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Bee v. Greaves: A Pretrial Detainee's Constitutional Right to Refuse Antipsychotic Drugs under the First and Fourteenth Amendments

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BEE V. GREAVES: A PRETRIAL DETAINEE'S CONSTITUTIONAL RIGHT TO REFUSE ANTIPSYCHOTIC DRUGS UNDER THE FIRST AND FOURTEENTH AMENDMENTS

INTRODUCTION

Daniel Howard Bee was forcibly medicated with Thorazine[1] while held as a pretrial detainee in the Salt Lake County Jail. Bee subsequently filed an action for damages against various members of the jail staff, alleging violations of several constitutional rights.[2] The federal district court in Utah ruled against Bee's claims, granting the defendant's motion for summary judgment. In *Bee v. Greaves,*[3] the Tenth Circuit Court of Appeals found that pretrial detainees possess a fundamental constitutional right to refuse unwanted antipsychotic medication. The court further held that only in emergency situations will a pretrial detainee's fundamental rights be outweighed by the interests of the state in maintaining jail safety and security.

The forced medication of a pretrial detainee with Thorazine brings into issue a host of constitutional bases for both the protection of an individual's rights and the competing governmental interests which may limit this protection. The rights embodied in the constitutional concepts of due process, right to privacy, and freedom of thought and speech meet in *Bee* to form a conflux of fundamental constitutional protection. This protection of an individual's rights is subsequently weighed against governmental interests which flow from a state's duty to prevent individuals from harming themselves or others while in confinement. This comment will outline the case law background pertinent to *Bee*, evaluate the level of protection afforded Bee, and will focus upon the difficulties with these protections within the context of the Tenth Circuit opinion.

I. FACTS

Daniel H. Bee was booked into the Salt Lake County Jail on August 9, 1980.[4] Four days later, Bee was referred by the jail staff to the mental health staff because he was hallucinating. On August 15, 1980, Bee

1. "Thorazine" is the brand name for chlorpromazine, a "psychotropic" drug or tranquilizer. Because psychotropic drugs are much more potent than standard tranquilizers, they are frequently used to control major psychiatric disorders such as schizophrenia and psychosis. T. BAN, SCHIZOPHRENIA: A PSYCHO-PHARMACOLOGICAL APPROACH 3 (1972). *See infra* note 10.

2. *See infra* text accompanying note 14.

3. 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 1187 (1985). This action was brought under 42 U.S.C. § 1983 (1976), which provides a federal remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

4. Thorazine and Valium were specified in the booking sheet as Bee's required medication. Brief for Lake County Appellees at 3, Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984).

complained of not receiving Thorazine and threatened suicide if not provided with the drug. Bee was placed in isolation and evaluated by jail psychiatrist Dr. Robert Greer. At the same time, Dr. Keith Greaves, the jail physician, prescribed Thorazine for Bee. On August 26, the jail sent Bee to the Utah State Hospital for an evaluation of his competency to stand trial. Breck Lebegue, a physician, diagnosed Bee as schizophrenic.[5] Bee was prescribed Thorazine by Dr. Lebegue and then returned to jail on September 23.[6] Dr. Lebegue subsequently wrote a letter to the state trial court rendering his opinion that Bee was competent to stand trial.[7] The next day, the state court found Bee competent to stand trial.[8] The court ordered Bee medicated with Thorazine each evening while awaiting trial.[9]

On October 7, Bee, who had been taking Thorazine voluntarily, complained of problems he was having with the medication.[10] Nine days later he refused to take Thorazine for a five-day period. Dr. Greer, a jail psychiatrist, testified that Bee was "decompensating"[11] as a result. Dr. Greer then issued an order stating that Bee was to be forcibly medicated any time he refused the Thorazine treatment.[12] On October 21, three jail officers and a jail medic forcibly injected Bee with Thorazine for the purpose of "intimidat[ing] him so he wouldn't refuse the oral medication any more."[13] Two days later, when Bee again refused the medication, he was threatened with forced injections. Under the threat, Bee acquiesced and took Thorazine orally. For at least three weeks following his initial refusal, the jail staff remained under a standing order to medicate Bee forcibly should he again refuse treatment. Bee contin-

5. 744 F.2d at 1389. Schizophrenia is a medical term describing a group of disorders characterized by multiple personalities, delusions, hallucinations, or certain other disturbances in thought forms. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 181-93 (3d ed. 1980).

6. 744 F.2d at 1389. Dr. Lebegue determined that Bee was mentally ill while in an unmedicated condition and that he was threatening, violent, and hallucinating without treatment. Dr. Lebegue also observed that in a medicated state Bee "normalized:" he had improved thought processes, decreased incidences of violent behavior, and fewer hallucinations. *Id.*

7. 744 F.2d at 1389.

8. The state psychiatrists were of the opinion that Bee would require continued Thorazine treatment in order to maintain his competency to stand trial. Brief for Lake County Appellees at 4-5, Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984).

9. Although not explicitly stated, it is possible to infer from the facts that Bee was medicated with Thorazine during his competency hearing. Brief for Lake County Appellees at 5, Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984).

10. There is significant evidence suggesting that Thorazine and other antipsychotic drugs often produce severe side-effects in patients continually administered these medications. These side-effects include psuedo-parkinsonisms, a mask-like face, tremors, muscle stiffness, and rigidity. Other side-effects are muscle spasms in the face, writhing and grimacing movements, protrusions of the tongue, drowsiness, weakness, dizziness, fainting, dry mouth and blurred vision. *See* Davis v. Hubbard, 506 F. Supp. 915, 928-29 (N.D. Ohio 1980); Comment, *Madness and Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 WIS. L. REV. 497, 530-39.

11. "It is unclear from the record what 'decompensating' means." 744 F.2d at 1389 n.1. The term decompensating implies some sort of violent behavior, although there is conflicting evidence as to the extent Bee was a threat to himself or others in the jail. *Id.*

12. *Id.* at 1390.

13. *Id.* at 1390 (quoting Record vol. III, Hughes Deposition at 24).

ued taking Thorazine orally as a result of this prolonged intimidation. Bee then brought suit in federal district court alleging violations of his constitutional rights. He alleged infringement of his right to privacy, his due process rights under the fourteenth amendment, and his rights to free speech and thought.[14]

II. BACKGROUND

A. *Foundation of Individuals' Rights*

1. Substantive Due Process and the Right to Privacy

Although first applied by the Supreme Court solely in the context of economic regulation, the due process clause has developed in the last few decades as one of several substantive bases for the protection of personal rights.[15] Because the issue is usually the extent to which the government may intrude into such personal areas of protection, the Court has simultaneously sought to balance these personal rights against legitimate governmental interests. In his frequently-cited dissent in *Poe v. Ullman*, Justice Harlan summarized this test: "Due process has not been reduced to any formula; . . . [it represents] the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[16] The right to privacy is one of the personal interests which the Supreme Court has afforded due process protection.

According to the Supreme Court, the right to privacy is "one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[17] The fourteenth amendment is not the only source of the right to privacy. The right stems from various other constitutional guarantees which, combined, create personal "zones of privacy."[18] Although no exact definition of the right to privacy can be given due to

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14. *Id.* at 1389-90.

15. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 890-96 (1978).

16. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

17. Carey v. Population Serv. Int'l, 431 U.S. 678, 684 (1977) (citing Roe v. Wade, 410 U.S. 113, 152 (1973)).

18. "Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Such "emanations" stem from the first amendment (right of association), fourth amendment (freedom from unreasonable searches and seizures), fifth amendment (freedom from testifying against oneself), and the ninth amendment ("The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."). *See* Roe v. Wade, 410 U.S. 113, 153 (1973); *Griswold*, 381 U.S. at 484; *see also* Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1978); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). One sociological basis for the right to privacy concept is the essays and philosophy of John Stewart Mill:

> There is a circle around every individual human being, which no government . . . ought to be permitted to overstep; there is a part of the life of every person who has come to years of discretion, within which the individuality of that person ought to reign uncontrolled either by any other individual or by the public collectively. That there is, or ought to be, some space in human existence thus entrenched around and sacred from authoritative intrusion, no one who professes the smallest regard to human freedom or dignity will call in question.

the amorphous nature of its origins, it is clear that, throughout its evolution, the right has been applied only in the context of marriage or family, education, travel, and procreation.[19] Attempts have been made, however, to extend the right to privacy to other fact situations beyond these four traditional areas.[20] When the right is invoked the balancing process utilized compares the individual privacy interest with the competing state interests.

In addition to perfecting a working model of the right to privacy, and providing the nucleus for the modern abortion controversy, *Roe v. Wade*[21] represents a definitive example of how the Supreme Court balances fundamental individual rights against compelling state interests. The Court in *Roe* held that as a fetus grows older and more mature, the state has an increasing interest in deciding whether or not abortion is proper.[22] Thus, *Roe* provides an excellent illustration of the willingness of the Court, in implementing its balancing process, to override a fundamental right through the recognition of a compelling state interest.[23]

2. Freedom From Bodily and Mental Restraint

One basic value developed by the Supreme Court in interpreting the due process clause of the fourteenth amendment is a person's freedom from bodily restraint. This right to be free from unjustified intru-

J. S. MILL, 2 PRINCIPLES OF POLITICAL ECONOMY 560-61 (1848).

19. Representative of the evolution of the right to privacy, its substantive due process origins, and the characteristic individual/state interest balancing process are: Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (the right to study the German language outweighs state interests of homogenization of American ideals; the due process clause protects the right of an individual to contract, to engage in the occupation of his choice, to learn, to marry, establish a home, raise children and to worship God); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (no state power to "standardize . . . children by forcing them to accept instruction from public teachers only"); Skinner v. Oklahoma, 316 U.S. 535 (1942) (fundamental right to marriage and procreation prohibits sterilization of habitual male criminals in spite of valid state interest in controlling crime); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (individual's right to travel outweighs governmental interest of controlling communist activities); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy protects individual's ability to have access to and use contraceptives).

20. In Roberts v. United States Jaycees, 104 S. Ct. 3244, 3250 (1984), the Court noted that relationships characterized by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" are entitled to the same right of privacy protections as a family. However, the Court concluded that because the Jaycees did not possess all of these characteristics, they were not entitled to such protections. *See also* Michael M. v. Superior Court, 450 U.S. 464 (1981) (Court rejected attack on California's statutory rape law, finding no right of privacy protection for sexual behavior among consenting minors); Whalen v. Roe, 429 U.S. 589 (1977) (although privacy interests include avoidance of disclosure of personal matters and the making of certain important decisions, patients do not have a right to privacy protecting physician-patient confidentiality); Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976) (no right to privacy regarding homosexual lifestyle); Kelley v. Johnson, 425 U.S. 238 (1976) (no right to privacy protecting a policeman's personal appearance); Paul v. Davis, 424 U.S. 683, 713 (1976) (no fundamental right to privacy protecting public dissemination of one's name in a negative context). *See generally* L. TRIBE, *supra* note 15, at 887-957.

21. 410 U.S. 113 (1973).

22. *Id.* at 162-64.

23. *See* Note, Roe v. Wade *and* Doe v. Bolton: *The Compelling State Interest Test in Substantive Due Process*, 30 WASH. & LEE L. REV. 628 (1973).

sions on personal security is limited by various legitimate societal interests which are given effect through application of Justice Harlan's *Poe v. Ullman* balancing test.[24]

The landmark decision of *Rennie v. Klein* (*Rennie I*)[25] extended the application of the right of personal security from bodily restraint to the mentally ill.[26] Rennie was a 40-year-old mental patient forcibly treated with antipsychotic drugs. The Third Circuit Court of Appeals found that forced medication was an intrusion "rising to the level of a liberty interest warranting the protection of the due process clause of the fourteenth amendment."[27] This right was not treated as absolute. Rather, the protection from bodily intrusions was balanced against the state's interest in preventing Rennie from endangering himself and others.[28] Additionally, in *Rennie I* the Third Circuit applied, as the appropriate standard of review, the "less intrusive means test."[29] Under this test "[t]he means chosen to promote the state's substantial concerns must be be carefully tailored to effectuate those objectives with minimal infringement of protected interests."[30]

Subsequent to *Rennie I*, in *Youngberg v. Romeo*,[31] the Supreme Court considered for the first time the substantive rights of involuntarily committed mentally retarded persons restrained against their will.[32] Citing *Vitek v. Jones*,[33] the Court found that committed mentally retarded patients retain certain liberty interests under the fourteenth amendment. In addition to the undisputed rights to food, shelter, clothing and medical care, the Court concluded that the patients possess rights of safety, freedom of movement, and liberty from bodily restraint. The Court stated that these patients retain the right to freedom from bodily restraint because this interest "survives criminal conviction and incarceration . . . it must also survive involuntary commitment."[34] Again, the

24. *See supra* text accompanying note 16; *see also* Ingraham v. Wright, 430 U.S. 651, 673 (1977) (school's corporal punishment policy upheld as a valid disciplinary method in the face of children's assertions of right to freedom from excessive punishment); *Cf.* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part) (action brought by inmates of a state prison alleging violation of due process rights: "liberty from bodily restraint always has been protected by the Due Process Clause from arbitrary governmental action").

25. *Rennie I*, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated and remanded*, 458 U.S. 119 (1982) (in light of Supreme Court decision in Youngberg v. Romeo, 457 U.S. 307 (1982)), *reinstated and modified on remand*, 720 F.2d 266 (3d Cir. 1983) (*Rennie II*).

26. The right to be free from bodily intrusions is treated by the court precisely the same as the right to be free from bodily restraint. *Rennie I*, 653 F.2d at 843-45.

27. *Id.* at 844.

28. This power flows from a state's police power and the *parens patriae* theory. *Id.* at 845 (citing Colls v. Hyland, 411 F. Supp. 905 (D.N.J. 1976)).

29. 653 F.2d at 845.

30. *Id.* at 846.

31. 457 U.S. 307 (1982).

32. *Youngberg* is factually distinguishable from *Rennie* and *Bee* in that the state action in *Youngberg* did not involve medication. *Id.* at 315.

33. 445 U.S. 480 (1980). In *Vitek*, a convicted felon was transferred from a state prison to a mental health hospital under the authority of a state statute. The Court recognized that a prisoner is entitled to the procedural due process protection of a hearing prior to being transferred to a mental hospital.

34. *Youngberg*, 457 U.S. at 316.

Court reiterated that these liberty interests are "not absolute."[35] The state is entitled to balance against these individual interests the competing interests of operating mental health institutions in a manner which protects the patients from themselves and others.[36]

Turning to a discussion of the appropriate level of judicial review, the Court, refusing to follow *Rennie I*,[37] declined to adopt the "less intrusive means" standard. Instead, the Court adopted the modern governing standard of review for the conduct of states when dealing with the mentally infirm: "Liability may be imposed only when the decision by the professional is such a substantial departure from the accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment."[38]

At least one court has noted that this right of freedom from bodily restraint extends to protection from mental restraint as well. In *Project Release v. Prevost*,[39] a state mental patient challenged the constitutionality of statutorily authorized commitment and treatment procedures. In holding that the specific commitment procedures did not violate due process, the court stated that "[f]orcible medication can alter mental processes and limit physical movement, and therefore is analogous to bodily restraint."[40]

Thus, the Supreme Court has developed a constitutional right, under the due process clause, of freedom from bodily restraint. This right does not exist in a vacuum; it is circumscribed by competing state interests. In reviewing these decisions, the appropriate level of review employed by courts in light of *Youngberg* is the "professional judgment" standard.[41]

3. First Amendment Protections

Justice Cardozo, writing in *Palco v. Connecticut*,[42] a case primarily involving the fourteenth amendment, paused in dicta to comment on the freedom of thought and speech described most prominently in the first amendment: "Of that freedom [of thought and speech] one may say it is the matrix, the indispensable condition, of nearly every other form of

35. *Id.* at 321.

36. *Id.* at 320-21. The Court once again, by balancing the liberty interest of the individual against the demands of organized society, relied on Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497, 542 (1961). *See supra* text accompanying note 16.

37. *See Rennie I*, 653 F.2d 836 (3d Cir. 1981), *supra* notes 25-29 and accompanying text. As a result of the Supreme Court's holding in *Younberg v. Romeo*, the Third Circuit in *Rennie II* adopted the "professional judgment" standard; however, this greater level of deference to the state interests failed to warrant a reversal. Rennie v. Klein, 720 F.2d 266 (3d Cir. 1983) (*Rennie II*).

38. *Youngberg*, 457 U.S. at 323.

39. 551 F. Supp. 1298 (E.D.N.Y. 1982), *aff'd*, 722 F.2d 960 (2d Cir. 1983).

40. 551 F. Supp. at 1309.

41. *See supra* text accompanying note 38; *see also* Comment, *Constitutional Rights of the Involuntarily Committed Mentally Retarded After* Youngberg v. Romeo, 14 ST. MARY'S L.J. 1113 (1983).

42. 302 U.S. 316 (1937).

freedom."[43]

Freedom of thought and speech was first applied to the forced medication of a mental patient in *Scott v. Plante*.[44] As well as addressing the protections available under the fourteenth amendment, the Third Circuit held that forced treatment amounts to a violation of a mental patient's first amendment rights.[45] The federal district court's opinion in *Rogers v. Okin*[46] similarly recognized the applicability of the first amendment to forced medication cases. *Rogers* involved a class action attacking the policies of non-emergency forced medication and involuntary seclusion at a state mental health facility. Finding that the first amendment provided a basis for the right to privacy, the district court held that the "protected right of communication presupposes a capacity to produce ideas."[47] Moreover, the court acknowledged that psychotropic medication interferes with an individual's capacity for thought, and, as such, infringes upon this fundamental right: "The right to produce a thought — or refuse to do so — is as important as the right protected in *Roe v. Wade* to give birth or abort. . . . Realistically, the capacity to think and decide is a fundamental element of freedom."[48] Thus, the scope of the first amendment protections has been held by lower courts to include freedom of thought as well as speech.

To summarize, there is a group of constitutional protections available to an individual who has been medicated against his or her will. Whether labeled "liberty interest," "right to privacy," "freedom from bodily and mental restraint" or "freedom from thought-control," this constitutional protection provides a shield for all persons — free, involuntarily committed, or incarcerated — from unjustified state infringements. However, this shield is often legitimately pierced by compelling state interests. Courts have sought to balance these competing interests in an effort to serve the needs of both society and the individual.

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43. *Id.* at 327. *See also* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

44. 532 F.2d 939 (3d Cir. 1976).

45. *Id.* at 946. *See also* Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973) (prisoners' alleged receipt of "fright drug" without consent raised possibility of cruel and unusual punishment or impermissible tinkering with mental processes); Kaimowitz v. Department of Mental Health, No. 73-19434-AW (Mich. Cir. Ct., Wayne County, July 10, 1973), *excerpted in* 2 PRISON L. REP. 433 (1973) (adult, or his legal guardian if the adult is involuntarily detained at a state mental facility, cannot give truly informed consent to experimental psychosurgery).

46. 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part and rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded on other grounds sub nom.* Mills v. Rogers, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984).

47. 478 F. Supp. at 1367.

48. *Id. See also* Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980) (although rejecting the first amendment as a basis for protection, the court acknowledged the ability of antipsychotic drugs to impede an individual's thought processes). *See generally* L. TRIBE, *supra* note 15, at §§ 15-7, 15-8; Comment, *The First Amendment Right to Freedom of Thought as Applied to Involuntarily Committed Patient's Right to Refuse Drugs*, 26 ST. LOUIS U.L.J. 973 (1982).

B. *Development of the Constitutional Protections of Pretrial Detainees*

1. The Rights Retained by Prisoners and Pretrial Detainees

In *Bell v. Wolfish*,[49] the Supreme Court stated that pretrial detainees "retain at least those constitutional rights that we have held are enjoyed by convicted prisoners."[50] However, this is not to say that a pretrial detainee possesses "the full range of freedoms of an unincarcerated individual."[51] In *Bell*, several inmates of a New York pretrial detention center brought a class action suit alleging that the overcrowded and understaffed conditions of the center violated their constitutional rights.[52] The Court found that because no fundamental rights were involved in the detainee's allegations, the only issue was whether the facility conditions amounted to "punishment" of the detainees.[53] In order to resolve this issue, the Court first investigated the extent to which the restrictions or conditions were imposed for purposes other than those stated and, then, whether such restrictions were excessive in relation to their purposes.[54] Further, the Court outlined the standard of judicial review to be implemented: whether or not the condition or restriction at issue is "reasonably related to a legitimate governmental objective."[55] If such a condition is "arbitrary or purposeless," courts should infer that the measure is punitive, thereby surpassing legitimate government objectives.[56] "Wide ranging deference" was accorded the prison officials and their policies in the absence of evidence that a particular restriction was an "exaggerated" response to the problem.[57] The Court concluded that all of the alleged violations were reasonably related to valid governmental objectives.[58]

Thus, the Court has fashioned a "reasonable relation" standard to be employed in evaluating possible breaches of the *non-fundamental* con-

49. 441 U.S. 520 (1979).

50. *Id.* at 545. In Vitek v. Jones, 445 U.S. 480 (1980), the Supreme Court held that prisoners retain certain liberty interests, under the due process clause, in freedom from involuntary transfer from prison to a state mental hospital. In Wolf v. McDonnell, 418 U.S. 539 (1974), the Court held that prisoners retain certain limited procedural due process protections in prison administrative procedures affecting them such as loss of "good time" credits due to misconduct. *See also* Meachum v. Fano, 427 U.S. 215 (1976); Pell v. Procunier, 417 U.S. 817 (1974).

51. *Bell*, 441 U.S. at 546.

52. Violations of rights under the first, fourth, fifth and eighth amendments were alleged by the pretrial detainees. Other alleged constitutional violations included: "undue length of confinement, improper searches, inadequate recreational, educational, and employment opportunities, . . . and objectionable restrictions on the purchase and receipt of personal items and books." *Id.* at 527.

53. *Id.* at 535-36. Justice Rehnquist stated that under the due process clause of both the fourteenth and fifth amendments, "a detainee may not be punished prior to adjudication of guilt." *Id.* (citing Ingraham v. Wright, 430 U.S. 651, 672 n.40, 674 (1977)).

54. *Bell*, 441 U.S. at 538.

55. *Id.* at 539.

56. *Id.*

57. *Id.* at 547-48.

58. The most important governmental interest is detention center security: " '[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.' " *Id.* at 546-47 (quoting Pell v. Procunier, 417 U.S. at 823).

stitutional rights of pretrial detainees. Courts are instructed to focus their inquiry upon the punitive intent, or lack of punitive intent, behind prison actions and restrictions when dealing with pretrial detainees.

C. *The Constitutional Rights of Mental Health Patients*

The constitutional rights of mental health patients stem mainly from the interaction of the fourteenth and the first amendments.[59] Courts have recognized a right to refuse treatment grounded in the right to privacy, which is derived from the due process clause of the fourteenth amendment.[60] The fourteenth amendment has also been held to protect a mental health patient's right to freedom from bodily restraint.[61] Further, in *Rennie v. Klien*,[62] this freedom was held to be applicable to mental patients who are medicated against their will. The second basis for a mental patient's constitutional right to be free from forced treatment is the first amendment right to freedom of expression. Both *Scott v. Plante*[63] and *Rogers v. Okin*[64] recognized the first amendment violations inherent in forced medication.

Thus, courts have allowed mental health patients the constitutional right to be free from both unwanted treatment and bodily intrusions. As set forth in the discussion of *Rennie v. Klein*,[65] these rights are limited by the legitimate state interests of controlling the mentally ill and of protecting the mentally ill from violence to themselves and others. Additionally, courts will balance the patient's interests with those of the state when inquiring into possible violations of constitutional protections.[66]

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59. These amendments encompass the right to privacy and the right to freedom of thought and mental processes, respectively.

60. *See* Wyatt v. Strickney, 344 F. Supp. 387 (M.D. Ala. 1972) (mental patients have constitutional rights not to receive treatments such as lobotomy, electro convulsive treatment, or "adverse reinforcement conditioning"), *aff'd sub nom.* Wyatt v. Aderbolt, 503 F.2d 1305 (5th Cir. 1974); Kaimowitz v. Michigan Dept. of Mental Health, No. 73-19434-AW (Mich. Cir. Ct., Wayne County, July 10, 1973), *excerpted in* 2 PRISON L. REP. 433 (1973) (right to free choice in deciding whether to undergo experimental medical procedures).

61. *See* discussion of *Youngberg*, 457 U.S. 307 (1982), *supra* notes 31-38 and accompanying text.

62. 653 F.2d 836 (3d Cir. 1981) *(Rennie I)*. *See supra* notes 25-29 and accompanying text.

63. 532 F.2d 939 (3d Cir. 1976). *See supra* notes 44-45 and accompanying text.

64. 478 F. Supp. 1342 (D. Mass. 1979). *See supra* notes 46-48 and accompanying text.

65. 653 F.2d 836 (3d Cir. 1981) *(Rennie I)*. *See supra* notes 25-29, 37 and accompanying text.

66. *See Rennie II*, 720 F.2d 266 (3d Cir. 1983), discussed *supra* note 37. Interestingly, many of these constitutional issues were brought together in a federal district court case involving mental patients and compulsory use of psychotropic drugs. In Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980), the court stated that, although some courts had derived the right to refuse treatment from "the First Amendment, the Eighth Amendment, as well as the 'penumbras' and 'shadows' of these and the Third, Fourth, and Fifth Amendments," it believed that "the source of the right can be best understood as substantive due process, or phrased differently, as an aspect of 'liberty' guaranteed by the due process clause of the Fourteenth Amendment." *Id.* at 929. Three interests were found to be involved in forced use of psychotropic drugs: the interest in "bodily integrity," the interest in making independent decisions, and the interest in being able to think and communicate freely. *Id.* at 930. After an extensive analysis, the court concluded that the legitimate state interests of protecting a patient from harming himself or others did not outweigh the indi-

Any constitutional infringement must meet the "least intrusive means" standard.

III. THE CASE

The Tenth Circuit Court of Appeals, finding issues of material fact, reversed the district court's summary judgment for the defendants and remanded *Bee* for further proceedings.[67] The court employed a two-tiered analysis, focusing on the issue of whether pretrial detainees have a constitutional right to refuse treatment with antipsychotic drugs.[68] The first task before the court was to determine the sources, if any, of Bee's constitutional protections. The second consideration by the court involved weighing these alleged constitutional protections against legitimate competing state interests.[69]

Judge Seymour, writing for a unanimous three-judge panel, began by analyzing Bee's claimed rights under *Roe v. Wade*.[70] The court determined that an individual possesses a constitutionally protected "privacy interest" in deciding whether or not to accept treatment by potentially dangerous drugs.[71] The court based its determination on the traditional rights analysis, finding that an individual's right to refuse treatment is important enough to fall within the zone of interests protected by the right to privacy.[72]

The Tenth Circuit reinforced this finding by uncovering a separate liberty interest protection within the due process clause of the fourteenth amendment.[73] Relying on *Youngberg v. Romeo*[74] and *Project Release v. Prevost*,[75] the court reasoned that if incarcerated individuals retain a liberty interest in freedom from bodily restraint, then the same individuals, *a fortiori*, have a liberty interest in freedom from mental restraint of the kind imposed upon them by antipsychotic drugs.[76] The court continued its due process analysis by drawing an analogy between Bee's situation and *Vitek v. Jones*,[77] in which the Supreme Court held that even a convicted prisoner retains due process rights, both substantive and procedural, prior to being subjected to involuntary psychiatric treatment.[78]

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vidual's fundamental interests. Thus, procedural measures safeguarding the right and ability to consent were enforced. *Id.* at 937-38.

67. 744 F.2d at 1397.

68. *Id.* at 1391.

69. *Id.* at 1392.

70. 410 U.S. 113 (1972). *See supra* notes 21-23 and accompanying text. Judge Seymour also relied extensively on Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980), discussed *supra* note 66.

71. 744 F.2d at 1393.

72. *Id.*

73. *Id.*

74. 457 U.S. 307 (1982). *See supra* notes 31-38 and accompanying text.

75. 551 F. Supp. 1298 (E.D.N.Y. 1982), *aff'd*, 722 F.2d 960 (2d Cir. 1983). *See supra* notes 39-40 and accompanying text.

76. 744 F.2d at 1393.

77. 445 U.S. 480 (1980). *See supra* note 33.

78. 744 F.2d at 1393. The Tenth Circuit further stated that the medical nature of using antipsychotic drugs was not reason enough to dispose of procedural due process requirements. *Id.* (citing Addington v. Texas, 441 U.S. 418, 430 (1979)). While the Court

Bee also contended that a third source of constitutional protection stems from the first amendment.[79] The court, agreeing with Bee, reasoned that antipsychotic drugs, because of their ability to severely impair an individual's thought processes and abilities to communicate, infringe upon the right to free speech and free thought. According to the court, this infringement implicates first amendment interests.[80]

The combination of these privacy, liberty and freedom of thought interests lead the court to hold that Bee retained a constitutional interest in refusing Thorazine treatments. However, the court qualified this interest as "not absolute,"[81] stating that such interests are subject to " 'the demands of an organized society.' "[82] The court then weighed Bee's liberty interests against the legitimate interests of the state.

Following *Bell v. Wolfish*,[83] the court stated that pretrial detainees, as lawfully incarcerated individuals, lose certain rights otherwise enjoyed by free people.[84] The court expressly adopted the *Bell* professional judgment standard[85] — even relating to the first amendment protections afforded Bee — as the level of review the courts must use when examining the policies and actions of prison officials.[86]

The court then examined each of the defendant-appellees' alleged overriding governmental interests.[87] The defendants first claimed a constitutional duty to medically treat pretrial detainees. This argument was dismissed outright as perverting the holding of *Bell*;[88] the duty is only applicable when the treatment not provided is desired and requested by the pretrial detainee.[89] Second, the defendants asserted their duty to maintain a pretrial detainee's competency to stand trial. This defense was also summarily dismissed by the court on the basis that the state court had found Bee competent to stand trial prior to the episode of forced medication.[90]

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defers to reasonably related professional judgment when addressing substantive due process requirements, it is much more demanding when procedural due process requirements are involved. *See* Bell v. Wolfish, 441 U.S. 520, *supra* notes 49-58 and accompanying text.

79. 744 F.2d at 1393-94.

80. *Id. See also* Davis v. Hubbard, 506 F. Supp. at 927-29.

81. 744 F.2d at 1394.

82. *Id.* (quoting Youngberg v. Romeo, 457 U.S. at 320).

83. 441 U.S. 520 (1979). *See supra* notes 50-58 and accompanying text.

84. 744 F.2d at 1394.

85. *Id.* This standard involves a substantial amount of deference to prison administrators. *See supra* text accompanying note 57.

86. 744 F.2d at 1394-95.

87. *Id.* at 1395.

88. *Id. See Bell*, 441 U.S. at 535. The court distinguished two cases which held that, because detainees were entitled to medical treatment, the state has a duty to provide such care. Jones v. Diamond, 636 F.2d 1364 (5th Cir.), *cert. granted sub nom.* Ledbetter v. Jones, 452 U.S. 959 (1981); Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977). According to the Tenth Circuit, this obligation is conditioned upon the request of the inmate himself. 744 F.2d at 1395.

89. *Id.*

90. *Id.* The Tenth Circuit did not have to go further on this point, yet it chose to develop the issue in detail, in dicta. The court doubted that there ever could exist a "sufficiently compelling" state interest in bringing an individual to trial strong enough to outweigh an accused's interest in not being forcibly medicated with antipsychotic drugs. *Id.*

The third and final state interest asserted by the defendants was the interest involved in protecting the inmates and staff from the actions of a violent detainee. Adopting the *Bell* "reasonable relation" standard, the court held that absent an emergency situation, forced medication is unconstitutional.[91] What, precisely, constitutes an "emergency situation" turns on the relevant circumstances present in each case.[92] As a final consideration for the district court on remand, the Tenth Circuit stated that even if an emergency existed at the time Bee was forcibly injected, such medication might still be unconstitutional.[93] The court held that the prison also had a duty to seek less restrictive means for controlling Bee.[94]

IV. ANALYSIS

A. *Legitimacy of the Court's Bases For Constitutional Protection*

1. Bee's Liberty Interest Under the Fourteenth Amendment

Traditionally, areas which call for substantive due process protections are marriage, education, free travel and procreation.[95] However, as Justice Harlan pointed out in his *Poe v. Ullman* dissent, due process cannot be "reduced to any formula."[96] The soundness of a court's decision regarding liberty interests will be evaluated through the test of time, contended Harlan.[97] Certainly, the Supreme Court has made a highly subjective practice of determining the specific areas deserving of substantive due process protection.

Against this background, the Tenth Circuit validly held that Bee was entitled to due process protection. In other words, Bee possessed a liberty interest under the fourteenth amendment. The first type of protection afforded Bee is his right to informed consent. This right extends to persons within a state's custody who are deprived of certain rights enjoyed by free persons.[98] In light of the recent opinions in *Rennie I* and *Rogers*,[99] Bee, under the circumstances of this case, possessed a clear constitutional right to refuse treatment. The second type of liberty protection recognized by the court was liberty from bodily restraint. There is little doubt following the Supreme Court's ruling in *Youngberg v. Ro-*

91. *Id.* (quoting *Bell*, 441 U.S. at 539).

92. 744 F.2d at 1396. Whether or not the circumstances in *Bee* made it an "emergency" situation was a material factual issue in dispute, for determination on remand. Another issue of fact to be determined on remand was whether or not forcible medication for an indefinite period constituted an exaggerated response. *Id.* at 1396-97.

93. *Id.* at 1395-96.

94. *Id.* The court suggested that "tranquilizers or sedatives" might have been tried first instead of the more powerful antipsychotic medication. In a footnote, the court acknowledged some dispute regarding the use of the less intrusive means analysis in cases involving the involuntary treatment of the mentally infirm. *Id.* at 1396 n.7. *See infra* notes 135-41 and accompanying text.

95. *See supra* notes 19-20 and accompanying text.

96. 367 U.S. at 542 (Harlan, J., dissenting). *See supra* text accompanying note 16.

97. 367 U.S. at 542 (Harlan, J., dissenting).

98. *See* Davis v. Hubbard, 506 F. Supp. at 929.

99. *See Rennie I*, 653 F.2d 836, *supra* notes 25-29 and accompanying text; Rogers v. Okin, 478 F. Supp. 1342, *supra* notes 46-48 and accompanying text.

meo,[100] that even convicted prisoners retain certain freedoms from bodily restraint.[101] In *Youngberg*, however, the Court did not address the possibility of mental restraints, as only physical bondage was at issue. The court in *Bee* relied on an analogy initially drawn in *Project Release v. Prevost*[102] to locate a liberty interest within the freedom from mental restraint. "Forcible medication can alter mental processes and limit physical movement and therefore is analogous to bodily restraint."[103] Thus, the Tenth Circuit stood on firm ground when it found that Bee possessed liberty interests under the due process clause of the fourteenth amendment. The holding is less solid, however, regarding the court's ruling that Bee possessed a special liberty interest protection based upon the right to privacy.

2. Bee's Right to Privacy

Relying on *Roe v. Wade*,[104] the Tenth Circuit found that Bee possessed a "fundamental" right to privacy.[105] As noted previously, the concept of protection embodied in the phrase "right to privacy" only appears in Supreme Court decisions relating to specific factual situations.[106] Further, the Supreme Court has been reluctant to find a right of privacy outside the traditional right-to-privacy contexts of marriage, education, travel and procreation.[107] Thus, it is unclear whether the Tenth Circuit's extension of the right-to-privacy beyond the prescribed boundaries will be adopted by the Supreme Court in the future, as a part of some general personal right to privacy.

3. The Use of the First Amendment

First amendment protections have long held a position of special importance with the Supreme Court. Justices writing on behalf of the Court have often called for the highest level of judicial scrutiny when reviewing first amendment issues.[108] In *Rogers v. Okin*,[109] the First Cir-

100. 457 U.S. 307 (1982).
101. *See* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979).
102. 551 F. Supp. 1298 (E.D.N.Y. 1982), *aff'd*, 722 F.2d 960 (2d Cir. 1983).
103. *Id.* at 1309.
104. 410 U.S. 113 (1973).
105. *See supra* text accompanying notes 71-72.
106. *See supra* notes 19-20 and accompanying text.
107. *See supra* note 20. The Tenth Circuit found support for Bee's right to privacy in the "important decisions" interest outlined in Whalen v. Roe, 429 U.S. 589 (1977), *supra* note 20. While *Whalen* appears to recognize a right to privacy which is general in nature and not dependent upon specific contexts for its existence, it is unclear from the holding whether the Court extended the right to privacy beyond the traditional zones of protection. In fact, the Court held that the specific relationship in question was not protected by the right to privacy and that "important decisions" are characterized as dealing with "matters relating to marriage, procreation, contraception, family relationships and child rearing and education." 429 U.S. at 600 n.26 (quoting Paul v. Davis, 424 U.S. 693, 713 (1976)).
108. *See supra* note 43 and accompanying text.
109. 634 F.2d 650 (1st Cir. 1980), *vacated and remanded on other grounds sub nom.* Mills v. Rogers, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984). *See supra* notes 46-48 and accompanying text; *see also* Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980).

cuit upheld the portion of the trial court's opinion which grounded the right to refuse treatment on the first amendment. The court thus gave tacit approval to using first amendment protection for mental patients forcibly medicated with antipsychotic drugs.[110] Therefore, assuming Bee is entitled to the same level of constitutional protection as mental health patients, the Tenth Circuit had at least one source of authority for finding first amendment protection for Bee.[111] However, although the first amendment provides a high level of protection, it is not absolute. Compelling state interests such as attempts to rehabilitate mental patients may override this protection, allowing involuntary treatment of mental health patients in certain situations.[112]

B. *The Level of Protection Afforded Bee as a Pretrial Detainee and Mental Patient*

None of these liberty interests, including those derived from the first amendment, is afforded absolute protection. Any liberty interest to which pretrial detainees are entitled must be weighed against compelling, possibly subordinating state interests. Before this "balancing" of competing interest occurs, it is necessary to determine the level of protection pretrial detainees in Bee's position are due. The Tenth Circuit looked to *Bell v. Wolfish*[113] for guidance as to the level of protection applicable to pretrial detainees. Under *Bell*, while not permitted the protections of a free person, Bee, as a pretrial detainee, retained fundamental rights at least as extensive as those of convicted prisoners.[114] Although the Tenth Circuit concluded under the *Bell* test that, absent an emergency, the governmental activities in *Bee* were not reasonably related to legitimate state interests, the court never recognized the fact that in *Bell* no fundamental rights were involved.[115] It is unclear whether the Tenth Circuit merely overlooked this distinction or whether the court determined that the presence of a fundamental right would not change the "reasonable relationship" standard.

Another distinguishing trait of pretrial detainees is their presumption of innocence, a factor which might cause a court to treat them in a manner similar to free persons. However, the Court in *Bell* gave no weight to this consideration when determining the rights of pretrial detainees.[116] Nor did the Tenth Circuit mention the issue in *Bee*.

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110. "The First Amendment protects the communication of ideas. That protected right of communication presupposes a capacity to produce ideas. . . . Whatever powers the Constitution has granted our government, involuntary mind control is not one of them, absent extraordinary circumstances." *Rogers*, 478 F. Supp. at 1367.

111. *But see infra* text accompanying notes 117-119.

112. As long as a mental patient is given due process procedures, he may also be judicially submitted to treatment. *See* Comment, *The First Amendment Right to Freedom of Thought as Applied to Involuntarily Committed Mental Patient's Right to Refuse Drugs*, 26 ST. LOUIS U.L.J. 973 (1982).

113. 441 U.S. 520 (1979).

114. *Id.* at 545. *See supra* text accompanying note 50.

115. 441 U.S. at 539.

116. "Without question, the presumption of innocence plays an important role in our

Further, in determining the appropriate level of protection, the Tenth Circuit declined to view Bee as a mental patient. In light of Bee's mental health history, the court might have viewed him as a mental patient, in addition to a pretrial detainee. As set forth in *Youngberg v. Romeo*,[117] although an involuntarily committed individual necessarily loses certain rights, a mental health patient also retains certain fundamental protections.[118] The *Bee* court could have strengthened its analysis regarding the level of Bee's constitutional protection by defining Bee as a mental health patient in addition to a pretrial detainee.[119] The court in *Bee* reached the correct level of protection for Bee, but overlooked an important consideration.

C. *State Interests and Levels of Review*

1. Duty to Treat Medical Needs of Patients

The defendants in *Bee* initially argued that the jail is under a constitutional duty to "treat the medical needs of pretrial detainees."[120] The Tenth Circuit disposed of this assertion as a misstatement of law. Contrary to the interpretation offered by the defendants, a jail's duty to medically or psychologically treat its inmates is purely conditional upon the request and desire of the inmates themselves.[121] Further, to hold that the state has a right to forcibly treat detainees at will, regardless of any standard as to legitimacy in the government's objectives, is to completely disregard all that *Bell* stands for.[122] Thus, the court in *Bee* rightfully rejected this attempt by the defendants to allege a legitimate state concern which simply does not exist. However, the other two state interests set forth were legally sound, whether or not applicable to the context of *Bee*.

2. Maintaining Bee's Competency to Stand Trial

Based upon *Jackson v. Indiana*,[123] there is a legitimate state interest, validly identified by the court in *Bee*, to bring the accused to trial in a

criminal justice system. . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Id.* at 533.

117. 457 U.S. 307 (1982).

118. *See supra* notes 31-36 and accompanying text.

119. Bee spent a substantial amount of time in the Salt Lake mental health facility. Moreover, he was treated by two state employed psychiatrists. Arguably, Bee could have been considered a mental health patient. *See supra* notes 4-13 and accompanying text.

120. 744 F.2d at 1395.

121. *See supra* notes 88-89 and accompanying text.

122. *See supra* notes 55-58 and accompanying text.

123. 406 U.S. 715 (1972). In *Jackson*, the Supreme Court found that a state has a limited right to commit incompetent criminally accused persons for a period of time, without a due process hearing. The detainee may be held "only for a 'reasonable period of time' necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future." *Id.* at 733. *See also* Cook v. Ciccone, 312 F. Supp. 822 (W.D. Mo. 1970) (where an unconvicted person is confined in federal custody and where it is clear that lack of competency to stand trial is permanent or has existed for an unreasonable period of time and there is not likely to be an immediate change, such person should be ultimately transferred to state authorities for adequate control and treatment).

state of mental competency. However, nothing in *Jackson* defines this state interest as "compelling." On the contrary, the Supreme Court in *Jackson* severely restrained a state's attempts to detain a criminal defendant for an indeterminate time or "until sane."[124] The court in *Bee* reached the appropriate conclusion under *Jackson*, but did not mention the case, nor call upon the above standards. The court chose instead to question whether a state interest in bringing a competent defendant to trial is ever "sufficiently compelling" to outweigh all of the aforementioned liberty interests.[125] Thus, while failing to cite any helpful authority to justify its position, the court in *Bee* was accurate in doubting that the interest in bringing a competent defendant to trial could ever be compelling enough to outweigh that defendant's numerous liberty interests against involuntary medication.[126]

However, this discussion is mere speculation on dicta, as the Tenth Circuit, relying on the lower court's finding that Bee was competent to stand trial, stated that the issue of Bee's competency is "not implicated in this case."[127] There is a strong inference in the record that when the Utah court found Bee competent to stand trial, Bee was under the influence of Thorazine.[128] In fact, the state psychiatrists who treated Bee were of the opinion that Bee would require continued Thorazine treatment to maintain his competency to stand trial.[129] A constant dosage of Thorazine would have a tremendous impact, not only on Bee's competency to stand trial, but also on his general demeanor as a witness.[130] Thus, there is at least a strong implication within the facts of *Bee* that Bee's competency was artificially controlled, and that his competency to stand trial was a direct product of the effects of an extremely potent tranquilizer. Apparently this was completely overlooked by the Tenth Circuit judges who relied upon the federal district court's reliance upon the state court's finding that Bee was competent to stand trial.[131]

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124. If the defendant does not attain a status of competency in a reasonable period of time, the state must either release the defendant or "institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen." *Jackson*, 406 U.S. at 738. *See also* Gobert, *Competency to Stand Trial: A Pre- and Post-* Jackson *Analysis*, 40 TENN. L. REV. 659 (1973).

125. *Bee*, 744 F.2d at 1395. The court might have strengthened its position by drawing an analogy to *Jackson*. If a state is prevented from retaining in its custody a legally incompetent defendant beyond a reasonable amount of time, then it follows that a state may not attempt to keep a person competent through the harsher liberty violation of forced medication.

126. This is particularly true since first amendment protections are implicated. Only "sufficiently compelling" state interests may override first amendment protections. *See supra* notes 43-48 and accompanying text.

127. 744 F.2d at 1395.

128. *See supra* notes 7-10 and accompanying text.

129. *See supra* note 8.

130. *See supra* notes 1 and 10 and accompanying text; *see also* Davis v. Hubbard, 506 F. Supp. at 927 ("Though there appears to be no generally accepted theory that explains the biochemical manner in which the drugs work, the beneficial effects of antipsychotic drugs are on thought processes and the brain's ability to sort out and integrate perceptions and memory. That is, they stabilize and blunt thought processes.").

131. While not an issue in *Bee*, the possibility of conviction while under the influence of Thorazine would involve the question of a criminal defendant's right to a fair trial. *See* Pledger v. United States, 272 F.2d 69 (4th Cir. 1959) (motion to vacate sentence of con-

3. Jail Security and the "Emergency" Standard

Both Bee and the defendants agreed that forced medication with psychotropic drugs may be required in an "emergency."[132] The Tenth Circuit, in remanding the issue to the trial court for a ruling on whether an emergency existed, outlined the "reasonable relation" test of *Youngberg v. Romeo*.[133] The court provided that the decision of what constitutes an emergency is to be decided on a case by case basis with deference to the "professional judgment" of medical authorities.[134] However, in listing the considerations to be analyzed in determining on remand whether an emergency existed,[135] the court in *Bee* departed from the *Youngberg* standard and seems to authorize the much higher level of judicial review inferred in the "less intrusive means" standard.[136] The court attempted to justify its deviance from the traditional standard by arguing that *Youngberg* is distinguishable as it does not contemplate the "severe effects" of antipsychotic drugs.[137] Although it is well-established that the side-effects of Thorazine and other psychotropic medications are severe and more permanent than other forms of restraint,[138] the Supreme Court, in *Rennie I*,[139] had the opportunity to change the level of review pertaining to cases specifically involving forced medication with antipsychotic drugs. Yet, the Court elected to maintain the *Youngberg* "professional judgment" standard. As set forth in the Third Circuit's opinion on remand,[140] the

> Supreme Court thus declined to adopt a "least intrusive means" analysis, and remanded both *Rennie*, [citations omitted] and *Rogers v. Okin* [citations omitted] to their respective courts. *Mills* involved the same issue as *Rennie*, namely, the constitutionality of the forcible administration of antipsychotic drugs to involuntarily committed mental patients. *Rennie* was remanded specifically for reconsideration in light of the Supreme Court's opinion in *Youngberg*.[141]

Thus, the Tenth Circuit sidestepped the Supreme Court's tacit rul-

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victed felon remanded for further consideration where defendant was incapacitated at time of trial due to the influence of narcotics); State v. Hancock, 426 P.2d 872 (Or. 1967) (criminal conviction affirmed because tranquilizers given to defendant did not deprive him of the ability to comprehend the nature of the proceedings and to assist in his own defense); State v. Murphy, 355 P.2d 323 (Wash. 1960) (new trial granted for defendant convicted of murder; defendant's attitude, appearance, and demeanor may have been influenced by tranquilizers during trial). For an in-depth treatment of this issue as it applies to psychotropic drugs, see Winick, *Psychotropic Medication and Competence to Stand Trial*, 1977 AM. BAR FOUND. RES. J. 769.

132. 744 F.2d at 1395.

133. 457 U.S. 307 (1982). *See supra* notes 31-38 and accompanying text.

134. 744 F.2d at 1396.

135. The considerations included the "nature and gravity of the safety threat, the characteristics of the individual involved, and the likely effects of particular drugs." *Id.*

136. *Id.*

137. *Id.* n.7.

138. *See supra* note 10 and accompanying text.

139. 458 U.S. 119 (1982).

140. *Rennie II*, 720 F.2d 266 (3d Cir. 1983).

141. *Id.* at 268.

ing that cases involving psychotropic medications should be evaluated according to the *Youngberg* "professional judgment" standard. In its efforts to provide a high degree of protection for Bee and others subjected to similar treatment, the Tenth Circuit appears to have exceeded the limitations on individual liberty interests, necessarily imposed by competing legitimate state objectives, as proscribed by the Supreme Court.

CONCLUSION

Bee v. Greaves straddles the law of several Supreme Court decisions. Bee was a pretrial detainee who was subjected to forced medication with a potentially dangerous drug. While the holding reached by the Tenth Circuit is accurate, several important points were overlooked by the court. The court ignored the possibility that without Thorazine, Bee may not have been competent to stand trial, a factor which would have been evident to the state court at his competency hearing. At that point, Bee would have undergone civil commitment. Similarly, the court should have considered Bee to be a mental patient as well as a pretrial detainee. Finally, in its "less intrusive means" language, the court appears to stray from the traditional standard of review attributed to cases of this nature. The holding in *Bee* is otherwise reasonable, affording persons like Bee numerous constitutional protections, while allowing room for subordinating state interests. Absent a clear showing of an emergency situation, Bee, and those like him in future decisions, will be adequately shielded by the Constitution from incidents of forced medication with antipsychotic drugs.

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