASTLE COALITION, *supra*. Cities and states that swiftly moved forward with many private-to-private economic development projects following the Supreme Court’s decision in *Kelo*, treated the Court’s comment on the planning process as strong advice. *See One Year After Kelo, supra*.

95. *See generally* Ilya Somin, *What if Kelo v. New London Had Gone The Other Way?*, 45 *IND. L. REV.* 21, 21, 27–28 (2011) (noting how public knowledge had an effect on the decision and exploring how the decision could have differed). A redesigned redevelopment plan may have led to a successful project, but, of course, this is speculation.

96. Zeiner, *Kelo, TJ Lens, supra* note 4, at 882 (citing LPH, *supra* note 43, at 129, 133).

97. *Id.* at 888–89.

98. *Id.*

to the eradication of the Fort Trumbull neighborhood, enough signatures for a referendum were quickly gathered,⁹⁹ and a professional, counter-proposal plan was prepared and submitted to the NLDC by a community group,¹⁰⁰ government ignored the public opposition.¹⁰¹ There may have been a brief behind-the-scenes effort to enable the survival of the neighborhood;¹⁰² Pfizer was asked to change its specifications so as to allow the Fort Trumbull neighborhood to remain, but Pfizer declined. Of course, this information provided by LITTLE PINK HOUSE author Jeff Benedict, does not seem to have been made available to the public at the time. Throughout the public process, Pfizer maintained the posture of interested bystander. Government continued to comply with its letters of intent, and it appeared that the public was ignored entirely.

Thus, after further TJ analysis, the conclusion is unchanged. Government, by its apparently voluntary conduct, undermined itself at the level of key principles underlying the social compact. As described above, the impacts *on* the government as a result of its conduct were very TJ-like, and very antitherapeutic.

Further study is needed and invited to determine other circumstances in which therapeutic jurisprudence can be used to discover TJ-like impacts on government. Such circumstances are likely to be those permeated with strong social, Constitution-related implications, such as free speech. At this juncture, TJ analysis will have to be explored in various circumstances before the extent of its applicability and usefulness can be determined. I suspect that the more emotionally charged the situation, the more likely it is that therapeutic jurisprudence analysis of the impacts on government will prove fruitful.

SHOULD TJ ANALYSIS BE USED TO EXAMINE IMPACTS ON GOVERNMENT, AND IF SO, FOR WHAT PURPOSE(S)?

The question that constitutes the heading for this section, which is actually a two-part compound question, is the logical follow up to the question that served as the heading for the immediately preceding section (can TJ analysis show TJ-like impacts *on* government, at least in certain circumstances?). Together, these questions form the structure for this

99. *Id.* at 882–83.

100. Zeiner, *Kelo, TJ Lens*, *supra* note 4, at 882 (citing LPH, *supra* note 43, at 137, 139). That plan contained all the uses specified by Pfizer, but with fewer condos; it was much the same as a proposal submitted by a national architectural firm. *Id.*

101. *Id.* at 888 (citing LPH, *supra* note 43, at 85).

102. *See* LPH *supra* note 43, at 105–06.

study. Sufficient answers for the two questions posed in this section were found while examining the previous question. To summarize, TJ analysis should be used to identify TJ-like impacts on government because such analysis provides further insights into the therapeutic and antitherapeutic impacts of the law or legal process under examination on the humans involved.

The most basic purpose for which this information can be used is to shed light on how the black letter law, or the process followed by government, or both, can be revised to ameliorate antitherapeutic impacts and to enhance therapeutic impacts on the individuals directly or indirectly affected by such laws and processes. Because this purpose mirrors the purpose that underlies all of therapeutic jurisprudence, this answer is fully adequate for TJ scholars and practitioners. Examination of the question posed in the immediately preceding section also revealed an additional benefit. The use of TJ analysis to identify and study TJ-like impacts *on* government can also produce benefits *to* government as it seeks to achieve its immediate objectives, while also preserving its unique role in society.

The article *Kelo through the Lens of Therapeutic Jurisprudence*, and thus far this article, used TJ analysis to look back in time at a legal process that had already occurred to gain insights on what went wrong. It seems entirely possible to use the tool of TJ analysis prospectively to consider, plan, and guide future interactions to more favorable results—both in the transaction to be undertaken, which is obviously a desire of government, and in terms of the overall relationship between government and the governed, which is also a “plus” for government. This appears to be the most promising and potentially important product of this article. Although therapeutic jurisprudence has been employed previously to bring about changes in laws and the conduct of government and other legal actors,¹⁰³ its purpose has been to improve the wellbeing of humans. The thrust has been to add protection for the dignity and value of the individual human being as an objective of legal analysis and of legal reform. This new use suggests that TJ can deliver benefits *to* government, and in many instances, simultaneously enhance the dignity and well-being of the persons involved. The capacity to provide such benefits has always been inherent in therapeutic jurisprudence; it is nothing new. The contribution of using TJ

103. See generally Zeiner, *Kelo, TJ Lens*, *supra* note 4, at 858 (describing how TJ was first applied to mental health when it was created in the 1980s, yet has expanded to vast and growing areas of law); see also *Therapeutic Jurisprudence and the Emergence of Problem Solving Courts*, NAT'L DRUG CT. RESOURCE CENTER, <http://www.ndcrc.org/content/therapeutic-jurisprudence-and-emergence-problem-solving-courts> (last visited Oct. 12, 2015) (describing how drug courts can implement TJ).

analysis to identify TJ-like impacts *on* government is to bring the possibility of *benefit to government*, as well as to individuals, clearly into focus.

This new use of TJ analysis does not spell “the end” of therapeutic jurisprudence as we know it. The outcome of *therapeutic* encounters between persons and government typically results in greater respect for law and legal processes, as well as growth of personal responsibility, and an enhanced sense of personhood in the individual involved.¹⁰⁴ This new use simply focuses the light through the lens of therapeutic jurisdiction in a slightly different way in order to make the benefits to government clearly visible. With the benefits to government now apparent, those who represent governmental entities can see the mutual benefits inherent in TJ. This opens up opportunities for expanded interest in therapeutic jurisprudence and its many advantages.

This article provides the initial suggestion. The various potential uses of TJ to improve the relationship of government with the governed, and thus enable government to better fulfill its role, remain to be discovered. There are many possibilities; here is one: suppose government is considering doing something new, controversial, or out of the ordinary. Use of therapeutic jurisprudence analysis as part of the decision-making process as to whether to undertake the action, and before selecting an approach and course of conduct, will better enable government to focus attention of the TJ impacts on government, and on the affected individuals. This will enable government to decide whether to undertake the action, and, if the decision is in the affirmative, to more carefully consider its approach to the action. Obviously, just because government *can* do something (believes it has the power and legal authority), does not necessarily mean that government *ought* to do it. TJ analysis will help government officials and agents focus on the bigger picture—not just achieving the desired direct outcome of the proposed action, but the full range of possible impacts on government and the individuals that may be produced by the proposed government action. Government officials can then consider whether the proposal is really a good idea, or not, in terms of the bigger picture of the relationship between government and the governed, and the special role of government in United States society. Once government officials decide, with adequate foresight, to undertake the action, then TJ will also help guide government to consider the *means* of attaining the objective, rather than the ends alone. The insights gained by

104. See Zeiner, *Kelo, TJ Lens*, *supra* note 4, at 857, 861 (describing the benefits that can be derived from TJ’s emphasis on human dignity).

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TJ analysis may guide government to change the process to ameliorate antitherapeutic impacts and enhance therapeutic impacts on the affected individuals in order to strengthen two things: (1) the likelihood that the proposed action will come to successful fruition without needless turmoil, and (2) that government will enjoy the support and respect of the citizenry. Along the way, it may become obvious that changes in the law are necessary, or that existing law and processes are adequate.

One of the beauties of therapeutic jurisprudence is how it has extended to other areas of law, and other aspects of legal thinking and practice. This new use has the potential of yet another win-win use of therapeutic jurisprudence. Thus, therapeutic jurisprudence can, and *should*, be used to discover TJ-like impacts *on* government.