

Life in Jail for Misbehavior: Criminal Contempt and the Consequence of Improper Classification

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LIFE IN JAIL FOR MISBEHAVIOR: CRIMINAL CONTEMPT AND
THE CONSEQUENCE OF IMPROPER CLASSIFICATION

*Kaley Ree Jaslow**

Abstract

Contempt is a crime that can be traced back to twelfth century England. It was an offense of disobedience that caused the obstruction of justice, and the punishment of such crimes was deeply important to the English justice system. Subsequent to the American Revolution, early American courts retained the use of contempt. Today, in the United States, criminal contempt is a federal crime under 18 U.S.C. § 401. Despite the federal code, actions that exemplify contempt are not specifically defined by statute. Judges are granted broad discretion in determining which actions are contemptuous and which are not. Moreover, federal criminal contempt lacks an offense classification and a statutory maximum. Judges are granted wide latitude in penalizing contemnors.

In response to the lack of direction by statute, federal circuits have formulated approaches to classify and punish contemnors; however, the circuits are split as to the proper method of doing so. This split represents a threat to equality, as equal crimes should be treated equally. The First and Seventh Circuits classify criminal contempt as a Class A felony, for which a plain reading of 18 U.S.C. § 401 creates no statutory maximum, and thus a literal reading would allow for life imprisonment. The Ninth Circuit analogizes the underlying action for the criminal contempt charge to its most similar offense and sentences accordingly. Finally, the Eleventh Circuit deems criminal contempt an offense *sui generis*, of its own kind. These approaches are vastly different and can result in sweeping variations in sentences. Such sweeping differences in criminal sentencing runs contrary to the paramount concern of uniform punishment. To uniformly punish contemnors, the circuits must identify and punish contempt in a consistent manner. Congress should adopt a statutory maximum for criminal contempt to ensure fundamental fairness and uniformity.

* J.D., University of Florida Levin College of Law 2019; B.A., University of Florida 2016. I dedicate this Note to my amazing parents, Kirk and Laura Jaslow, without whose immense and enduring support and encouragement I would have neither the ability nor the courage to chase my dreams. I would also like to thank my note advisor, Professor Kenneth Nunn, for his invaluable advice; Professor Caprice Roberts, for her precise comments; and the wonderful editors of the *Florida Law Review*, who not only made the publication of this Note possible, but also made the process of writing it fulfilling and worthwhile. Last but certainly not least, I would like to thank my research assistant, Freddy, for always lending a paw.

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INTRODUCTION

A judge’s ability to impose sanctions for criminal contempt ensures an orderly and effective judicial system. This judicial tool allows a judge to assert authority over the workings of the judicial system and thereby deter participating parties’ misbehavior. However, the power to hold an individual in contempt of court is highly unregulated.¹ Therefore, while

1. See Joan Meier, *The “Right” to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 85 (1992).

this license to hold an individual in contempt may act as a shield for the court system, it often acts as a sword against the contemnor.²

A judge has broad discretion in imposing the conviction and sentence upon an individual for criminal contempt.³ In fact, this authority, and its latitude, dates back to the very creation of the American judicial system.⁴ In 1821, the United States Supreme Court stated, “Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates”⁵ Given the lack of regulation and the broad power granted to courts, contemnors and their crimes have been classified in a variety of ways.⁶

This Note will examine the difficulty of classifying criminal contempt and the consequences of failing to uniformly categorize the offense level of criminal contempt. Part I will briefly describe the history of contempt. Part II will define criminal contempt—both by distinguishing it from civil contempt and by exploring the statute from which criminal contempt is derived. In Part III, this Note will provide statistics from the Department of Justice relating to contempt. In Part IV, this Note will explore various circuits’ interpretations of criminal contempt. In Part V, this Note will explain the significance of divergent interpretations of criminal contempt’s classification. Part VI will examine the split in the circuits over the proper interpretation of criminal contempt, while Part VII will assess the strengths and weaknesses of each approach. Additionally, Part VIII will compare these approaches to state approaches to contempt. Finally, in Part IX, this Note will propose and analyze the proper

2. The contempt power allows the court to protect order and obedience, while contemnors are subject to sweeping variations in punishment for a wide array of crimes. The power acts as a sword against contemnors who are unable to predict the nature and extent of a criminal contempt punishment.

3. *United States v. Carpenter*, 91 F.3d 1282, 1283 (9th Cir. 1996) (“Congress has not seen fit to impose limitations on the sentencing power for contempts” (alteration in original) (quoting *Green v. United States*, 356 U.S. 165, 188 (1958))).

4. *Ex parte Robinson*, 86 U.S. 505, 510 (1873) (“The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power [i.e., the contempt power].”).

5. *Anderson v. Dunn*, 19 U.S. 204, 227 (1821).

6. *See generally* *United States v. Wright*, 812 F.3d 27 (1st Cir. 2016) (revealing the differing ways in which courts have classified criminal contempt, and therefore sentenced contemnors); *United States v. Broussard*, 611 F.3d 1069 (9th Cir. 2010) (classifying the contempt offense as a Class A felony); *United States v. Cohn*, 586 F.3d 844 (11th Cir. 2009) (holding that contempt offenses cannot be classified); *United States v. Ashqar*, 582 F.3d 819 (7th Cir. 2009) (upholding the application of a terrorism enhancement to a contempt offense and holding that imposing a 135-month sentence was not unreasonable); *Carpenter*, 91 F.3d 1282 (classifying the contempt offense as a Class A misdemeanor).

approach to the classification of criminal contempt and recommend a solution to achieve uniformity among the circuits.

I. A BRIEF HISTORY OF CRIMINAL CONTEMPT

“Rules for preserving discipline, essential to the administration of justice, came into existence with the law itself, and Contempt of Court (*contemptus curiae*) has been a recognized phrase in English law from the twelfth century.”⁷ Contempt developed as a method of protecting against disobedience to the King, thereby protecting against the obstruction of justice.⁸ Firmly established in English Common Law, the use of contempt of court was also adopted by the newly independent United States. “Viewed as a legal doctrine which was articulated and immersed in the common law, it is generally a product of Anglo-American society.”⁹ The United States began punishing contemnors as early as 1788.¹⁰

In 1789, the First Congress granted courts of the United States the “power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempt of authority in any cause or hearing before the same.”¹¹ In *United States v. Hudson*,¹² the Court held that the contempt power cannot be dispensed with because it is necessary for the proper administration of justice.¹³ This power includes both civil and criminal contempt.¹⁴ Additionally, independent of statute, a court of the United States has the power to fine and imprison individuals held in contempt.¹⁵ Congress defined the power of the courts in 1831¹⁶ and granted the Supreme Court the ability to establish procedure for the punishment of contempt in 1941.¹⁷ Consequently, the Court enacted Rule 42 of the Federal Rules of Criminal Procedure.¹⁸ Congress additionally codified contempt in 1948,¹⁹

7. JOHN C. FOX, *THE HISTORY OF CONTEMPT OF COURT: THE FORM OF TRIAL AND THE MODE OF PUNISHMENT* 1 (1972).

8. *Id.*

9. Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L.Q. 1, 6 (1961).

10. *Republica v. Oswald*, 1 U.S. 319, 324 (1788).

11. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (1789).

12. 11 U.S. 32 (1812).

13. *Id.* at 34.

14. *Civil and Criminal Contempt in the Federal Courts*, 57 YALE L.J. 83, 90 n.49 (1947).

15. *Id.*

16. An Act Declaratory of the Law Concerning Contempt of Court, Act of Mar. 2, 1831, ch. 99, 4 Stat. 487 (1831).

17. Act of June 29, 1940, ch. 492, 55 Stat. 779 (1941).

18. FED. R. CRIM. P. 42.

19. *See* 18 U.S.C. § 401 (1948).

which remained law until 2002, when the statute was amended to its current language.²⁰

II. DEFINING CRIMINAL CONTEMPT

Criminal contempt is an offense distinguishable from civil contempt. While the distinction may appear obscure at times,²¹ as a specific action may be considered either a civil or criminal contempt²² and both criminal and civil contempt can occur in either a civil or criminal trial,²³ the distinction is imperative to the imposition of punishment. Courts in England and in many states drew this distinction²⁴ before it was first explored by the Supreme Court in 1911.²⁵ The Court focused on the “character and purpose” of the sanction imposed to draw the distinction.²⁶ Civil coercive contempt is prospective and intends “to be remedial by coercing the defendant to do what he had refused to do.”²⁷ However, and noticeably more disciplinary, criminal contempt seeks to punish the contemnor while vindicating the court.²⁸ “Consequently, criminal contempt is punitive in character.”²⁹

A Federal Court has the power to hold an individual or an officer in criminal contempt pursuant to 18 U.S.C. § 401, which states:

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;

20. See 18 U.S.C. § 401 (2012).

21. Joel M. Androphy & Keith A. Byers, *Federal Contempt of Court*, 61 TEX. B.J. 16, 18 (1998).

22. *Id.* (citing *In re Rumaker*, 646 F.2d 870, 871 (5th Cir. 1980)).

23. *Id.* at 19 (citing *United States v. Ryan*, 810 F.2d 650, 653 (7th Cir. 1987); *United States v. United Mine Workers*, 330 U.S. 258 (1947); *Hubbard v. Fleet Mortg. Co.*, 810 F.2d 778, 781–82 (8th Cir. 1987) (per curiam); *United States v. Rose*, 806 F.2d 931, 933 (9th Cir. 1986) (per curiam)).

24. *Civil and Criminal Contempt in the Federal Courts*, *supra* note 14.

25. See generally *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418 (1911) (examining criminal and civil contempt).

26. *Gompers*, 221 U.S. at 441.

27. *Id.* at 442. Civil contempt may also be compensatory, which compensates for loss rather than coercing compliance.

28. Androphy & Byers, *supra* note 21 (citing *Gompers*, 221 U.S. at 422).

29. *Id.*

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.³⁰

Interestingly, the statute fails to specify a minimum or a maximum sentence. Additionally, the statute does not classify contempt as a felony, a misdemeanor, or a petty offense. Given the absence of a statutory maximum and any classification of criminal contempt, the courts are granted wide discretion in determining the appropriate penalty for such an offense.³¹ Furthermore, Congress has not specifically limited this discretion.³² Given the lack of clarity, courts have penalized contempt offenses in vastly different manners.³³

III. DEPARTMENT OF JUSTICE STATISTICS

In March 2017, the Department of Justice released Federal Justice Statistics from 2014 from the Bureau of Justice Statistics and the Federal Justice Statistics Program. The data utilized was collected from the United States Marshals Service, Drug Enforcement Administration, Executive Office for U.S. Attorneys, Administrative Office of the U.S. Courts, U.S. Sentencing Commission, and the Federal Bureau of Prisons.³⁴ Interestingly, criminal contempt is classified by the Department of Justice as an “[o]ther public order” offense, and is labeled as “[p]erjury, contempt, and intimidation,”³⁵ with obstruction of justice grouped separately.

From October 1, 2013, to September 30, 2014, U.S. Attorneys received 316 suspects for matters involving “[p]erjury, contempt, and intimidation.”³⁶ In that same year, 224 defendants were sentenced for “[p]erjury, contempt, and intimidation,” with 162 defendants receiving a term of incarceration, 46 receiving probation, and 3 receiving only a

30. 18 U.S.C. § 401 (2012).

31. *United States v. Carpenter*, 91 F.3d 1282, 1283 (9th Cir. 1996) (“Congress has not seen fit to impose limitations on the sentencing power for contempts” (alteration in original) (quoting *Green v. United States*, 356 U.S. 165, 188 (1958))).

32. *Frank v. United States*, 395 U.S. 147, 149 (1969).

33. *See generally* *United States v. Wright*, 812 F.3d 27 (1st Cir. 2016) (imposing a sentence of 30-months imprisonment); *United States v. Broussard*, 611 F.3d 1069 (9th Cir. 2010) (imposing a sentence of two years imprisonment and one year of supervised release); *United States v. Cohn*, 586 F.3d 844 (11th Cir. 2009) (imposing a sentence of forty-five days imprisonment and five years of supervised release); *United States v. Ashqar*, 582 F.3d 819 (7th Cir. 2009) (imposing a 135-month sentence); *Carpenter*, 91 F.3d 1282 (imposing a sentence of one year of supervised release).

34. U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2014 - STATISTICAL TABLES 1 (2017).

35. *Id.* at 9 tbl.2.1.

36. *Id.*

fine.³⁷ The average incarceration sentence length for all “[o]ther public order offenses” was 73.1 months.³⁸

IV. DIFFERING INTERPRETATIONS FOR SENTENCING CRIMINAL CONTEMPT

Courts penalize criminal contempt differently because they interpret 18 U.S.C. § 401 differently.³⁹ Under a strict interpretation of the statute, the maximum penalty for criminal contempt is life imprisonment, which would classify a violation as a Class A felony⁴⁰—class A felonies are those which are punishable by life imprisonment or death.⁴¹ This interpretation implies that “Congress meant to brand all contempts as serious and all contemnors as felons.”⁴² However, many courts have refused to interpret 18 U.S.C. § 401 so strictly, recognizing that the wide range of conduct that may constitute contempt requires a broader and more lenient reading of the statute.⁴³

A more lenient reading of the statute recognizes the appropriateness of discretion granted to a trial judge to apply an open-ended range of punishments such that the most egregious offenses are punished in a suitable manner and minor offenses are punished properly as well.⁴⁴ This interpretation relies on the commentary within the sentencing guidelines, U.S.S.G. § 2J1.1, which implies that the Sentencing Commission neglected to promulgate a guideline sentence for criminal contempt “[b]ecause misconduct constituting contempt varies significantly.”⁴⁵ This reading of the statute allows a sentencing judge to analogize a conviction of criminal contempt to a crime of a similar nature and therefore to penalize the offender with a sentence that reflects the seriousness of the crime.⁴⁶ The Ninth Circuit stated and later reaffirmed that “[t]he severity of contempt violations for purposes of 18 U.S.C. § 3559(a) turns on the

37. *Id.* at 22 tbl.5.2.

38. *Id.* at 24 tbl.5.4.

39. *See supra* note 33 and accompanying text.

40. 18 U.S.C. § 3559(a) (2012) (“An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is— (1) life imprisonment, or if the maximum penalty is death, as a Class A felony”); *see United States v. Ashqar*, 582 F.3d 819, 825 (7th Cir. 2009) (“[T]he statutory maximum for criminal contempt is life”).

41. 18 U.S.C. § 3559.

42. *United States v. Carpenter*, 91 F.3d 1282, 1284 (9th Cir. 1996).

43. *Id.*

44. *Id.*

45. U.S. SENTENCING GUIDELINES MANUAL § 2J1.1 cmt. n.1 (U.S. SENTENCING COMM’N 2018).

46. *Carpenter*, 91 F.3d at 1285.

most analogous underlying offense.”⁴⁷ This allows a court to determine whether the contempt offense is best classified as a misdemeanor or a felony.⁴⁸

Yet other courts have concluded that criminal contempt is an offense *sui generis* that is neither a felony nor a misdemeanor,⁴⁹ as it lacks a statutory maximum and therefore fails to fall neatly into a classification category.⁵⁰ An offense is classified *sui generis*—“[o]f its own kind”⁵¹—when it would not be appropriate to deem an offense a felony or a misdemeanor.⁵² Such interpretation suggests that classifying contempt as *sui generis* allows a judge discretion to apply a punishment that fits the crime, rather than attempting to classify every possible action that may be classified as contempt as either a felony or a misdemeanor.⁵³ This interpretation may be practical.⁵⁴

V. SO, WHY DOES THIS EVEN MATTER?

Any criminal contempt punishment implicates the constitutional due process limit on deprivation of life, liberty, or property.⁵⁵ Judicial authority to punish individuals for criminal contempt may not defy the limitations set forth by the Constitution,⁵⁶ and sentences or fines that exceed judicial authority may violate the Due Process Clause. The Constitution further requires similar sentences for similar crimes.

Criminal contempt of court creates a specific obstacle for sentencing specifically relating to the imposition of supervised release, and the revocation of supervised release,⁵⁷ and the lack of a statutory maximum allows initial punishments to vary. In applying a term of supervised release, the offense must fall into one of the types of felony or misdemeanor class.⁵⁸ Additionally, when applying a sentence upon revocation of supervised release, the court looks to the seriousness of the

47. *United States v. Broussard*, 611 F.3d 1069, 1072 (9th Cir. 2010).

48. *Carpenter*, 91 F.3d at 1285.

49. *See United States v. Cohn*, 586 F.3d 844, 849 (11th Cir. 2009).

50. *Carpenter*, 91 F.3d at 1284.

51. *Sui generis*, BLACK’S LAW DICTIONARY (10th ed. 2014).

52. *See Cohn*, 586 F.3d at 848.

53. *See id.*

54. *See id.*

55. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

56. *See Ex parte Hudgings*, 249 U.S. 378, 383 (1919) (“[O]bstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest.”).

57. *United States v. Wright*, 812 F.3d 27, 30 (1st Cir. 2016); *United States v. Broussard*, 611 F.3d 1069, 1071 (9th Cir. 2010); *Cohn*, 586 F.3d at 848; *United States v. Carpenter*, 91 F.3d 1282, 1284 (9th Cir. 1996).

58. *See* U.S. SENTENCING GUIDELINES MANUAL § 5D1.1 (U.S. SENTENCING COMM’N 2018).

underlying offense.⁵⁹ This requires the court to classify the underlying offense to determine the appropriate sentence.⁶⁰ Offenses are classified pursuant to 18 U.S.C. § 3559(a), which states:

An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is—

- (1) life imprisonment, or if the maximum penalty is death, as a Class A felony;
- (2) twenty-five years or more, as a Class B felony;
- (3) less than twenty-five years but ten or more years, as a Class C felony;
- (4) less than ten years but five or more years, as a Class D felony;
- (5) less than five years but more than one year, as a Class E felony;
- (6) one year or less but more than six months, as a Class A misdemeanor;
- (7) six months or less but more than thirty days, as a Class B misdemeanor;
- (8) thirty days or less but more than five days, as a Class C misdemeanor; or
- (9) five days or less, or if no imprisonment is authorized, as an infraction.⁶¹

Therefore, depending on the interpretation of the statute, the sentence imposed for criminal contempt, or upon revocation of supervised release with the underlying offense of criminal contempt, may vary vastly.

VI. A SPLIT IN THE CIRCUITS

The differing interpretations of the penalty for criminal contempt, pursuant to 18 U.S.C. § 401, become readily apparent upon an examination of holdings among the United States Circuit Courts.⁶² The Seventh Circuit and the First Circuit, in 2009 and 2016, respectively, read the statute strictly and interpreted criminal contempt as a Class A felony with life imprisonment as the maximum term imprisonment authorized.⁶³ The Ninth Circuit read the statute liberally in both 1996 and 2010,

59. *Broussard*, 611 F.3d at 1071.

60. *See* 18 U.S.C. § 3583(b) (2012).

61. *Id.* § 3559(a).

62. *See Wright*, 812 F.3d at 32; *Broussard*, 611 F.3d at 1072; *Cohn*, 586 F.3d at 849; *United States v. Ashqar*, 582 F.3d 819, 825 (7th Cir. 2009); *Carpenter*, 91 F.3d at 1285.

63. *See Wright*, 812 F.3d at 32; *Ashqar*, 582 F.3d at 825.

analogizing the offense to one similar in character.⁶⁴ Conversely, the Eleventh Circuit, in 2009, interpreted the statute as a sui generis offense, classifying contempt as neither a felony nor a misdemeanor.⁶⁵

A. History of the Circuit Split

Four circuits use three different approaches to criminal contempt. This results in a lack of uniformity that presents a serious concern for contemnors. None of the circuits appear to be willing to budge from their reading of the statutory language in 18 U.S.C. § 401. In fact, the circuits expressly comment on the pitfalls and perils of using an approach different than their own.⁶⁶

The Ninth Circuit addressed the issue of classification for criminal contempt as a question of first impression in *United States v. Carpenter*⁶⁷ in 1996 and determined that “criminal contempt should be classified for sentencing purposes according to the applicable Guidelines range for the most nearly analogous offense.”⁶⁸ In 2009, the Eleventh Circuit declared criminal contempt to be a sui generis offense, directly declining to follow Ninth Circuit persuasive precedent, reasoning that sentencing considering the most analogous offense fails to consider criminal contempt in the absence of a sufficiently analogous offense.⁶⁹ Days later, in *United States v. Ashqar*,⁷⁰ the Seventh Circuit merely stated, without explanation, that “the statutory maximum for criminal contempt is life”⁷¹ The next year, in 2010, the Ninth Circuit again addressed the issue of classification in *United States v. Broussard*.⁷² In *Broussard*, the Ninth Circuit held firm on its reasoning in *Carpenter* but revised the holding by requiring consideration of the statutory maximum of an

64. See *Broussard*, 611 F.3d at 1072; *Carpenter*, 91 F.3d at 1285.

65. See *Cohn*, 586 F.3d at 849.

66. See *Wright*, 812 F.3d at 32–34; *Cohn*, 586 F.3d at 847 n.7; *Carpenter*, 91 F.3d at 1284.

67. 91 F.3d 1282 (9th Cir. 1996).

68. *Id.* at 1285.

69. *Cohn*, 586 F.3d at 847 n.7 (“The Ninth Circuit is the only court of appeals to have ruled on this precise issue in a reported decision. . . . We decline to adopt this method of classification. The method does not address how to classify criminal contempt if a sufficiently analogous guideline is absent. More importantly, maximum penalties are established by statute, not the Sentencing Guidelines. It is far from clear whether a district court, in classifying a criminal contempt, should use the maximum penalty called for by the base offense level or the total offense level, including all possible enhancements.”).

70. 582 F.3d 819 (7th Cir. 2009) (affirming *Ashqar*’s 135 month sentence for criminal contempt and obstruction of justice).

71. *Id.* at 825.

72. 611 F.3d 1069 (9th Cir. 2010).

analogous offense, rather than merely looking to the sentencing guidelines.⁷³

Most recently, in 2016, the First Circuit addressed this question for the first time in *United States v. Wright*.⁷⁴ In *Wright*, the court joined “the Seventh Circuit in holding that the statutory maximum for the offense of criminal contempt, 18 U.S.C. § 401, is life imprisonment.”⁷⁵ However, given the brevity of the discussion of classification in *Ashqar*,⁷⁶ the First Circuit extended the Seventh Circuit holding to include that criminal contempt should be classified as a Class A felony for the purposes of 18 U.S.C. § 3559(a).⁷⁷ The court explicitly addressed the concerns of the Ninth Circuit and chose to disregard them as not crucial enough to warrant overlooking the plain language of § 401.⁷⁸ The First Circuit did not read the plain language as “patently absurd,”⁷⁹ as statutory language is within the domain of “Congress, and not the courts, to create sentencing policy.”⁸⁰ The *Wright* court explicitly rejected the Eleventh Circuit holding—that criminal contempt is an offense sui generis—as well.⁸¹ In its rejection of the Eleventh Circuit holding, the court offered reasoning similar to that which it applied in its rejection of the Ninth Circuit holding. The First Circuit held firmly to its plain language interpretation of the statute, noting that the Eleventh Circuit has not refuted this reading.⁸² Therefore, the court explained, even though the Supreme Court has referred to criminal contempt as a sui generis offense, this does not negate the possibility that Congress intended the offense to be punishable by life imprisonment, requiring it to be classified as a Class A felony for the purposes of § 3559(a).⁸³ The Supreme Court has not yet ruled on this split among the circuits.

B. *The First and Seventh Circuit Interpretation*

In *United States v. Ashqar*, the Seventh Circuit held that the statutory maximum for criminal contempt is life imprisonment.⁸⁴ The court spent

73. *Id.* at 1073 (“The sentencing guidelines are now advisory. The maximum sentence authorized by the statute of conviction is the upper limit on a district judge’s discretion. We adapt *Carpenter*’s express rationale to this new reality.”).

74. 812 F.3d 27, 32 (1st Cir. 2016).

75. *Id.* at 32 (citation omitted) (citing *Ashqar*, 582 F.3d at 825).

76. *Ashqar*, 582 F.3d at 825.

77. *Wright*, 812 F.3d at 32.

78. *Id.* at 33.

79. *Id.*

80. *Id.* at 34.

81. *Id.*

82. *Id.*

83. *Id.*

84. *United States v. Ashqar*, 582 F.3d 819, 825 (7th Cir. 2009).

little time discussing this issue and instead asserted the statutory maximum as fact before discussing the legality of the terrorism enhancement which it imposed on the sentence for contempt and obstruction of justice.⁸⁵ However, subsequent to this holding, the First Circuit, in *United States v. Wright*, similarly asserted that the maximum penalty for criminal contempt is life imprisonment, therefore holding that contempt is a Class A felony for purposes of revocation of supervised release.⁸⁶

In *United States v. Wright*, the court sentenced the defendant to thirty months' imprisonment for violating his supervised release.⁸⁷ The district court determined the underlying offense of criminal contempt to be a Class A felony, and, upon appeal, the First Circuit then addressed the question of how to classify criminal contempt as an issue of first impression.⁸⁸ The court agreed with the district court and held that criminal contempt is a Class A felony punishable by life imprisonment.⁸⁹ In doing so, the court reasoned that it is bound by the plain reading of the statute and joined the Seventh Circuit in its holding that criminal contempt is a crime without a statutory maximum and is therefore punishable by life imprisonment.⁹⁰

Moreover, the court explained that an abundance of case law grants judges wide discretion in sentencing for crimes without statutory maximums, "including up to life imprisonment."⁹¹ The court relied on *United States v. Turner*,⁹² which explains, "the sensible rule of statutory construction [is that] the absence of a specified maximum simply means that the maximum is life imprisonment. By declining to limit the penalty, Congress gives maximum discretion to the sentencing court."⁹³ Additionally, the court reasoned that the only occasion to ignore a plain reading of the statute is in the event of an "undeniable textual ambiguity, or some other extraordinary consideration, such as the prospect of yielding a patently absurd result."⁹⁴ The court rejected the Ninth Circuit approach in this line of reasoning, stating that the concern of "absurdity"

85. *Id.*

86. *Wright*, 812 F.3d at 30 ("Wright's underlying criminal contempt conviction was a Class A felony under 18 U.S.C. § 3559(a), which carries a maximum revocation imprisonment sentence of five years, according to 18 U.S.C. § 3583(e)(3).").

87. *Id.* at 31.

88. *Id.* at 32.

89. *Id.*

90. *Id.*

91. *Id.* (citing *United States v. Ortiz-Garcia*, 665 F.3d 279, 285 (1st Cir. 2011)).

92. 389 F.3d 111 (4th Cir. 2004).

93. *Id.* at 120.

94. *Wright*, 812 F.3d at 33 (quoting *United States v. Fernandez*, 722 F.3d 1, 10 (1st Cir. 2013)).

does not warrant ignoring the strict interpretation and plain meaning of the statute.⁹⁵ Finally, the court determined that it is not within the realm of the judiciary to discern the proper sentencing for an offense, as it is the legislatures' duty to write and give meaning to an offense.⁹⁶ However, the First Circuit reasoned that the discretion to sentence individuals for criminal contempt is not unchecked, since sentencing guidelines consider many factors pursuant to 18 U.S.C. §§ 3553(a), 3583(e).⁹⁷

C. *The Ninth Circuit Interpretation*

In *Carpenter*, the Ninth Circuit rejected a strict reading of 18 U.S.C. § 401 and elected to analogize the nature of the criminal contempt charge to its most similar offense.⁹⁸ Under this approach, a sentencing judge has the discretion to penalize a defendant by using the sentencing guidelines of the analogous crime to impose a sentence.⁹⁹ A court will then use the sentencing guidelines of the analogous crime to impose a sentence.¹⁰⁰ The Ninth Circuit interpreted the penalty for criminal contempt entirely differently than the First and Seventh Circuits. The *Carpenter* court reasoned, “[t]he Sentencing Guidelines do not contain a specific guideline for criminal contempt. However, U.S.S.G. § 2J1.1 says to apply U.S.S.G. § 2X5.1, which in turn directs the court to apply the most analogous offense guideline.”¹⁰¹ Where a strict interpretation of 18 U.S.C. § 401 would suggest that the maximum penalty is life imprisonment, this court reasoned that this could not possibly be Congress' intent.¹⁰² Many actions meet the criteria for “contempt,” and yet not all actions are so severe as to require a felony classification.¹⁰³ “It would be unreasonable to conclude that by authorizing an open-ended range of punishments to enable courts to address even the most egregious contempts appropriately, Congress meant to brand all contempts as serious and all contemnors as felons.”¹⁰⁴ The court then suggested that the scope and variety of conduct which may constitute contempt could not possibly be read to hold that all 18 U.S.C. § 401 offenses are felonies.¹⁰⁵ Therefore, the court decided against immediately classifying

95. *Id.*

96. *Id.* at 34.

97. *Id.*

98. *United States v. Carpenter*, 91 F.3d 1282, 1285 (9th Cir. 1996).

99. *Id.*

100. *Id.*

101. *Id.* at 1283.

102. *Id.* at 1284.

103. *Id.*

104. *Id.*

105. *Id.* (“[F]ailure to establish maximum sentence for contempt may reflect Congress’s ‘recognition of the scope of criminal contempt[.]’ . . . Sentencing Commission decided against

all criminal contempts as Class A felonies,¹⁰⁶ reasoning that the only similarity between criminal contempt and other Class A felonies is the lack of a statutory maximum.¹⁰⁷ Crimes of the most serious nature are classified as Class A felonies, and the court found it “absurd” to suggest criminal contempt necessarily belongs in this category.¹⁰⁸ The First and Seventh Circuits plainly declined to interpret the statute this way.¹⁰⁹

Unlike the Eleventh Circuit’s interpretation, the Ninth Circuit further held that the inability to classify all contempts as Class A felonies does not require that criminal contempt pursuant to 18 U.S.C. § 401 is an offense *sui generis*.¹¹⁰ The court found that the line of reasoning upon which the defendant in *Carpenter* relied is futile.¹¹¹ The defendant argued that in *United States v. Holmes*¹¹² the Fifth Circuit held that a misdemeanor or felony fine could not be applied to criminal contempt as criminal contempt was neither a misdemeanor nor a felony.¹¹³ The Ninth Circuit rejected this holding, stating that many other courts have classified criminal contempt.¹¹⁴

Additionally, in a more recent decision, the Ninth Circuit held firm on its reasoning in *Carpenter*, explaining that “[t]he severity of contempt violations for purposes of 18 U.S.C. § 3559(a) turns on the most analogous underlying offense.”¹¹⁵ However, the court adapted *Carpenter*, as federal sentencing guidelines are no longer mandatory, but rather advisory after *Broussard*.¹¹⁶ In *Broussard*, the court held that the discretion of a sentencing judge to impose a penalty is no longer limited by the sentencing guidelines, but rather by the statutory maximum of the offense.¹¹⁷

promulgating a criminal contempt guideline ‘[b]ecause misconduct constituting contempt varies significantly.’” (fourth alteration in original) (citation omitted) (first quoting *Frank v. United States*, 395 U.S. 147, 149 (1969); and then quoting U.S. SENTENCING GUIDELINES MANUAL § 2J1.1 cmt. n.1 (U.S. SENTENCING COMM’N 1995))).

106. *Id.*

107. *Id.*

108. *Id.*

109. *See United States v. Wright*, 812 F.3d 27, 32 (1st Cir. 2016); *United States v. Ashqar*, 582 F.3d 819, 825 (7th Cir. 2009).

110. *Carpenter*, 91 F.3d at 1284.

111. *Id.*

112. 833 F.2d 481 (5th Cir. 1987).

113. *Carpenter*, 91 F.3d at 1284 (citing *Holmes*, 833 F.2d 481).

114. *Id.*

115. *United States v. Broussard*, 611 F.3d 1069, 1072 (9th Cir. 2010).

116. *Id.*

117. *Id.*

D. *The Eleventh Circuit Interpretation*

The Eleventh Circuit approach to classification rejects all such uniform classification attempts.¹¹⁸ It is the opinion of the court that criminal contempt is much too far reaching to be appropriately classified in all its possible violations.¹¹⁹ Moreover, it would be impractical to individually classify every possible violation.¹²⁰ Therefore, the Eleventh Circuit elects to interpret criminal contempt as a sui generis offense rather than as a felony or a misdemeanor.¹²¹

The Eleventh Circuit came to this conclusion in *United States v. Cohn*, where Defendant Cohn appealed his sentence for criminal contempt as a Class A felony.¹²² Cohn received 45 days' imprisonment and five years of supervised release.¹²³ The court considered whether criminal contempt was properly classified as a Class A felony as a question of first impression.¹²⁴

The court conceded that, pursuant to 18 U.S.C. § 3559(a), an offense lacking a letter grade classification is instead classified by the maximum term of imprisonment authorized for the offense.¹²⁵ The Eleventh Circuit explained that the district court classified criminal contempt as a Class A felony because 18 U.S.C. § 401 does not contain a maximum penalty; a violation is punishable by life imprisonment.¹²⁶ Moreover, Class A felonies are ineligible for a sentence of mere probation.¹²⁷ However, the Eleventh Circuit plainly disagreed with the district court's interpretation of § 3559(a)'s classification scheme.¹²⁸

The court noted that the Supreme Court has recognized a broad range of offenses which constitute criminal contempt,¹²⁹ as well as a variety of appropriate sentences,¹³⁰ and reasoned that “[n]o single sentencing

118. *United States v. Cohn*, 586 F.3d 844, 848 (11th Cir. 2009).

119. *Id.*

120. *Id.*

121. *Id.* at 845.

122. *Id.* at 846.

123. *Id.*

124. *Id.* at 847.

125. *Id.* at 847–48.

126. *Id.* at 848.

127. *Id.*

128. *Id.*

129. *Frank v. United States*, 395 U.S. 147, 149 (1969) (“[A] person may be found in contempt of court for a great many different types of offenses Congress, perhaps in recognition of the scope of criminal contempt, has authorized courts to impose penalties but has not placed any specific limits on their discretion”).

130. *Green v. United States*, 356 U.S. 165, 188 (1958) (“Congress has not seen fit to impose limitations on the sentencing power for contempts”).

guideline applies to § 401.”¹³¹ The court explained that courts defer to the “Other Felony Offenses” section of the Guidelines¹³² instead of using a specific guideline. The court further acknowledged the note in U.S.S.G. § 2J1.1 Contempt, which explains that the Commission has elected not to provide a guideline sentence for criminal contempt given the wide variety of conduct which may constitute contempt.¹³³ The court then reasoned that a uniform classification of criminal contempt as either a felony or a misdemeanor would be inconsistent with the variety of conduct that constitutes criminal contempt. Alternatively, a specific classification for every action that constitutes criminal contempt would be arduous and perhaps never exhaustive.¹³⁴ Therefore, the Eleventh Circuit concluded that criminal contempt is “best categorized as a *sui generis* offense, rather than a felony or misdemeanor.”¹³⁵

An offense *sui generis* is a unique or peculiar crime of its own class.¹³⁶ The Eleventh Circuit reasoned that this is consistent with the meaning of § 401, “reflect[ing] the differences between criminal contempt and the traditional crimes classified pursuant to § 3559.”¹³⁷ The court further explained that previous Supreme Court decisions have similarly classified criminal contempt as offenses *sui generis*.¹³⁸ Therefore, the Eleventh Circuit declined to classify criminal contempt pursuant to U.S.S.G. § 3559.

131. *Cohn*, 586 F.3d at 848.

132. U.S. SENTENCING GUIDELINES MANUAL § 2X5.1 (U.S. SENTENCING COMM’N 2018).

133. *Id.* § 2J1.1 cmt. n.1 (“Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent, the Commission has not provided a specific guideline for this offense.”).

134. *Cohn*, 586 F.3d at 848.

135. *Id.*

136. *Sui generis*, *supra* note 51.

137. *Cohn*, 586 F.3d at 849.

138. *See* *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (referring to criminal contempt as “an offense *sui generis*”); *see also* *United States v. Holmes*, 822 F.2d 481, 493 (5th Cir. 1987) (“[T]he Supreme Court has never characterized contempt as either a felony or a misdemeanor, but rather has described it as ‘an offense *sui generis*.’” (quoting *Cheff*, 384 U.S. at 380)).

VII. ASSESSING THE STRENGTHS AND WEAKNESS OF THE DIFFERING INTERPRETATIONS

The three approaches to classifying criminal contempt—the “Class A felony” interpretation,¹³⁹ the “analogous offense” interpretation,¹⁴⁰ and the sui generis offense interpretation¹⁴¹—all exhibit particular strengths. However, no approach is without its pitfalls.

A. *Class A Felony*

Categorizing all criminal contempts as Class A felonies provides uniformity and judicial efficiency, a hallmark of American jurisprudence and the very purpose behind the creation of the U.S. Sentencing Guidelines.¹⁴² In fact, the primary purposes of the Sentencing Guidelines include:

(1) to create a fair sentencing system that provided offenders certainty and honesty in sentencing; (2) to narrow the disparity in sentencing among similar offenders convicted of similar crimes; and (3) to establish a sentencing system that calculated a defendant’s sentence in proportion to the severity of the individual’s criminal conduct.¹⁴³

Using this approach—categorizing all acts of criminal contempt as Class A felonies—promotes this function. All Class A felonies are subject to the same sentencing range pursuant to U.S.C. §§ 3553, 3559, and 3583.

139. This is the First and Seventh Circuit approach. *See generally* United States v. Wright, 812 F.3d 27 (1st Cir. 2016) (classifying criminal contempt as a Class A felony); United States v. Ashqar, 582 F.3d 819 (7th Cir. 2009) (classifying criminal contempt as a Class A felony).

140. This is the Ninth Circuit approach. *See generally* United States v. Broussard, 611 F.3d 1069 (9th Cir. 2010) (classifying criminal contempt as an analogous offense); United States v. Carpenter, 91 F.3d 1282 (9th Cir. 1996) (classifying criminal contempt as an analogous offense).

141. This is the Eleventh Circuit approach. *See generally* Cohn, 586 F.3d 844 (classifying criminal contempt as a sui generis offense).

142. Rebekah R. Runyon, *Am I Under Arrest? Why the U.S. Sentencing Guidelines Need a Strict Definition of What Constitutes an Intervening Arrest*, 67 FLA. L. REV. 1307, 1307 (2015) (“Congress provided for the creation of the U.S. Sentencing Guidelines to promote fairness and produce proportional and uniform sentences.”).

143. *Id.* at 1310 (citing U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (U.S. SENTENCING COMM’N 2014); U.S. SENTENCING COMM’N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1–2, https://isb.ussc.gov/files/USSC_Overview.pdf [<https://perma.cc/NC89-EVSK>]).

However, criminal contempt covers a broad array of actions ranging from being excessively loud¹⁴⁴ to refusal to testify.¹⁴⁵ Pigeonholing such vastly different actions into a single classification runs contrary to the notions of justice and fairness. Therefore, while this approach forwards the idea of uniformity, it fails to consider the differences in crimes that constitute criminal contempt. Moreover, to suggest that Congress intended for criminal contempt to be punishable by life imprisonment completely discounts the nature of the offense. Excessive noise, as to disturb the judicial proceedings, cannot be synonymous with first degree murder—a crime also punishable by life imprisonment. As noted by the *Carpenter* court, “[i]t would be unreasonable to conclude that by authorizing an open-ended range of punishments to enable courts to address even the most egregious contempts appropriately, Congress meant to brand all contempts as serious and all contemnors as felons.”¹⁴⁶

B. Analogous Offense

Given the dynamic character of criminal contempt, avoiding rigid classification of the offense may more gracefully satisfy society’s notions of justice. Analogizing the actions that constitute the violation of criminal contempt presents a more fluid and malleable approach to classifying criminal contempt. Under this approach, violations are classified according to the classification of the most similar crime. Rather than outright deciding that all offenses will be felonies, or misdemeanors, this scheme of classification considers the totality of the circumstances from which the offense arises. “The idea is simple: similar cases should be treated similarly.”¹⁴⁷ However, this scheme presents three possible shortcomings: inconsistent analogizing, situations that lack appropriate analogies, and unfettered discretion of the court to determine the appropriate analogy. The Eleventh Circuit explains, “[t]he method does not address how to classify criminal contempt if a sufficiently analogous

144. See *Cuyler v. Atlantic & N.C.R. Co.*, 131 F. 95, 98 (C.C.E.D.N.C. 1904) (“Any loud noise or other disturbance in the presence of the court, or in the street or other place so near thereto as to interfere with the orderly proceedings of the court, would undoubtedly tend to obstruct the administration of justice, and under such circumstances the court is empowered to summarily punish for contempt.”).

145. See *Ex parte Hudgings*, 249 U.S. 378, 383 (1919) (“[O]bstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest.”).

146. *United States v. Carpenter*, 91 F.3d 1282, 1284 (9th Cir. 1996).

147. Rachael A. Hill, *Character, Choice, and “Aberrant Behavior”*: *Aligning Criminal Sentencing with Concepts of Moral Blame*, 65 U. CHI. L. REV. 975, 975 (1998). Hill goes on to explain, “Thus, situations inevitably arise where the Guidelines call for a sentence substantially more severe than our moral intuitions tell us is necessary or right.” *Id.*

guideline is absent.”¹⁴⁸ The avoidance of uniform classification presents an immediate concern of inconsistency, the problem already at hand, which the solution of analogizing exacerbates. Moreover, it allows a judge to make a unilateral decision as to what is the most analogous offense and sentence a contemnor for a crime he has not necessarily committed.¹⁴⁹

C. *Sui Generis Offense*

Classification of criminal contempt as an offense *sui generis* allows flexibility not available under alternative approaches. It completely bypasses the need to categorize an offense, but rather accords a sentence solely based on the crime committed. Like the analogous offense approach, it looks to the totality of circumstances. However, also comparable to the analogous offense approach, it lacks any semblance of uniformity. To classify criminal contempt as an offense *sui generis* tells the court absolutely nothing about how the crime should be sentenced, leaving the court’s discretion unfettered.

The Eleventh Circuit, in holding that criminal contempt is an offense *sui generis*, relied on a reference made by the Supreme Court.¹⁵⁰ In *Cheff v. Schnackenberg*,¹⁵¹ the Supreme Court alluded to criminal contempt as an offense *sui generis* but did not require it in its holding.¹⁵² The Supreme Court has not explicitly held that criminal contempt is an offense *sui generis*,¹⁵³ and circuits are therefore not bound by the reference in *Cheff*. Moreover, as the First Circuit noted, the Supreme Court’s reference to criminal contempt as an offense *sui generis* does not negate Congress’s intent, which very well may have been that criminal contempt is a Class A felony with a maximum term of life imprisonment.¹⁵⁴

148. *United States v. Cohn*, 586 F.3d 844, 847 n.7 (11th Cir. 2009).

149. In *Carpenter*, the defendant’s criminal contempt was classified pursuant to the classification for obstruction of justice. *Carpenter*, 91 F.3d at 1285. The defendant had not been charged, nor convicted of obstruction of justice. *See id.* at 1285.

150. *Cohn*, 586 F.3d at 849 (citing *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (referring to criminal contempt as “an offense *sui generis*”); *United States v. Holmes*, 822 F.2d 481, 493 (5th Cir. 1987) (“[T]he Supreme Court has never characterized contempt as either a felony or a misdemeanor, but rather has described it as ‘an offense *sui generis*.’” (quoting *Cheff*, 384 U.S. at 380))).

151. 384 U.S. 373 (1966).

152. *Id.* at 380.

153. *Cheff*, 384 U.S. at 380.

154. *United States v. Wright*, 812 F.3d 27, 34 (1st Cir. 2016).

VIII. HOW DOES THIS COMPARE TO STATE TREATMENT OF CONTEMPT?

To reconcile the differing treatments of federal criminal contempt, it is important to understand the treatment of criminal contempt at the state level. This Note uses Texas, Florida, New York, and California as samples.¹⁵⁵ The populations of these four states represent about one third of the entire United States population and are therefore fairly representative of how citizens are treated at the state level in the United States. Each state defines criminal contempt and provides an offense classification, a maximum sentence, or both purposes of sentencing.

Florida defines contempt as “[a] refusal to obey any legal order, mandate or decree, made or given by any judge relative to any of the business of the court”¹⁵⁶ for which every court may impose punishment.¹⁵⁷ Florida does not classify contempt as a felony or a misdemeanor but rather as a common law offense.¹⁵⁸ However, Florida does define the punishment for common law crimes, and consequently defines the punishment for contempt: “when there exists no such provision by statute, the court shall proceed to punish such offense by fine or imprisonment, but the fine shall not exceed \$500, nor the imprisonment 12 months.”¹⁵⁹ Additionally, for the purposes of right to counsel, contempt is the “functional equivalent” of a misdemeanor.¹⁶⁰ Thus, in Florida, a criminal contemnor is granted the right to counsel, as the punishment for such an offense includes incarceration.¹⁶¹

California, however, patently defines contempt as a misdemeanor.¹⁶² In California, a misdemeanor is punishable by “imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both.”¹⁶³ Moreover, the contempt statute in California explicitly defines the occasions on which punishment

155. The four states represent about one third of the entire United States population and are therefore fairly representative of how citizens are treated at the state level in the United States.

156. FLA. STAT. § 38.23 (2018).

157. *Id.* § 38.22.

158. *Graves v. State*, 821 So. 2d 459, 460 (Fla. Dist. Ct. App. 2002) (“Contempt is a common law crime in Florida, which, although recognized by statute, is not specifically classified by statute as either a felony or a misdemeanor.” (citation omitted)).

159. FLA. STAT. § 775.02 (2018).

160. *Giordano v. State*, 32 So. 3d 96, 98 (Fla. Dist. Ct. App. 2009).

161. *Moorman v. Bentley*, 490 So. 2d 186, 187 (Fla. Dist. Ct. App. 1986).

162. CAL. PENAL CODE § 166(a) (West 2018).

163. *Id.* § 19.

should exceed the standard punishment for a misdemeanor,¹⁶⁴ as allowed by statute.¹⁶⁵

In Texas, the punishment for contempt of court is explicitly defined by statute. Contempt of court, other than in a municipal court or justice court, is punishable by a fine of \$500, six months' imprisonment, or both.¹⁶⁶ Texas classifies offenses not specifically labeled as a felonies of the third degree if imprisonment in a penitentiary is possible, as Class B misdemeanors if the offense is not a felony and jail is affixed as a possible punishment, and as Class C misdemeanors if the offense is punishable by a fine only.¹⁶⁷ Texas classifies offenses as either felonies or misdemeanors.¹⁶⁸

Finally, New York designates criminal contempt as either second degree, first degree, or aggravated criminal contempt.¹⁶⁹ Second degree criminal contempt is a Class A misdemeanor.¹⁷⁰ First degree criminal contempt is a Class E felony.¹⁷¹ Aggravated criminal contempt is a Class D felony.¹⁷² A Class A misdemeanor is punishable by up to one year imprisonment and/or a fine of not more than \$1,000.¹⁷³ A Class E felony is punishable by up to four years' imprisonment and/or a fine of not more than \$5,000.¹⁷⁴ A Class D felony is punishable by up to seven years imprisonment and/or a fine of not more than \$5,000.¹⁷⁵

This selection of states illustrates the use of clear and distinct punishments for criminal contempt. Federal courts lack such exact guidelines for sentencing criminal contempt. For that reason, circuits have developed various methods for sentencing contempt. However, these methods lack the precision that sentencing in Florida, California, Texas, and New York exemplify.

164. *Id.* § 166(b)–(d).

165. *Id.* § 19 (“Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both.”).

166. TEX. GOV'T CODE ANN. § 21.002 (West 2018).

167. TEX. PENAL CODE ANN. § 12.41 (West 2018).

168. *Id.* § 12.02.

169. N.Y. PENAL LAW §§ 215.50–52 (McKinney 2018).

170. *Id.* § 215.50.

171. *Id.* § 215.51.

172. *Id.* § 215.52.

173. *Id.* §§ 70.15, 80.05.

174. *Id.* §§ 70.00, 80.00(a).

175. *Id.* §§ 70.00, 80.00(a).

IX. SO, NOW WHAT?

Generally speaking, none of the interpretations for classifying criminal contempt pursuant to 18 U.S.C. 401 are incorrect. As explained by the First and Seventh Circuits, there is no statutory maximum for the offense, and “the sensible rule of statutory construction [is that] the absence of a specified maximum simply means that the maximum is life imprisonment.”¹⁷⁶ Under the plain meaning of the statute, the maximum is technically life imprisonment, making contempt a Class A felony.¹⁷⁷ “An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is . . . life imprisonment, or if the maximum penalty is death, as a Class A felony.”¹⁷⁸ Yet the Ninth Circuit also correctly analogizes criminal contempt to the offense it is most similar to, presenting a practical approach to classifying criminal contempt.¹⁷⁹ Additionally, as reasoned by the Eleventh Circuit, the Supreme Court did reference criminal contempt as an offense *sui generis*.¹⁸⁰ However, these different methods for categorizing criminal contempt produce different outcomes. Invariably, criminal contempt is a Class A felony in the First and Seventh Circuits.¹⁸¹ In the Ninth Circuit, criminal contempt may be a Class A felony but it may also be a misdemeanor, depending on the most analogous offense.¹⁸² Finally, the Eleventh Circuit classifies the offense as neither a felony nor a misdemeanor, but rather as an offense *sui generis*.¹⁸³ Therefore, because categorizing criminal contempt as a Class A felony, by analogizing it to its most similar offense, and categorizing criminal contempt as an offense *sui generis* are all theoretically sound methods, and yet all result in different outcomes for a defendant, a definitive system for classification must be reached. Our justice system

176. *United States v. Turner*, 389 F.3d 111, 120 (4th Cir. 2004).

177. *United States v. Wright*, 812 F.3d 27, 32 (1st Cir. 2016).

178. 18 U.S.C. § 3559(a) (2012).

179. *See generally* *United States v. Carpenter*, 91 F.3d 1282, 1285 (9th Cir. 1996) (“[W]e conclude that criminal contempt should be classified for sentencing purposes according to the applicable Guidelines range for the most nearly analogous offense.”).

180. *See* *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (referring to criminal contempt as “an offense *sui generis*”); *see also* *United States v. Holmes*, 822 F.2d 481, 493 (5th Cir. 1987) (“[T]he Supreme Court has never characterized contempt as either a felony or a misdemeanor, but rather has described it as ‘an offense *sui generis*.’” (quoting *Cheff*, 384 U.S. at 380)).

181. *See generally* *Wright*, 812 F.3d 27 (classifying criminal contempt as a Class A felony); *United States v. Ashqar*, 582 F.3d 819 (7th Cir. 2009) (classifying criminal contempt as a Class A felony).

182. *See generally* *Carpenter*, 91 F.3d 1282 (classifying criminal contempt as an analogous offense).

183. *See generally* *United States v. Cohn*, 586 F.3d 844 (11th Cir. 2009) (classifying criminal contempt as a *sui generis* offense).

must therefore come to a conclusive determination for the proper method of classifying criminal contempt because convictions for the same offense must be uniform to properly effectuate justice.

Legislative intent is instructive in approaching this predicament. Relying on Sentencing Commission commentary, as the *Carpenter* court stated, “[i]t would be unreasonable to conclude that by authorizing an open-ended range of punishments to enable courts to address even the most egregious contempts appropriately, Congress meant to brand all contempts as serious and all contemnors as felons.”¹⁸⁴ Crimes of the most serious nature are classified as Class A felonies. This includes capital offenses, rape, murder, and other similarly violent crimes. Criminal contempt cannot be classified with such heinous and “extraordinarily serious crimes.”¹⁸⁵ In fact, the Ninth Circuit notes that the only similarity between Class A felonies and criminal contempt is the lack of a statutory maximum.¹⁸⁶ It is readily apparent from the face of the statute, due to the stark contrast between Class A felonies and criminal contempt, that Congress did not include a statutory maximum because Congress did not want to limit the vast discretion of the court in sentencing for the variety of conduct that constitutes criminal contempt.¹⁸⁷

Common sense dictates that criminal contempt not be classified as a Class A felony. For example, criminal contempt is often analogous to obstruction of justice.¹⁸⁸ Obstruction of justice is not a Class A Felony.¹⁸⁹ This is illustrated by *Carpenter*, in which the defendant refused to testify upon being subpoenaed to a grand jury hearing.¹⁹⁰ Upon release from jail for civil contempt, the defendant was arrested and charged with criminal contempt.¹⁹¹ The district court sentenced the defendant pursuant to the presentencing report and analogized the offense to obstruction of justice as suggested by U.S.S.G. § 2J1.1.¹⁹² Obstruction of justice was classified as a Class A misdemeanor for sentencing purposes.¹⁹³ The Ninth Circuit concluded “that criminal contempt should be classified for sentencing purposes according to the applicable Guidelines range for the most nearly

184. *Carpenter*, 91 F.3d at 1284.

185. *Id.*

186. *Id.*

187. *Id.* at 1283 (“Congress has not seen fit to impose limitations on the sentencing power for contempts” (alteration in original) (quoting *Green v. United States*, 356 U.S. 165, 188 (1958))).

188. U.S. SENTENCING GUIDELINES MANUAL § 2J1.1 cmt. n.1 (U.S. SENTENCING COMM’N 2018).

189. 18 U.S.C. § 3559(a) (2012).

190. *Carpenter*, 91 F.3d at 1282.

191. *Id.*

192. *Id.* at 1283.

193. *Id.* at 1285.

analogous offense.”¹⁹⁴ Therefore, by analogizing the crime to its most similar offense, a court is able to properly punish for criminal contempt based on its severity,¹⁹⁵ rather than according to a blanket classification as a Class A felony, which may not accurately represent the crime committed. Moreover, if the crime is easily classified by the circumstances surrounding the offense, there is no need to classify it as *sui generis*—neither a felony nor a misdemeanor—especially since the Supreme Court never explicitly held that criminal contempt is a crime *sui generis* and referenced that classification only in dicta.¹⁹⁶

In terms of practicality, the Ninth Circuit approach presents the most reasonable of the three methods of classification. It is the only means of classification that thoroughly examines the crime of contempt in making a determination of its appropriate classification. Classifying criminal contempt as a Class A felony or as *sui generis* ignores the context in which the offense occurs. Neither approach considers the real world consequences of failing to consider the factual specificities of the offense. Neither approach considers the specific facts of the crime. What is the practicality in defining an act of criminal contempt, one so similar to obstruction of justice, as a Class A felony, or an offense *sui generis*? If the actions that constitute criminal contempt do not differ from the actions that constitute obstruction of justice, where is the justice in classifying one as a Class A felony or as an offense *sui generis* but not the other?

Additionally, neither the Class A felony approach nor the *sui generis* approach offer much support for their reasoning.¹⁹⁷ Aside from the plain meaning of the statute,¹⁹⁸ it seems extreme to suggest that criminal contempt is an offense punishable by up to life imprisonment. Moreover, the Supreme Court never held that criminal contempt is an offense *sui generis*.¹⁹⁹ These proffered reasonings are not sufficient for the purposes of creating a uniform method of classification.

194. *Id.*

195. *Id.*

196. *See* *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966).

197. *See generally* *United States v. Wright*, 812 F.3d 27 (1st Cir. 2016) (classifying criminal contempt as a Class A felony); *United States v. Cohn*, 586 F.3d 844 (11th Cir. 2009) (classifying criminal contempt as a *sui generis* offense); *United States v. Ashqar*, 582 F.3d 819 (7th Cir. 2009) (classifying criminal contempt as a Class A felony).

198. 18 U.S.C. § 3559(a) (2012) (“An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is . . . life imprisonment, or if the maximum penalty is death, as a Class A felony.”); *see Ashqar*, 582 F.3d at 825 (“[T]he statutory maximum for criminal contempt is life . . .”).

199. *See Cheff*, 384 U.S. at 380.

Conversely, the Analogous Offense approach considers the policy behind the statutory text by embracing the broad discretion of the court²⁰⁰ and recognizes that the various conduct that constitutes criminal contempt deserves case-by-case analysis.²⁰¹ The statutory maximum is absent from the text of 18 U.S.C. 401 because of Congress's intent to give broad discretion to the court; the absence of a stated statutory maximum does not signal the appropriateness of a maximum authorized punishment of life imprisonment.²⁰² The Commentary to the United States Sentencing Guidelines obviates this fact.²⁰³ In fact, U.S.S.G. § 2J1.1 Contempt specifically promotes analogizing to a similar offense, most notably, as seen in *Carpenter*,²⁰⁴ to obstruction of justice:

Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent, the Commission has not provided a specific guideline for this offense. *In certain cases, the offense conduct will be sufficiently analogous to § 2J1.2 (Obstruction of Justice) for that guideline to apply.*²⁰⁵

The Sentencing Commission clearly advocates analogizing to a similar offense when issuing a sentence for criminal contempt. Moreover, the Commission states:

Many offenses, especially assimilative crimes, are not listed in the Statutory Index or in any of the lists of Statutory Provisions that follow each offense guideline. Nonetheless, the specific guidelines that have been promulgated cover the type of criminal behavior that most such offenses proscribe. *The court is required to determine if there is a sufficiently analogous offense guideline, and, if so, to apply the*

200. *Carpenter*, 91 F.3d at 1283 (“Congress has not seen fit to impose limitations on the sentencing power for contempts” (alteration in original) (quoting *Green v. United States*, 356 U.S. 165, 188 (1958))).

201. *Frank v. United States*, 395 U.S. 147, 149 (1969) (“[A] person may be found in contempt of court for a great many different types of offenses Congress, perhaps in recognition of the scope of criminal contempt, has authorized courts to impose penalties but has not placed any specific limits on their discretion”).

202. *Id.*

203. See U.S. SENTENCING GUIDELINES MANUAL § 2J1.1 cmt. n.1 (U.S. SENTENCING COMM’N 2018).

204. See generally *Carpenter*, 91 F.3d at 1285 (comparing criminal contempt to obstruction of justice and sentenced the defendant as such).

205. U.S. SENTENCING GUIDELINES MANUAL § 2J1.1 cmt. n.1 (U.S. SENTENCING COMM’N 2018) (emphasis added).

guideline that is most analogous. In a case in which there is no sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553 control.²⁰⁶

Clearly, the Commission intended criminal contempt to be punished as its most analogous offense would be punished.

Given the clear language of the Sentencing Commission Application Commentary, the policy behind the lack of a statutory maximum, and general rationality, the Ninth Circuit approach to classification of criminal contempt seems most in line with legislative intent. However, this approach has one extreme shortcoming—it rests on the assumption that all courts will uniformly analogize criminal contempt. Universal adoption of this method fails to account for the discretion judges would have in analogizing contempt to similar offenses. Such an approach would likely bring a litany of appeals. And what would the standard of review be for such an appeal? Abuse of discretion? This is a difficult standard to overcome and would not yield much relief to those convicted of criminal contempt.

Therefore, while most practical, the Ninth Circuit Analogous Offense approach fails to provide the uniform of application of law that is the very foundation of our Constitution, which requires equal treatment and due process of law such that similar crimes are punished similarly. Something must change, and none of these approaches are particularly helpful. This Note proposes the adoption of a statute, such as those in Florida, California, Texas, and New York, to provide a maximum sentence for federal criminal contempt. This Note does not advocate for the suppression of judicial discretion to punish criminal contempt, as our Founders found this discretion necessary to the administration of law;²⁰⁷ however, this Note suggests that the court should retain its broad discretion to determine what is and is not criminal contempt, but that the court's ability to vary the sentences contemnors receive should be limited by the creation of a statutory maximum.

This pragmatic approach does not require an additional statute to define which actions constitute criminal contempt, as some states have.²⁰⁸ This solution merely requires adopting a ceiling for punishment of criminal contempt—a statutory maximum. With the adoption of a statutory maximum for criminal contempt, such that a defendant cannot be sentenced for more than six months' or one years' imprisonment and not subject to more than a \$500 or \$1,000 fine, similar to the states mentioned in Part IX, defendants will face much more uniform punishments, as well as punishments that fit the crime for which they are

206. *Id.* § 2X5.1 background (emphasis added).

207. *United States v. Hudson*, 11 U.S. 32, 34 (1812).

208. FLA. STAT. § 38.23 (2018).

convicted. A contemnor will no longer be branded a Class A felon as he would be under current law in the First and Seventh Circuits. Rather, a contemnor will be subject to uniform punishment under the law as the Constitution requires. This applies directly to the issue of supervised release discussed in Part VI, as a clear definition of the statutory maximum allows for uniform classification of the offense, pursuant to 18 U.S.C. § 3559. All contempts will be classified as the same offense level, and therefore the appropriate length of supervised release will similarly be uniform.²⁰⁹

CONCLUSION

In 2014, 316 defendants faced charges for “[p]erjury, contempt, and intimidation,” only 0.2% of the 160,505 suspects in matters received by U.S. Attorneys.²¹⁰ Of the 229 defendants who were sentenced, 162 were incarcerated.²¹¹ While these numbers do not represent a large subset of the population, it is imperative to the fundamental notions of justice that all defendants receive sentences of similar character for similar crimes. Moreover, offenders of the same crime should be classified in the same way—one should not be sentenced for a misdemeanor and the other for a felony.

Adoption of a statutory maximum maintains the discretion of courts to punish offenders for criminal contempt while creating uniformity in sentencing for criminal contempt; such a statute limits the ability of judges to impose sentences that can vary drastically. Judges may punish many offenses—which may differ drastically, from being too loud in court²¹² to refusing to testify²¹³—as criminal contempt. However, criminal contempt boils down to a contemnor causing a court difficulty in administering justice. All crimes of that nature should be punished similarly.

The approaches advanced by the First, Seventh, Ninth, and Eleventh Circuits do not present practical solutions to the uncertainty surrounding how to punish for criminal contempt. The First and Seventh Circuits rely too heavily on the plain meaning of 18 U.S.C. § 401 without considering the practicality of punishing criminal contempt as a Class A felony. The

209. 18 U.S.C. § 3559 (2012).

210. U.S. DEP’T OF JUSTICE, *supra* note 34, at 9 tbl.2.1.

211. *Id.* at 22 tbl.5.2.

212. See *Cuyler v. Atlantic & N.C.R. Co.*, 131 F. 95, 98 (C.C.E.D.N.C. 1904) (“Any loud noise or other disturbance in the presence of the court, or in the street or other place so near thereto as to interfere with the orderly proceedings of the court, would undoubtedly tend to obstruct the administration of justice, and under such circumstances the court is empowered to summarily punish for contempt.”).

213. See *Ex parte Hudgings*, 249 U.S. 378, 383 (1919) (“[O]bstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest.”).

Eleventh Circuit approach is far too unpredictable and lacks precedent. Finally, the Ninth Circuit fails to address the notion that judges may not uniformly analogize contempt. Creating a statutory maximum is a balanced solution which even-handedly applies the law while retaining the broad discretionary power of judges.