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NOTES

LEGISLATIVE CONTEMPT AND DUE PROCESS: THE GROPPI CASES

On October 1, 1969, the Wisconsin Assembly¹ passed a resolution directing the imprisonment of the Rev. James E. Groppi for up to six months.² In so doing, the Assembly “. . . afforded [Groppi] no

1. The lower house of the Wisconsin Legislature.

2. Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county [Madison] jail.

In that James E. Groppi led a gathering of people on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted “disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings” and is an offense punishable as a contempt under Section 13.26(1)(b) of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27(2) of the Wisconsin Statutes; and, be it further

Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

Ass’y Res. 6, 1969 Spec. Sess.

Assembly Rule 10, in the words of the Wisconsin Supreme Court, “. . . provides who has floor privileges when the Assembly is in session. Needless to say, neither Groppi nor his followers qualified or had permission. . . .” State *ex rel.* Groppi v. Leslie, 44 Wis. 2d 282, 291, 171 N.W.2d 192, 196 (1969). Article IV, § 8 of the Wisconsin constitution provides in relevant part:

Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior. . . .

WIS. STAT. §§ 13.26-27 (1967), since amended to apply to legislative committees as well as to the parent houses [Wis. Laws 1969 ch. 367, eff. Feb. 12, 1970], provided:

13.26(1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members; but only for one or more of the following offenses:

(a) . . . [arresting members] . . .

(b) Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings.

(c) . . . [refusing to testify] . . .

(d) . . . [bribery of a member] . . .

specification of the charge against him, no notice of any kind, and no hearing of any kind."³ A recent decision by the Court of Appeals for the Seventh Circuit has sustained the Assembly's action.⁴ An examination of the events that precipitated the Assembly's "extraordinary"⁵ response and the various reactions of the judiciary to Groppi's effort to gain his liberty provides insight into the law of legislative contempt and also offers an illustration of the flexibility of habeas corpus as a remedy for deprivation of due process rights.

Facts

An extensive recitation of the facts is particularly important for comprehension of legal questions raised in the *Groppi Cases*.⁶ For example, the contempt resolution, of which the events of September 29, 1969, were the fountainhead, speaks largely in conclusory terms. Although the court of appeals deemed these terms adequate,⁷ it found it necessary to supplement the resolution with "facts" added by the Wis-

(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature.

13.27(1) Whenever either house of the legislature orders the imprisonment of any person for contempt under s. 13.26 such person shall be committed to the Dane county jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law.

(2) Any person who is adjudged guilty of any contempt of the legislature, or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane county, and may be fined not more than \$200 or imprisoned not more than one year in the county jail.

3. Groppi v. Leslie, 311 F. Supp. 772, 774 (W.D. Wis. 1970).

4. Groppi v. Leslie, 436 F.2d 331 (7th Cir. 1971), *aff'g on rehearing en banc* 436 F.2d 326 (7th Cir. 1970).

5. So termed by federal District Judge James E. Doyle. Chicago Tribune, Oct. 7, 1969, § 1, at 3, col. 1.

6. The *Groppi Cases* are the state and federal habeas corpus proceedings for which reported decisions exist: State *ex rel.* Groppi v. Leslie, 44 Wis. 2d 282, 171 N.W.2d 192 (1969) (per curiam) and Groppi v. Leslie, 436 F.2d 331 (7th Cir. 1970) (4-3 decision), *aff'g on rehearing en banc* 436 F.2d 326 (7th Cir. 1971) (3-0 decision), *rev'g* 311 F. Supp. 772 (W.D. Wis. 1970). Two related cases are not treated in this note. State *ex rel.* Groppi v. Leslie, No. 128-425 (Cir. Ct. for Dane County, Oct. 8, 1969) is unreported. In addition, this case lost its significance as a state remedy requiring exhaustion (see text accompanying notes 69-70 *infra*) when the Wisconsin Supreme Court took original jurisdiction. Groppi v. Froehlich, 311 F. Supp. 765 (W.D. Wis. 1970), an action for declaratory and injunctive relief under 42 U.S.C. § 1983 (1964), is omitted because it has no bearing on the proceedings in habeas corpus. *But see* note 20 *infra*.

7. While the resolution adopted by the Wisconsin Assembly might well have spelled out the alleged misconduct of Groppi with greater particularity, it nevertheless is couched in terms of ultimate fact which we do not find lacking in adequate specificity.

436 F.2d 331, 332.

consin Supreme Court in an uncommon exhibition of judicial notice.⁸ Analysis of the factual setting is likewise useful in demonstrating the evil against which the law guards by requiring prosecutors and judges⁹ to specify the words or acts that they allege or find to constitute a crime.¹⁰ The factual summary within the resolution is so sketchy as almost to beg for elaboration. Points at which the court of appeals and the Wisconsin Supreme Court reasoned on the basis of seemingly erroneous or misleading assumptions of fact are noted.

In August, 1969, the Wisconsin Legislature had cut the welfare budget by 24,000,000 dollars. Although the Legislature was still in regular session, the Governor called it into special session to deal exclusively with a proposed supplemental budget that restored the welfare funds. The Senate and Assembly were scheduled to meet in Madison in the Assembly chamber at 2:30 p.m., September 29, to hear the Governor's opening address. Approximately one-half hour before the time of meeting, the chamber's locked doors were forced open, and, within minutes, 1,000 people had filed into the empty hall, filling every available space. They were there to demonstrate their opposition to the welfare cuts. Their leader was Groppi, a Roman Catholic priest and civil rights activist from Milwaukee.¹¹

Late in the afternoon, after consultation with the Attorney General, Groppi asked the demonstrators to move out of the seats and into the side aisles and the gallery. Shortly thereafter about half the assemblymen came in and quickly adjourned until the next day.¹² The demonstrators re-

8. 436 F.2d 326, 328 n.2, quoting 44 Wis. 2d at 288, 171 N.W.2d at 194. This fact-finding without evidentiary hearing was the subject of strong criticism in the district court. 311 F. Supp. at 777 n.5. The only facts before the courts were those few contained in the resolution itself. 436 F.2d 326, 328.

9. The Assembly performed the duties of both.

10. Circuit Judge Kiley cited as examples of matters governed by this requirement a judicial summary contempt order, a complaint for disorderly conduct and an indictment. 436 F.2d 331, 336-37 (dissenting opinion).

11. For an account of some of Groppi's previous activities in that city, see Comment, *The Mediation of Civil Rights Disputes: Open Housing in Milwaukee*, 1968 Wis. L. Rev. 1127.

12. This is evidently the basis of the resolution's assertion that Groppi's group ". . . by its presence on the floor of the Assembly during a meeting of the 1969 regular session . . . prevented the Assembly from conducting public business. . . ." (emphasis added). For the text of the resolution see note 2 *supra*. It seems likely that the court of appeals and the Wisconsin Supreme Court imagined the demonstrators to have entered the chamber while the Assembly was meeting, rather than the converse. For example, the supreme court opinion begins:

On September 29, 1969, during a regular meeting of the Assembly . . .

Groppi led a crowd of noisy protesters into the state capitol building and proceeded to "take over" the Assembly chamber The Assembly was unable to proceed

44 Wis. 2d at 288, 171 N.W.2d at 194 (emphasis added).

mained, their numbers dwindling gradually. At about midnight the 300 to 400 remaining demonstrators permitted themselves to be removed peacefully. No arrests were made.¹³

The next evening the contempt resolution was introduced in the Assembly. Its sponsors failed by two votes to achieve the two-thirds majority¹⁴ necessary to suspend the rules and consider the resolution that day without referring it first to a committee.¹⁵ The following afternoon, October 1, Groppi was arrested on a warrant charging him with having committed the misdemeanor of disorderly conduct¹⁶ during the Assembly

Circuit Judge Pell, author of both opinions in the court of appeals, accepted this recital by the Wisconsin court. See note 8 *supra*. He also utilized the concept of the demonstrators having invaded the Assembly during a meeting in his attempt to refute the district court's contention that the analogy between the legislative situation and the strict rules governing summary judicial imposition of contempt penalties could not be maintained:

In view of the fact that regularly constituted legislative sessions are frequently marked by substantially less than a full attendance on the "floor" by all members of the body, it may be arguable whether the strict standards enunciated in *In re Oliver*, 333 U.S. 257, 274-75 (1948), need be scrupulously observed or whether it may not be adequate that proceedings were disrupted for those *who were in the chamber at the time*, that no *further* proceedings could be had during the continuance of the *invasion* and that the resolution of punishment be adopted by at least a majority

436 F.2d 326, 329 (emphasis added except for case name; footnote omitted). For further discussion of the judicial analogy argument, see text accompanying note 126 *et seq. infra*.

13. The events of September 29, 1969, were gathered from articles in N.Y. Times, Sept. 30, 1969, at 35, col. 1, and Chicago Tribune, Sept. 30, 1969 § 1, at 1, col. 4.

14. The Assembly has 100 members.

15. N.Y. Times, Oct. 1, 1969, at 25, col. 1; Chicago Tribune, Oct. 1, 1969, § 1, at 7, col. 3. The Wisconsin Supreme Court disregarded the passage of September 30. After stating the "events" of September 29 (see text accompanying note 13 *supra*), the court continued:

The Assembly convened on October 1, 1969, and passed a resolution finding the petitioner in contempt for "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings."

44 Wis. 2d at 288-89, 171 N.W.2d at 194 (footnote omitted). That the Assembly took no action against Groppi at the first available opportunity tends to belie the argument that the action, when taken, was necessary for the Assembly's continued existence as a legislative body. See text accompanying notes 115-25 *infra*. It also goes far toward destroying the judicial analogy. See text accompanying note 126 *et seq. infra*.

16. WIS. STAT. § 947.01 (1967), as amended by Wis. Laws 1969 ch.73; eff. June 18, 1969, states in relevant part:

Disorderly conduct. Whoever does any of the following may be fined not more than \$200 or imprisoned not more than 90 days or both:

(1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance

The statute has been the subject of scholarly criticism. See generally Note, *Disorderly Conduct Statute: Why It Should Be Changed*, 1969 Wis. L. REV. 602. It has, nevertheless, been sustained against charges that it is unconstitutionally vague and overbroad on its face. *Zwicker v. Boll*, 270 F. Supp. 131 (W.D. Wis. 1967), *aff'd per curiam*, 391 U.S. 353 (1968); *Soglin v. Kauffman*, 286 F. Supp. 851 (W.D. Wis. 1968).

incident. Groppi refused to post bail and was held in the Dane county jail. While he was in jail that evening, the Assembly passed, after five hours of debate, the contempt resolution by a vote of 71-24.¹⁷

On October 2, Groppi filed suit in the United States District Court for the Western District of Wisconsin, seeking the enpanelment of a three-judge district court to declare the legislative contempt statutes unconstitutional and to enjoin the defendant legislators, prosecutor, and sheriff from enforcing them or the contempt resolution against him.¹⁸ Federal District Judge James E. Doyle, on October 6, granted Groppi's request for a three-judge court, but refused him a temporary restraining order,¹⁹ stating that issuance of such an order would accomplish the same result as granting habeas corpus—Groppi's release from custody under the resolution—but would bypass the statutory requirement that Groppi exhaust his state remedies.²⁰

Groppi filed a petition for habeas corpus in the Circuit Court for Dane County.²¹ Having been refused bail in that court, he asked the

The disorderly conduct charge against Groppi was eventually dismissed after trial and a hung jury. *Milwaukee Journal*, Nov. 21, 1970, at 1, col. 2.

17. *N.Y. Times*, Oct. 2, 1969, at 34, col. 1; *Chicago Tribune*, Oct. 2, 1969, § 1, at 1, col. 6. For the text of the resolution see note 2 *supra*. That Groppi was in jail at the time the resolution passed went completely unheeded by the courts. Consideration of this fact would have assisted in establishing the disingenuousness of the "necessity" or "self-preservation" argument mentioned in note 15 *supra*. At the time the resolution passed, a bench warrant from Milwaukee also sought Groppi's arrest to review his probationary status on a conviction there for resisting arrest during an open housing march. *N.Y. Times*, *supra*, col. 4. That conviction has since been vacated by the United States Supreme Court because of the trial court's refusal to allow a venue change on a misdemeanor charge. *Groppi v. Wisconsin*, 400 U.S. 505 (1971).

A spokesman for the state Attorney General announced on October 1 that the Assembly resolution would take precedence over all other charges. *Chicago Tribune*, *supra* at 2, col. 3.

18. *Groppi v. Froehlich*, 311 F. Supp. 765 (W.D. Wis. 1970). See note 6 *supra*.

19. *Chicago Tribune*, Oct. 7, 1969, § 1, at 3, col. 1.

20. 28 U.S.C. § 2254(b) (1964). Judge Doyle's implicit determination that 28 U.S.C. § 2241(c) (3) (1964) required Groppi to exhaust his state remedies before seeking relief through federal habeas corpus is open to question. See note 70 *infra*. His refusal to issue a temporary restraining order, however, is clearly correct. The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964), may not be employed to evade the requirements of the habeas statutes, 28 U.S.C. § 2241 *et seq.* (1964). See authorities cited by the three-judge district court. *Groppi v. Froehlich*, 311 F. Supp. 765, 767 n.1 (W.D. Wis. 1970).

The three-judge court decided to restrict itself to the issues raised by a possible "second confinement" under the provisions of Wis. STAT. § 13.27(2) (1967). *Id.* at 767. It dismissed the complaint, largely because:

We have construed § 13.27(2) to require that [Groppi] be afforded procedural due process in any criminal action commenced in a state court, including a trial of the underlying issues of fact.

Id. at 771.

21. *Chicago Tribune*, Oct. 7, 1969, § 1, at 3, col. 1. The state statutes involved, in relevant part, are:

Supreme Court of Wisconsin for leave to file an original habeas corpus action²² and for bail. The first request was postponed, the second denied. Groppi then filed a third habeas petition, this time in federal district court.²³ The Dane circuit court denied Groppi relief on October 8.²⁴ That same day, Judge Doyle ordered Sheriff Jack Leslie, respondent in all three habeas actions, to show cause within two days why Groppi should not be released on bail.²⁵

The Wisconsin Supreme Court granted Groppi leave to file, denied him bail again, heard arguments on the petition, and, on October 10, denied the petition.²⁶ The next day, after having served ten days of his legislative sentence, Groppi was released by Judge Doyle on 500 dollars bond.²⁷ Six months later, the district court granted Groppi's habeas corpus petition, vacated its bail order, and ordered him released from

WIS. STAT. § 292.01 (1967): (1) Every person restrained of his liberty, except in the cases specified in section 292.02, may prosecute a writ of habeas corpus to obtain relief from such restraint

WIS. STAT. § 292.02 (1967): No person shall be entitled to prosecute such writ who shall have been committed or detained by virtue of the final judgment or order of any competent tribunal of civil or criminal jurisdiction or by virtue of any execution issued upon such order or judgment; but no order of commitment for any alleged contempt or upon proceedings as for contempt to enforce rights or remedies of any party shall be deemed a judgment or order within the meaning of this section; nor shall any attachment or other process issued upon any order be deemed an execution within the meaning of this section.

WIS. STAT. § 292.21 (1967): The court or judge must make a final order to remand the prisoner if it shall appear that he is detained in custody . . .

...

(3) For any contempt, specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged; and

(4) That the time during which such party may be legally detained has not expired.

22. The Wisconsin constitution and habeas statutes allow such jurisdiction: The supreme court . . . shall have power to issue writs of habeas corpus . . .

WIS. CONST. art. VII, § 3.

Application for such writ shall be by petition . . . and may be made to the supreme court . . .

WIS. STAT. § 292.03 (1967).

23. Chicago Tribune, Oct. 8, 1969, § 1, at 16, col. 4.

24. State *ex rel.* Groppi v. Leslie, No. 128-425 (Cir. Ct. for Dane County, Oct. 8, 1969) (*see note 6 supra*).

25. Chicago Tribune, Oct. 9, 1969, § 3, at 15, col. 4.

26. Chicago Tribune, Oct. 11, 1969, § 1, at 5, col. 1. Although the Wisconsin Supreme Court's opinion was not delivered until October 17 (and the case is designated in the state reporter as having been "decided" that day), the order denying Groppi's petition was entered on October 10. Brief for Appellant at 5, Groppi v. Leslie, 436 F.2d 326 (7th Cir. 1970).

27. Chicago Tribune, Oct. 12, 1969, § 1, at 30, col. 1. Milwaukee county sheriff's deputies rearrested Groppi on the ten-day-old bench warrant (*see note 17 supra*) as he left Judge Doyle's chambers after posting bond. They returned him to Milwaukee. *Id.*

custody and from any further restraint pursuant to the contempt resolution.²⁸ On appeal, a three-judge panel of the court of appeals unanimously reversed.²⁹ A rehearing en banc upheld the panel's decision by a 4-3 margin.³⁰

The Law of Contempt

A brief examination of the complexities of the law of contempt will assist in a clearer understanding of the *Groppi Cases*.

Contempt can be generally defined as an act of disobedience or disrespect toward a judicial or legislative body of government, or interference with its orderly process, for which a summary punishment is usually exacted.³¹

The first important distinction is that between judicial and legislative contempts. Although the *Groppi Cases* involved the latter, this does not render consideration of judicial contempt unnecessary. To the contrary, contempt of court is important in two respects.

First, all three courts felt compelled to establish that the procedures followed by the Assembly either were or were not analogous to those employed by a judge confronted with contemptuous behavior in his courtroom.³² Second, the vocabulary of judicial contempt, including its underlying concepts, appears in the Wisconsin legislative contempt statutes, the resolution, and the courts' opinions.³³ However inappropriate it may be that language and concepts developed for one situation be used in another,³⁴ it is imperative that these sources be understood. It is,

28. 311 F. Supp. at 782.

29. 436 F.2d 326.

30. 436 F.2d 331.

31. R. GOLDFARB, *THE CONTEMPT POWER* 1 (1963) [hereinafter cited as *GOLDFARB*].

32. The Wisconsin Supreme Court specifically disclaimed any interest in the judicial analogy argument:

We make no reference by analogy to the judicial power of courts to punish for direct contempt which is of a different scope and nature.

44 Wis. 2d at 295, 171 N.W.2d at 197. The court then turned immediately to that very argument and devoted three paragraphs to a discussion of it. *Id.* at 295-96, 171 N.W.2d at 197-98. Both federal courts met the argument directly. 311 F. Supp. at 775-80; 436 F.2d 326, 329-30. For further discussion of the judicial analogy argument, see text accompanying note 126 *et seq. infra*.

33. Examples will be noted when appropriate in the text following.

34. All these variations [of contempt] apply only to the contempt of court power. Contempt of Congress is of one basic kind, and these shadings are not applied. Congressional contempt is criminal, deriving from a federal criminal statute, and is prosecuted procedurally as such.

GOLDFARB supra note 31, at 47. Contempt of court and contempt of Congress do not exhaust the field, however. Congress has, indeed, used 2 U.S.C. § 192 (1964) and its predecessors exclusively since World War II. *Watkins v. United States*, 354 U.S. 178,

moreover, interesting to speculate on the extent to which the presence of judicial contempt terminology³⁵ induced judges unfamiliar with the rarer legislative type³⁶ to ignore the historical, evidentiary, and perhaps constitutional differences between the two.

The law of contempt is bizarrely dichotomous.³⁷ Many of the bifurcate categorizations of the past have now fallen into disuse,³⁸ but

206 (1957) (*see* note 58 *infra*). Prior to that time, however, Congress employed traditional legislative contempt procedures under claim of an inherent right to protect itself. The Wisconsin Assembly alleged a similar right in proceeding against Groppi. Brief for Appellant at 10, *Groppi v. Leslie*, 436 F.2d 326 (7th Cir. 1970). For a discussion of these traditional legislative contempt procedures, see text accompanying notes 55, 57-58 *infra*.

Besides Wisconsin, 37 states have in force constitutional and/or statutory provisions dealing specifically with contempt of the legislature: ALA. CONST. art. 4, §§ 53-54; ARIZ. REV. STAT. ANN. § 41-1155 (1956); ARK. CONST. art. 5, § 12; CAL. GOV'T. CODE §§ 9050-51 (West 1966); COLO. CONST. art. V, § 12; FLA. CONST. art. 3, § 5 (during investigations only); GA. CONST. art. III, § 7, para. 2; HAWAII CONST. art. 3, § 19; SMITH-HURD ILL. ANN. STAT. ch. 63, §§ 9, 11-12 (1959), ILL. CONST. art. 4, § 9; IND. CONST. art. 4, § 15; IOWA CODE ANN. §§ 2.18-.22 (1967); KY. REV. STAT. § 6.070-.071 (1971), KY. CONST. § 39; LA. STAT. ANN.-REV. STAT. 24:4-6 (1969), LA. CONST. art. 3, § 11; ME. CONST. art. IV, pt. 3, § 6; MD. CONST. art. III, § 23; MASS. CONST. pt. 2, ch. 1, § 3, arts. X-XI; MINN. STAT. ANN. §§ 3.14-151 (1967), MINN. CONST. art. 4, § 18; MISS. CODE ANN. §§ 2258-59, 2530, 3342, 3361 (1942), MISS. CONST. art. 4, § 58; VERNON'S ANN. MO. STAT. §§ 21.030, 21.050 (1952), MO. CONST. art. 3, § 18; REV. CODES MONT. 94-2901 to-2902 (1969), MONT. CONST. art. V, § 11; REV. STAT. NEB. §§ 50-105 to-106 (1968), NEB. CONST. art. III, § 10; NEV. REV. STAT. 218.540 (1967), NEV. CONST. art. 4, § 7; N.H. CONST. pt. 2, arts. 22-23; N.M. CONST. art. IV, § 11; N.D. CENT. CODE ANN. §§ 54-03-17 to-18, 12-09-01 to -04 (1960), N.D. CONST. § 48; OHIO CONST. art. II, § 8; OKLA. STAT. ANN. tit. 21, §§ 301-04 (1958), OKLA. CONST. art. 5, § 42 (during investigations only); ORE. CONST. art. IV, § 16; PA. CONST. art. 2, § 11; R.I. CONST. art. 4, § 7; S.C. CONST. art. 3, § 13; S.D. Comp. Laws §§ 2-4-14 to -15 (1967); TENN. CONST. art. 2, § 14; TEX. CONST. art. 3, § 15; UTAH CODE ANN. §§ 76-28-13 to -14 (1953); REV. CODE WASH. ANN. 9.55.010 (1969), WASH. CONST. art. 2, § 9; W. VA. CONST. art. 6, § 26; WYO. CONST. art. 3, § 12.

35. One must note that these classifications are signally important. With each labeling of a given contempt, a different door is opened to a different legal arena and a new association of participating procedures and characteristics. These classifications go to the heart of an accused contemnor's liberty and property rights. The decision-maker's every treatment of a contempt case involves a kaleidoscope of legal procedures. One turn, one move of position causes a swirl of new and special legal relationships between government and the individual. This aspect of the law of contempt is as reasonable as Russian roulette. Often also the results are tragic.

GOLDFARB *supra* note 31, at 48.

36. The only previous reported case involving use of the contempt power by the Wisconsin Legislature was *In re Falvey*, 7 Wis. 528 (1858).

37. But this penchant for dividing contempts into categories and opposites has been typical and has grown to confuse and often plague the common lawyer. It was as if our forebears were so calculating that they not only endowed us with this debatable legal tool, but so complicated matters as to make our use of it difficult, and at times incomprehensible.

GOLDFARB *supra* note 31, at 46. Although Mr. Goldfarb criticizes this approach and makes several excellent proposals for changing the entire conceptual basis of contempt law (*Id.* at 280-308), it is necessary to deal in this note with the law as it is.

38. *Id.* at 47. These include ordinary-extraordinary, *United States v. Anonymous*, 21 F. 761 (C.C.D. Tenn. 1884); contempt of the court's power-contempt of its authority,

the civil-criminal and direct-indirect distinctions remain popular.³⁹ The method of adjudging guilt and imposing punishment in a contempt is likewise described as either summary or non-summary. Each of these divisions was significant in the *Groppi Cases*.

Originally, all contempts were what now would be denominated criminal. Criminal contempts, in the words of Judge Learned Hand, are "those which result in a punishment, vindictive as opposed to remedial. . . ."⁴⁰ Civil contempt, developed by equity as a procedural device,⁴¹ is coercive.⁴² As such, it looks to future conduct rather than completed acts. The civil contemnor is not an attractive candidate for judicial sympathy because he is classically a recalcitrant defier of the court with the prison keys in his pocket.⁴³ It is this image that the Wisconsin court tried to conjure up by describing the legislative power as "more in the nature of what is known as civil contempt."⁴⁴ The court carried the image further, stressing what it found to be the exclusively coercive nature of legislative contempt in Wisconsin: "Its function is not to punish for a past deed but to prevent threatened conduct which interferes with the proper function of the legislative body."⁴⁵

The district court and the court of appeals refused to acquiesce in this characterization of the Assembly's contempt power.⁴⁶ Even if the

6 ENCYCLOPAEDIA OF THE LAWS OF ENGLAND [A. Renton ed. 1897], cited in GOLDFARB *supra* note 31, at 47; and an imaginative trichotomy by Lord Chancellor Hardwicke:

There are three different sorts of contempt.

One kind of contempt is, scandalizing the court itself.

There may be likewise a contempt of this court, in abusing parties who are concerned in causes here.

There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard.

Roach v. Garvan, 26 Eng. Rep. 683, 684-85 (Ch. 1742).

39. GOLDFARB *supra* note 31, at 47.

These two classifications are always made, and though cases usually turn upon a decision as to one of the two dichotomies, they both are not mutually exclusive. That is to say, though each contempt can be criminal or civil, direct or indirect, criminal or civil contempts are at the same time direct or indirect as well. The opposite is also true.

Id. at 47-48.

40. *McCann v. New York Stock Exch.*, 80 F.2d 211, 214 (2d Cir. 1935).

41. GOLDFARB *supra* note 31, at 50.

42. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do.

Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442 (1911).

43. This phrase can be traced to *Williamson's Case*, 26 Pa. 9, 24 (1855).

44. 44 Wis. 2d at 296, 171 N.W.2d at 198.

45. *Id.* This point is tied in very closely with the "necessity" or "self-preservation" argument for the Assembly's action. See text accompanying notes 115-25 *infra*.

46. 311 F. Supp. at 780; 436 F.2d 326, 329. *Quaere*: Was this refusal by the federal courts to accept the highest state court's construction of a matter of state law (the nature of the Assembly's contempt power) proper? See *Erie R.R. v. Tompkins*, 304 U.S.

Wisconsin court's recognition of an implied⁴⁷ intent in the Assembly were accepted, it is not at all clear that the contemnor being coerced should, or does, possess fewer procedural rights than the contemnor being punished.⁴⁸ The result, imprisonment, is certainly identical.

The terms "direct" and "indirect" apply only to criminal contempts. The difference between the two is typically defined by the use of examples⁴⁹ which make an intuitive sorting relatively simple, but which nearly always fail when the question is close. However, there are characteristics common to all the examples of direct contempt :

Direct contempts are said to be more readily recognizable. They are obstructive acts or inaction or words in the presence of the court which interfere with the administration of justice in obvious, usually physical ways. The issue which typically arises is whether the act was "in the presence of the court." For this purpose, the act may be in the actual presence of the court or in sufficient proximity to have an actual as opposed to a remotely casual effect on the court's work. . . .⁵⁰

The contempt resolution, using statutory language,⁵¹ charges Groppi

64 (1938). Had the federal courts adopted this interpretation, the sole remaining point for federal habeas adjudication would have been whether the Assembly employed the method of "prevention" least destructive of Groppi's constitutional rights.

47. That prevention of future invasions was the Assembly's actual purpose seems hardly tenable. Neither the resolution nor contemporaneous newspaper reports nor the court decisions contain a single suggestion that Groppi planned further disturbance of the Assembly.

48. In a parallel situation, the recent trend of cases in several areas of the law suggests that where the effects of a proceeding on an individual are similar to those usually resulting from a criminal trial, designation of the affair as civil will not obviate the requirement that he be afforded the normal due process safeguards. *See, e.g., In re Gault*, 387 U.S. 1 (1967) (juvenile hearing); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966) (commitment to a mental hospital); *In re Maddox*, 351 Mich. 358, 88 N.W.2d 470 (1958) (imprisonment under sexual psychopathy law).

49. Thus, a treatise writer of the last century listed as direct judicial contempts such diverse acts as:

. . . performing military maneuvers near the court while it is in session, insulting protests against judgments of a court, assault and battery near the courtroom, threatening witnesses near the courtroom, and blaspheming the judge. . . .

S. RAPALJE, A TREATISE ON CONTEMPT § 23 (1884), as quoted in GOLDFARB *supra* note 31, at 70.

Indirect contempts include:

[p]reventing service of process, improper communications to or by jurors, withholding evidence from the jurisdiction of the court, bribing a witness or juror. . . .

GOLDFARB *supra* note 31, at 70-71.

50. *Id.* at 71 (footnote omitted).

51. Disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings.

with what would be a direct contempt in a judicial context.⁵² This fact is important because, in the law of contempt of court, direct contempt justifies summary reprisal.⁵³

If a judge punishes a criminal contempt non-summarily, he requires the filing of a complaint or show-cause order; he permits the accused contemnor counsel, process for witnesses, bail, and a jury trial; he disqualifies himself if the contempt involves disrespect toward him.⁵⁴ If a judge finds a contemnor guilty and sentences him under procedures less regular, his action is summary. In the sense of failing to utilize the ordinary criminal machinery in punishing a contempt, any determination of guilt and imposition of punishment emanating from a legislative body is summary. However, in the narrower sense in which "summary" was used in the *Groppi Cases*, it refers to a procedure on the legislature's part which does not embody the minimal due process safeguards included in the methods by which legislatures have traditionally punished contempt.

These traditional methods may be explained by using as an illustration *Anderson v. Dunn*,⁵⁵ the first Supreme Court case in which the

WIS. STAT. § 13.26(1)(b) (1967). For a fuller text of both the resolution and the statute see note 2 *supra*.

52. This raises again the question of whether the analogy to the judicial contempt power is appropriate. See notes 12 & 32 *supra* and text accompanying note 126 *et seq. infra*. As the quotation from GOLDFARB, (see text accompanying note 50 *supra*) would indicate, a major point at issue in the courts that accepted the analogy was whether an act could be "in the presence" of a 100-member body. 311 F. Supp. at 777-78; 436 F.2d 326, 329-30. The fact that all direct contempts are criminal is further indication, if more were needed, that the contempt for which the Assembly punished Groppi was not "in the nature of . . . civil contempt." See text accompanying note 44 *supra*.

53. The case establishing this proposition in American law is *Ex parte Terry*, 128 U.S. 289 (1888). Recent Supreme Court decisions have restrained somewhat the free hand given to judges by *Terry*. See, e.g., *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). *Mayberry* is especially interesting in that it requires a judge either to "act the instant the contempt is committed," (*Id.* at 463) or to employ less summary modes of procedure, including trial before a different judge. The Assembly, it will be recalled, took two days to react. See text accompanying note 17 *supra*. It, nevertheless, remains a viable proposition that a judicial contemnor's chances of receiving the normal due process protections diminish appreciably if his behavior can be branded direct contempt.

Terry was a crucial event in the fascinating legal drama involving Mr. Justice Field of the United States Supreme Court and David Terry, pre-Civil War Chief Justice of the California Supreme Court and Field's colleague on that bench. See C. SWISHER, STEPHEN J. FIELD 321-61 (1930). A recently published fictionalized account of the affair, although of indefinite factual value, suggests the evils that can follow from unprincipled use of the direct contempt power. E. LIPSKY, *DEVIL'S DAUGHTER* (1969).

54. FED. R. CRIM. P. 42. The federal rules were promulgated by the Supreme Court pursuant to its supervisory power over the inferior federal courts. The due process clause of the fourteenth amendment imposes some undefined requirements on the state courts that they be "fair" in the administration of justice. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971).

55. 19 U.S. (6 Wheat.) 204 (1821). Details of the procedures followed by the House are taken from 2 A. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTA-*

power of a house of Congress to punish for contempt was challenged. In 1818, a member of the House of Representatives accused Anderson, a non-member, of trying to bribe him. He produced a letter purportedly from Anderson. The House adopted a resolution pursuant to which the Speaker⁵⁶ ordered the Sergeant-at-Arms to arrest Anderson and bring him before the bar of the House to answer the charge. When Anderson appeared, the Speaker informed him why he had been brought before the House and asked if he had any requests for assistance in answering the charge. Anderson stated his requests, and the House granted him counsel, compulsory process for defense witnesses, and a copy of the accusatory letter. Anderson called his witnesses; the House heard and questioned them and him. It then passed a resolution finding him guilty of contempt and directing the Speaker to reprimand him and then to discharge him from custody.⁵⁷ The pattern was thereby established of attachment by the Sergeant-at-Arms; appearance before the bar; provision for specification of charges, identification of the accuser, compulsory process, counsel and a hearing; determination of guilt; imposition of penalty. This traditional procedure was followed by both houses of Congress until they abandoned it for a more convenient statutory device.⁵⁸ It was also followed, as far as the reported cases recite procedure,⁵⁹ by every state legislature that used the contempt power from

TIVES OF THE UNITED STATES: §§ 1606-07 (1907). Although *Anderson* was the first challenge to reach the Supreme Court, the House had dealt with contempt before, also a case of attempted bribery, in 1795. *Id.* §§ 1599-603. Representative John Forsyth of Georgia, leader in the proceedings against Anderson, stated that the procedure being employed followed the precedent of 1795. *Id.* § 1606.

56. Henry Clay of Kentucky.

57. Anderson subsequently sued Dunn, the Sergeant-at-Arms, in trespass for assault and battery and false imprisonment. Dunn pleaded the Speaker's warrant as a legal justification and bar to the suit. The procedure employed by the House was not the object of Anderson's legal attack. He challenged, rather, the very existence of the congressional contempt power. The Supreme Court upheld Dunn's defense in an opinion by Mr. Justice William Johnson, portions of which were incorporated into the Wisconsin Supreme Court's opinion in the instant case as authority. 44 Wis. 2d at 294, 171 N.W.2d at 197. The decision in *Anderson* was overruled in most respects by *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

58. 2 U.S.C. § 192 (1964). This statute was originally enacted as Act of Jan. 24, 1857, ch. 19, § 1, 11 Stat. 155.

Until the twentieth century Congress was reluctant to use the statutory provisions of 1857. . . . Since 1945, however, all contempt citations have been prosecuted under the statute of 1857. . . .

C. BECK, CONTEMPT OF CONGRESS 7 (1959).

59. That the court reports are inadequate for a proper study of legislative contempt is patent. Forty-five years ago, a student of the contempt power of the colonial, pre-Constitutional, and early Constitutional legislatures bemoaned the paucity of available research matériel:

Since the constitutions and the court reports are silent we must turn to the Assemblies themselves. What, then, was the practice of the new legislatures?

1795 until 1969.⁶⁰

Habeas Corpus

Groppi sought his freedom and won it temporarily by the ancient⁶¹ writ of habeas corpus. Most challenges to legislative contempt proceedings in the last century have employed this remedy,⁶² and it has several distinct advantages for those who wish to be released rapidly from confinement they deem unlawful. First, almost any judge can grant habeas.⁶³ Second, it pits the captive directly against his immediate captor so that

The answer is to be found scattered through a multitude of legislative journals, usually poorly printed and unindexed, that have not yet been fully explored.

Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 691, 715 (1926).

60. Potts, *supra* note 59, did manage to discover several cases in which early state legislatures, chiefly those of Virginia and New York, used their contempt power "harshly." *Id.* at 725. The word evidently describes the severity of the penalty, not the manner in which the legislatures exercised their power. Potts was interested more in proving the existence of the legislative power than in examining the methods by which it was implemented. *Id.* at 691-92. It should be remembered with regard to these cases, as with such reported cases as *In re Falvey*, 7 Wis. 528 (1858) (*see* note 36 *supra*) and *Ex parte McCarthy*, 29 Cal. 395 (1866) (contemnors denied the right to counsel), that they were decided before the fourteenth amendment applied due process requirements to the states. Nevertheless, not a single American legislative body of which this writer is cognizant, either before or since the fourteenth amendment took effect, has decided a contemnor's guilt and sentenced him to jail without first granting him an opportunity to be heard in his own behalf.

61. The ultimate threads have not been traced but within a century after the victory of William in 1066 . . . the writ of habeas corpus was in general use.

The ultimate origins are surely more remote . . .

R. SOKOL, FEDERAL HABEAS CORPUS § B, at 3 (2d rev. ed. 1969) [hereinafter cited as SOKOL]. At this early date, habeas was used simply to get a reluctant party into court. It did not emerge as an independent action to test the cause of incarceration until the early fourteenth century. *Id.* at 4-6.

62. *See, e.g.*, *Jurney v. MacCracken*, 294 U.S. 125 (1935); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929); *Marshall v. Gordon*, 243 U.S. 521 (1917); *In re Battelle*, 207 Cal. 227, 277 P. 725 (1929); *In re Gunn*, 50 Kan. 155, 32 P. 470 (1893); *Lowe v. Summers*, 69 Mo. App. 637 (1897); *People ex rel. McDonald v. Keeler*, 99 N.Y. 463, 2 N.E. 615 (1885); *Ex parte Dalton*, 44 Ohio St. 142, 5 N.E. 136 (1886); *Ex parte Parker*, 74 S.C. 466, 55 S.E. 122 (1906). *Contra*, *Canfield v. Gresham*, 82 Tex. 10, 17 S.W. 390 (1891) (unlawful and malicious arrest and imprisonment against the Sergeant-at-Arms and fifty-six members).

A tort action has the obvious disadvantage of being unable to free the plaintiff from jail. Furthermore, the contemnor would probably fail to recover damages in state courts because of state constitutional provisions granting immunity to legislators for their official acts. *See Tenney v. Brandhove*, 341 U.S. 367 (1951).

63. Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

28 U.S.C. § 2241(a) (1964).

Application for such writ . . . may be made to the supreme court, or to the circuit court of the county or the county court, or to any justice or judge of the supreme, circuit or county court, or to any court commissioner. . . .

WIS. STAT. § 292.03 (1967).

the petitioner may be freed at once should the judge so order.⁶⁴ Third, the initial burden is upon the respondent to justify the incarceration. Finally, it contemplates a swift determination of the detention's legality.⁶⁵

Groppi won his temporary freedom under 28 U.S.C. § 2241(c) (3),⁶⁶ the lineal descendant of the Habeas Corpus Act of 1867.⁶⁷ As the scope of the rights guaranteed by the Constitution expanded under judicial interpretation of the fourteenth amendment, and habeas began to be used to attack all constitutional defects in a state proceeding,⁶⁸ the

64. SOKOL *supra* note 61, § 7, at 81.

65. A court, justice or judge entertaining an application for a writ of habeas corpus shall *forthwith* award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. The writ . . . shall be returned *within three days* unless for good cause additional time, *not exceeding twenty days*, is allowed.

. . .
When the writ or order is returned a day shall be set for hearing, *not more than five days* after the return unless for good cause additional time is allowed.

28 U.S.C. § 2243 (1964) (emphasis added).

The court or judge to whom such petition shall be properly presented shall grant the same *without delay* unless it shall appear from the petition or from the documents annexed that the party applying therefor is prohibited from prosecuting the same.

WIS. STAT. § 292.06 (1967) (emphasis added).

66. The writ of habeas corpus shall not extend to a prisoner unless—

. . .
He is in custody in violation of the Constitution or laws or treaties of the United States. . . .

28 U.S.C. § 2241(c) (3) (1964).

67. Act of Feb. 5, 1867, ch. 27, 14 Stat. 385. This law was intended to protect the newly emancipated blacks of the South from state interference with their civil rights. See *Fay v. Noia*, 372 U.S. 391, 415-17 (1963); 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 455-97 (rev. ed. 1937).

68. In the 19th century and on into the early 20th the scope of the writ was limited . . . to whether the convicting court had jurisdiction.

SOKOL *supra* note 61, § D, at 20. Under this doctrine, a federal court was powerless to correct most violations of federal constitutional rights committed during the course of state criminal proceedings, so long as the state court had jurisdiction over the defendants. It is significant that the case that removed this limitation on the scope of the federal habeas power, *Moore v. Dempsey*, 261 U.S. 86 (1923), involved both the class of citizens for whose benefit the 1867 Act had originally been enacted (Southern blacks) and the particular right in support of which habeas would thenceforth most commonly be invoked (fourteenth amendment due process). The old limitation was circumvented by inventing a fiction. Denial of due process rights to defendants, it was said, robbed the state court of its jurisdiction over them. Any confinement based on the judgment of such a court was unlawful, for the judgment was a nullity. *Id.* at 91-92.

In his opinion for the Court, Mr. Justice Holmes set the tone for future judicial treatment of allegations that due process rights had been violated:

The petitioners say that [the white man for whose murder they were indicted] must have been killed by other whites, but that we leave on one side, as what we have to deal with is not the petitioners' innocence or guilt, but solely the question whether their constitutional rights have been preserved.

Id. at 87-88. The views of the Wisconsin Supreme Court in the instant case differed considerably from those of Mr. Justice Holmes:

Supreme Court engrafted requirements arising from federal-state comity considerations onto the habeas law. Thus, it was not deemed appropriate for a federal court to release a prisoner from state custody until he had exhausted his state remedies.⁶⁹ In 1948, this doctrine was codified and enacted into statutory law.⁷⁰

Although the writ serves a purpose in testing such diverse restraints as Indian tribal court orders, deportation and exclusion orders, commitments to mental institutions, and extradition proceedings,⁷¹ where the challenge may have a statutory as well as a constitutional basis, ". . . its major office in the federal courts since the Civil War has been to provide post-conviction relief."⁷² These post-conviction habeas proceed-

The petitioner has not sought a hearing in this court or any court on the merits of the contempt issue. He has not offered any defense or denied his acts amounted to a contempt although this court in this proceeding allowed him to amend his complaint to present any matter he wished. *The only issues presented dealt primarily with procedure, not with the issue of his innocence or with the merits of any defense.*

44 Wis. 2d at 297, 171 N.W.2d at 198 (emphasis added).

69. See *Ex parte Hawk*, 321 U.S. 114 (1944); *Urquhart v. Brown*, 205 U.S. 179 (1907); *Ex parte Royall*, 117 U.S. 241 (1886). Compliance with the exhaustion requirement, as a matter of comity only, has never become a prerequisite to federal court jurisdiction. *Fay v. Noia*, 372 U.S. 391, 420 (1963). It represents, rather, a determined effort by one sovereign to defer action until the courts of a sovereign with concurrent jurisdiction have had an opportunity to resolve the matter satisfactorily. SOKOL *supra* note 61, § 22.1, at 162-64. The requirement is met when the petitioner's claims have once been presented to the state's courts. *Id.* § 22.2, at 164. "[I]t is not necessary to urge it upon them a second time under an alternate procedure." *Grundler v. North Carolina*, 283 F.2d 798, 800 (4th Cir. 1960). Groppi exhausted his state remedies as to the issues raised in his state court petition, then, when the Wisconsin Supreme Court denied his motion for rehearing on December 19, 1969. 44 Wis. 2d at 282 n., 171 N.W.2d at 192. See note 76 *infra*.

70. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

28 U.S.C. § 2254(b) (Supp. V, 1970). The codified section contains what may be a significant change in the previous judge-made law. Note that the section requires the petitioner to exhaust his state remedies only if he is held "pursuant to the judgment of a State court." Sokol would read this phrase out of the statute, for the statute was intended to codify existing law, and this had not been part of that law. Further, since Sokol holds that the whole doctrine of exhaustion does not limit the *power* of the federal courts, he thinks

. . . there is even more reason to find it applicable to detention arising out of any state process.

SOKOL *supra* note 61, § 22, at 162.

Although Groppi was not held under a state court judgment, both federal courts seemed to assume that he had first to exhaust his state remedies. 311 F. Supp at 775 n. 1; 436 F.2d 326, 329. Groppi did not contest the point.

71. SOKOL *supra* note 61, § D, at 20.

72. *Peyton v. Rowe*, 391 U.S. 54, 59 (1968) (footnote omitted).

ings are essentially constitutional litigation.⁷³

Groppi's Constitutional Contentions

The issues Groppi raised, with a single exception,⁷⁴ also alleged federal constitutional violations that were as fully before the Wisconsin court as they were before the federal courts.⁷⁵ The only difference between the determinations in the two judicial systems was that, since the exhaustion rule was applied, the state court had to make its decision first.⁷⁶ The federal proceedings were a collateral attack on, rather than a direct review of, the state court's judgment.

Groppi's substantive contention was that the Assembly resolution constituted an unconstitutional bill of attainder⁷⁷ or, more properly, a bill of pains and penalties.⁷⁸ The United States Supreme Court described the forbidden bills as follows :

In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the

73. Of the 7,544 federal habeas petitions filed in 1967, 6,766 were to test the constitutionality of a state or federal conviction. Sokol *supra* note 61, § D, at 20.

74. Groppi challenged the legality, under the state constitution, of the special session which began meeting on September 29, 1969. Evidently, the special session was held during a recess in the regular session. (The resolution cited Groppi for misconduct "during a meeting of the 1969 regular session." See the text of the resolution at note 2 *supra*. This is either an error or an attempt to define the status of the Legislature when the invasion occurred, one-half hour before the scheduled convening of the special session. See text accompanying notes 11-12 *supra*.) The Wisconsin Supreme Court sustained the power of the Governor to call such a session under art. IV, § 11 of the Wisconsin constitution. 44 Wis. 2d at 300, 171 N.W.2d at 200. The district court properly refused to consider the question further, noting that a federal habeas petitioner may challenge the lawfulness of his custody only on the grounds specified in 28 U.S.C. § 2241(c) (3) (1964), *supra* note 66. 311 F. Supp. at 777 n. 4.

75. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
U.S. CONST. art. VI, cl. 2.

76. See note 70 *supra*. *Fay v. Noia*, 372 U.S. 391 (1963), eliminated the previous requirement that an unsuccessful state habeas petitioner apply for certiorari to the United States Supreme Court as a part of his exhaustion of state remedies. *Id.* at 435.

77. No State shall . . . pass any Bill of Attainder. . . .
U.S. CONST. art. I, § 10, cl. 1.

A bill of attainder is a legislative act, which inflicts punishment without a judicial trial.

Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867).

78. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.

Id. The phrase "bill of attainder" will be used in this note to describe both.

forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence.⁷⁹

The courts in the *Groppi Cases* gave the bill of attainder argument less attention than it merited. The Assembly resolution fell within the Supreme Court's definition,⁸⁰ it included a pronouncement of Groppi's guilt⁸¹ without any form of trial, and set his punishment at up to six months' imprisonment, presumably in accordance with the Assembly's view of the enormity of the transgression.

The Wisconsin court, apparently returning to its previous characterization of the legislative contempt power as coercive rather than punitive,⁸² stated that the resolution did not find Groppi "guilty of a crime."⁸³ Thus, it could not be a bill of attainder. In addition to the objections already raised to this description of the legislative contempt power,⁸⁴ and the clear wording of the resolution,⁸⁵ this syllogistic approach ignores the latest Supreme Court decision regarding the bill of attainder clause. In *United States v. Brown*,⁸⁶ the Court found § 504 of the Labor-Management Reporting and Disclosure Act of 1959⁸⁷ violative of the constitutional prohibition. Section 504 made it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union. It likewise disqualified anyone who had been a member within the last five years.⁸⁸ Among the arguments advanced by

79. *Id. Cummings* and a companion case decided the same day, *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867), invalidated state and federal provisions, respectively, that required members of certain professions (*Cummings* was a Roman Catholic priest, *Garland* an attorney) to swear they had given no aid, however remote, to the late Confederacy. The penalty for failure to take this "Ironclad Oath" was interdiction of the right to follow one's chosen profession.

80. The Court has adhered to this definition in the few bill of attainder cases decided since *Cummings* and *Garland*. See *United States v. Brown*, 381 U.S. 437 (1965); *United States v. Lovett*, 328 U.S. 303 (1946). But see *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

81. *Resolved by the Assembly*, That the Assembly . . .

(1) Finds James E. Groppi guilty of contempt of the Assembly . . . Ass'y. Res. 6, 1969 Spec. Sess. For full text of the resolution, see note 2 *supra*.

82. See text accompanying note 45 *supra*.

83. 44 Wis. 2d at 299, 171 N.W.2d at 200.

84. See text accompanying note 48 *supra*.

85. See note 81 *supra*.

86. 381 U.S. 437 (1965).

87. 29 U.S.C. § 401 *et seq.* (1964).

88. The Court speculated that this provision may have been included in order to prevent defeat of the section's purpose by pro forma resignation from the Communist Party. 381 U.S. 437, 458.

the United States to sustain the constitutionality of § 504 was the protestation that the section's purpose was preventive rather than punitive, essentially the Wisconsin Supreme Court's position in the instant case. The Supreme Court rejected this contention:

It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution.⁸⁹

The reasons advanced by the district court for rejecting Groppi's bill of attainder argument are more tenable,⁹⁰ albeit still less than compelling. In essence, the district court recognized the seeming inconsistency between the Supreme Court decisions defining and striking down bills of attainder⁹¹ and those allowing legislative bodies to punish for contempt.⁹² It concluded that these inconsistent positions had been permitted "to co-exist for so many years that I am not free now to hold that the survival of the first demands the extinction of the second."⁹³

It is possible that the Supreme Court has never had the question of this apparent inconsistency before it. The district court assumed⁹⁴ that the dissents of Mr. Justice Black and Mr. Justice Douglas in several congressional contempt cases, primarily in *Barenblatt v. United States*,⁹⁵ were indications that the issue had been raised and that the Court had decided to ignore it. In *Barenblatt*, the defendant had refused to answer five questions posed by a congressional committee investigating Communist activities. Congress had certified the refusal to the United States Attorney, who prosecuted the defendant under the statutory procedure.⁹⁶ In maintaining that the defendant should have been permitted to raise the

89. *Id.*

90. 311 F. Supp. at 781. The court of appeals adopted and approved this portion of the district court's opinion. 436 F.2d 326, 330. Before investigating this part of the opinion, it should be noted, as Judge Doyle made clear, that decision of this point was not necessary, as the court had already found sufficient warrant to free Groppi on due process grounds.

91. See cases cited at note 80 *supra*.

92. See, e.g., Supreme Court cases cited at note 62 *supra*.

93. 311 F. Supp. at 781.

94. Citing *GOLDFARB supra* note 31, at 223.

95. 360 U.S. 109, 134 (1959) (dissenting opinion of Black, J.).

96. 2 U.S.C. § 192 (1964). See notes 34, 58 *supra*.

bill of attainder clause as a defense to the charge, the dissent focused on the punitive nature of the committee's "exposure" tactics.⁹⁷

The *Barenblatt* situation is inapposite in two respects to that presented in the *Groppi Cases*. First, *Barenblatt* was prosecuted for contempt in the courts, where the due process protections of regular criminal procedures were afforded him; *Groppi* was proceeded against in the Assembly, where no due process protections were afforded him. Second, the bill of attainder posited by the dissent in *Barenblatt* was a "legislative program" leading to punishment by exposure;⁹⁸ the bill of attainder in the *Groppi Cases* was a traditional legislative resolution leading to punishment by imprisonment.

In fact, there is no evidence that the bill of attainder argument has ever been before the Supreme Court in a case involving the traditional legislative contempt procedures.⁹⁹ There is, moreover, strong indication in the sweeping language of *Brown*,¹⁰⁰ the last bill of attainder case decided by the Court, that legislative behavior like that of the Wisconsin Assembly cannot pass constitutional muster. Mr. Chief Justice Warren, speaking for the Court, analyzed the entire course of its bill of attainder decisions. He began by explaining the holding in *Fletcher v. Peck*:¹⁰¹

The Court's pronouncement therefore served notice that the Bill of Attainder Clause was not to be given a narrow historical reading . . . but was instead to be read in the light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups.¹⁰²

Groppi's procedural due process arguments were the crux of his case. In none of the judicial proceedings did *Groppi* deny that he had done what the contempt resolution charged,¹⁰³ nor did he deny that the

97. The Committee proceedings were part of a legislative program to stigmatize and punish by public identification and exposure all witnesses considered by the Committee to be guilty of Communist affiliations, as well as all witnesses who refused to answer Committee questions on constitutional grounds; the Committee was thus improperly seeking to try, convict, and punish suspects, a task which the Constitution expressly denies to Congress and grants exclusively to the courts, to be exercised by them only after indictment and in full compliance with all the safeguards provided by the Bill of Rights.

360 U.S. 109, 136-37 (dissent).

98. *Id.* at 136.

99. *See, e.g.*, Supreme Court cases cited at note 62 *supra*.

100. *See* note 86 *supra*.

101. 10 U.S. (6 Cranch) 87 (1810).

102. 381 U.S. 437, 447.

103. That the Wisconsin Supreme Court and the majority of the court of appeals thought this omission rather significant (44 Wis. 2d at 297, 171 N.W.2d at 198; 436 F.2d 326, 330) is indicative of how far removed these courts were temperamentally from

Assembly had the power to punish disorderly conduct committed in its presence. Given that the Assembly might punish conduct of the sort in which Groppi engaged, the threshold inquiry, raised by Groppi, is what procedures it must utilize.

In practical terms, the requirements of due process often come down to telling the state that in order to accomplish certain goals entailing interference with a person's normal liberty, it *must* use certain procedures or *may not* use others. What these procedures are in a given situation is determined, according to a much-quoted dictum of Mr. Justice Frankfurter, by a compound of "history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess."¹⁰⁴

Groppi maintained that he was entitled to six separate procedural safeguards. With regard to each of these rights, the state was compelled to demonstrate either that Groppi had in fact been granted it¹⁰⁵ or that due process did not require that it be granted to him. The rights Groppi claimed were:

- . . . the right to be represented by counsel, the right to a trial or hearing of [some] kind, the right to compulsory process for the attendance of witnesses, the right to be informed of the nature and cause of the accusation against him, the right to confront his accusers and the right to present his defense to the alleged charges.¹⁰⁶

the ideal judicial attitude in a case involving allegations of due process violations. For Mr. Justice Holmes' formulation of that attitude, see note 68 *supra*.

104. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (concurring opinion). The due process clause of the fourteenth amendment is, in its essence, a force restraining the state in its effect upon those under its power. In its procedural aspect, although it surely does more than tell the state to "play fairly," it does require that the state proceed in a manner acceptable to the fundamental principles of American society.

Mr. Justice Frankfurter has observed:

Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment.

Bartkus v. Illinois, 359 U.S. 121, 128 (1959). Mr. Justice Cardozo touched the same chord when he wrote of

. . . some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

105. The state was candid enough not to contend that Groppi had, in fact, been allowed any of the procedural rights he claimed to merit. The state's argument throughout was that, in the circumstances, the Assembly was not required to grant them to him.

106. 311 F. Supp. at 774.

There are a few reported cases in which legislatures refused to grant an accused contemnor the right to counsel,¹⁰⁷ but the weight of precedent is to the contrary.¹⁰⁸ Nevertheless, the philosophy underlying the Supreme Court's right-to-counsel decisions¹⁰⁹ of the 1960's should apply to a proceeding in which the accused can theoretically be imprisoned for as long as two years.¹¹⁰

The other five procedural rights to which Groppi laid claim can all be subsumed under the right to a hearing. In the 176 years since Congress first dealt with a contemnor,¹¹¹ certainly since the ratification of the fourteenth amendment,¹¹² the *Groppi Cases* are the first reported of an American legislature refusing an accused contemnor the right to a hearing.¹¹³ There is one difference, however, between the *Groppi Cases* and all previously reported instances of legislative contempt. Never before has a legislative body dealt with a contemnor accused of a direct contempt committed in its chambers.¹¹⁴ Is there something about this sort of

107. See, e.g., *Ex parte McCarthy*, 29 Cal. 395 (1866); *In re Falvey*, 7 Wis. 528 (1858). Note that both cases were decided before the adoption of the fourteenth amendment.

108. See, e.g., cases cited at note 62 *supra*.

109. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Massiah v. United States*, 377 U.S. 201 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

110. Although Groppi was sentenced for a term not to exceed six months, an indulgence on the Assembly's part probably inspired by such recent Supreme Court jury trial decisions as *Bloom v. Illinois*, 391 U.S. 194 (1968), *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), Wis. STAT. § 13.26(2) (see note 2 *supra*) is clear that Groppi might have been imprisoned for the remainder of the session, or 15 months. This may raise problems under the Court's more recent pronouncement in *Baldwin v. New York*, 399 U.S. 66 (1970).

111. The cases of *Randall and Whitney*, 2 A. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 1599-603 (1907). See note 55 *supra*.

112. See note 60 *supra*.

113. Judge Pell ignores these precedents. His two opinions for the court of appeals cite, besides the state and district court decisions in the instant case, only one legislative contempt case, *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929). *Barry* is cited for only one point—concerning a presumption of regularity in legislative proceedings. The more important details in *Barry*, like the due process safeguards afforded him by the House, are passed over.

114. The closest case, in that it involved actual physical conduct on the floor of the house, is *Canfield v. Gresham*, 82 Tex. 10, 17 S.W. 390 (1891). It is, nevertheless, markedly afield. The contemnor was a newspaper reporter. A series of sketches uncomplimentary to a number of legislators had led the Texas House of Representatives to bar him from the floor. In an evident fit of pique, the reporter attempted to enter the chamber, realizing that he would be prevented physically from doing so. Over two weeks after a doorkeeper had escorted him from the premises, the reporter appeared before an unwitting justice of the peace, charged the Speaker with assault, obtained a warrant for his arrest, and persuaded an equally unsuspecting constable to execute the warrant. The Speaker somehow got word to his brethren that he had been arrested and was about to stand trial, for they promptly ordered the Sergeant-at-Arms and "such number of assistant sergeants as may be deemed necessary" to arrest the reporter, the policeman, and

physical act, the invasion, the noise, the defiance of authority, perhaps, that justified the Assembly's unprecedented reaction? Two arguments answering this question in the affirmative can be found in the *Groppi Cases*.

Both the Wisconsin Supreme Court and the court of appeals relied heavily upon the contention that a legislative body needs the power to defend itself from those who would disrupt its proceedings.¹¹⁵ The Wisconsin court went further¹¹⁶ and reasoned that if the legislature *needs* the power in order to exist, then it *has* that power of its very nature; the power is inherent in the concept of a legislature.¹¹⁷

Initially, it must be recalled that Groppi did not deny the Assembly's right in the abstract to punish contempt committed in its presence.¹¹⁸ His

the justice of the peace and to bring them all before the bar of the House to explain their conduct. The police officer and the justice were released, but the newsman admitted his actions, refused to apologize to the House, and was ordered imprisoned for 48 hours. Even though the case involved conduct on the floor of the legislative body, the punishment meted out was only for having obstructed the business of the House by procuring the Speaker's arrest in violation of his privileges.

115. Historically, this contempt power has been considered one of self-defense and of self-preservation.

44 Wis. 2d 290, 171 N.W.2d 195.

. . . [T]he contempt power was only to be used to protect the legislature in its deliberation. . . .

Id. at 294, 171 N.W.2d 197.

. . . [T]he Assembly and the Senate . . . need enough power to properly protect themselves and to properly discharge their constitutional responsibility.

Id. at 296, 171 N.W.2d at 198.

We cannot be unmindful of recent relatively unprecedented illegal disruptions of the proceedings in courts in our country and this appeal, presenting, as it appears to do, a case of first impression, assumes in our judgment critically significant proportions as to the ability of deliberative legislative bodies to carry on their governmental functions.

436 F.2d 326, 328.

116. In keeping with the recognized rules of construction of state constitutions, we consider this article [art. IV, § 8 of the Wisconsin constitution] not to be a grant of contempt power but a recognition and affirmation of the historic and inherent contempt power possessed by the legislative branch of our tripartite government and of the British Parliament.

44 Wis. 2d at 290, 171 N.W.2d at 195.

117. This necessity argument has also circuitously been developed into one of inherency. Certain cases have advanced the argument that the power of contempt is not only expedient and necessary but also so essential that it must be a natural, innate power of any legislature. I suggest that all these arguments—necessity, expediency, inherency—are but full circle around the same ground. The courts have, to one degree or another, recognized that the power is helpful to the completion of legislative tasks. And this it certainly is. To acknowledge the claims for the power by legislatures, courts have been wont to articulate some rationalization for its condonation. But other than this merry circle of need—usefulness—naturalness, there has been no one, agreed-upon-as-true explanation of the purpose and value of legislative contempt powers in the cases.

GOLDFARB *supra* note 31, at 28 (footnote omitted).

118. See text accompanying note 103 *supra*.

fourteenth amendment challenge went solely to the Assembly's neglect to embody due process safeguards in its action against him. Therefore, the courts' arguments of inherency and necessity going to the *existence* of a contempt power in the legislature are wide of the mark because they fail to justify the *procedure* followed by the Assembly.

So viewed, the necessity-inherency arguments are either factually refutable or they prove too much. Judge Stevens, dissenting in the court of appeals,¹¹⁹ for example, suggested that the necessity arguments might be factually erroneous.¹²⁰ If, he asked, the legislature could truly not be free to perform its duties until it had insured the "imprisonment of the intruders,"¹²¹ why was Groppi the only one of the 1,000 demonstrators to receive the Assembly's attention? If the legislature's contempt power is "one of self-defense and of self-preservation,"¹²² why was it necessary to exercise that power two full days after the incident, when the emergency had subsided, and while Groppi sat in jail?¹²³

The necessity-inherency arguments also prove too much. If, for instance, the power to punish for contempt summarily is inherent in legislative bodies and necessary for their continued existence, why is it not just as inherent in city councils?¹²⁴ Furthermore, why has it been used by only one of two houses of the legislature of only one of the 50 states in only one of the 176 years of reported cases.¹²⁵

Another facet of the *Groppi Cases* was the attempt by all three courts to analogize to the judicial power over direct contempts.¹²⁶ The judicial power in cases of direct contempt, restricted now to a very few situations,¹²⁷ is the only constitutionally licit power comparable to that exercised by the Wisconsin Assembly. Therefore, it was natural that the state endeavored to justify the Assembly's action by analogy to it.

Based upon the theory that direct contempts within the view of a court require immediate reaction and that no further proof is necessary before punishment may be imposed fairly, the law empowers judges to proceed summarily "where all of the essential elements of the misconduct

119. 436 F.2d 331, 332.

120. *Id.* at 335 nn. 15 & 18.

121. 44 Wis. 2d at 291, 171 N.W.2d at 195-96.

122. *Id.* at 290, 171 N.W.2d at 195.

123. See text accompanying note 17 *supra*.

124. See *Whitcomb's Case*, 120 Mass. 118 (1876); *State ex rel. Peers v. Fitzgerald*, 131 Minn. 116, 154 N.W. 750 (1915).

125. See text accompanying note 113 *supra*.

126. The Wisconsin Supreme Court discussed this argument contrary to its own best wishes, however. See note 32 *supra*. 436 F.2d 326, 329-30; 311 F. Supp. at 777-81; 44 Wis. 2d at 295-96, 171 N.W.2d at 197-98.

127. The power given to judges by *Ex parte Terry*, 128 U.S. 289 (1888), has been restricted greatly in recent years. See note 53 *supra*.

are under the eye of the court, are actually observed by the court."¹²⁸ The district court concluded that the contempt resolution and the record in the case were insufficient to answer the question whether "all of the essential elements of the misconduct" committed on September 29 were observed by the particular members who voted affirmatively on October 1. The burden was on the state to justify the detention of Groppi and, more precisely, to sustain the analogy to the judicial direct contempt power; requiring Groppi to prove that a majority of those voting affirmatively had not seen the incident would shift an unreasonable burden of proof onto him. Consequently, the court held that the analogy to the judicial power failed.¹²⁹

The district court found as separate, general grounds for freeing Groppi that the shape of legislative halls, the diffusion of legislator attention, and the members' constant comings and goings made it impossible for any large legislative group to perceive events in the chamber as a judge must in order to punish summarily. Finally, the more summary the procedure, the less likely it is that a record will be maintained which would make possible a meaningful judicial review.¹³⁰ A legislature, therefore, must grant some minimal procedures before it can punish for contempt.¹³¹

To these considerations, the dissenters in the court of appeals¹³² added several more. Judge Stevens noted that legislators are more susceptible to political pressures than judges.¹³³ He remarked, moreover, that legislators might be persuaded to change their minds during a hearing even though they had seen the contempt, just as judges are presumably persuadable by argument even though they know the facts.¹³⁴

To the district court's finding that the state had not established that the perception of the legislators was comparable to that required of a judge and that it would be unreasonable to shift the burden of proof,¹³⁵ Judge Pell, for the majority in the court of appeals, responded that the issues need not be determined because

. . . [t]here is no allegation which would serve to create an

128. *In re Oliver*, 333 U.S. 257, 275 (1948).

129. 311 F. Supp. at 777-78.

130. *Id.* at 778-79.

131. *Id.* at 777.

132. Judge Stevens wrote a dissent in which he was joined by Chief Judge Swygert and Judge Kiley. 436 F.2d 331, 332. Judge Kiley also wrote a separate dissent. *Id.* at 336. See also note 10 & text accompanying notes 119-20 *supra*.

133. 436 F.2d 331, 335.

134. *Id.*

135. See text accompanying note 129 *supra*. The burden is on the respondent in habeas corpus initially to justify petitioner's confinement.

issue of fact included in the petition filed in the district court. The issue appears to have been created by the district court's opinion.¹³⁶

However, if the analogy to judicial contempt is accepted, as Judge Pell professes that it should be, then the issue of perception goes directly to the Assembly's competence to adjudge Groppi guilty of contempt in a summary manner. Whether the Assembly has this power, therefore, cannot be ignored either by saying that the issue is not raised or by placing an unreasonable burden of proof on Groppi. To the district court finding that the chances are slim of uniform perception of an incident by any body of 100 members,¹³⁷ also an important question in the analogy argument, Judge Pell answered:

. . . [T]he matter is not before us on the factual basis of perceptivity of witnesses. It is before us on the basis that James E. Groppi led a gathering of people onto the floor of the Assembly and prevented the Assembly from conducting its business.¹³⁸

The opinion of the court of appeals, in short, does not reach the merits of a single question raised by the district court.

Conclusion

Groppi was able to avoid the brunt of the contempt penalty; he spent only ten days in jail.¹³⁹ The outcome of the *Groppi Cases* is, nevertheless, distressing because the final decision disregarded a long line of precedents in the areas of procedural due process and bill of attainder and failed to acknowledge the fundamental principles those cases express. Though the majority of the court of appeals evidently believed that Groppi's egregious behavior warranted elimination of traditional due process protections, it might have been better advised to have heeded Judge Stevens' admonition that resort to procedural expediency, while

136. 436 F.2d 326, 329.

137. 311 F. Supp. at 778.

138. 436 F.2d 326, 330.

139. See text accompanying note 27 *supra*. The second decision of the court of appeals was handed down January 6, 1971. The 1969 regular session adjourned sine die January 7. Groppi did not serve the last day in jail (Chicago Tribune, Jan. 7, 1971, § 1, at 3, col. 3), for the court of appeals stayed the execution of its judgment pending appeal. Groppi filed a petition for certiorari in the the United States Supreme Court on April 6, 1971, which petition is pending at the time this note goes to press. The case, *Groppi v. Leslie*, was assigned docket number 1549. 39 U.S.L.W. 3446.

perhaps facilitating an occasional conviction, may make martyrs of common criminals.¹⁴⁰

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140. 436 F.2d 331, 336.