Put Away the Duct Tape and Bring Out the Prosecution: Combating the Unruly Passenger Crisis by Improving Federal Enforcement Procedures

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PUT AWAY THE DUCT TAPE AND BRING OUT THE PROSECUTION: COMBATING THE UNRULY PASSENGER CRISIS BY IMPROVING FEDERAL ENFORCEMENT PROCEDURES

MICHAEL McCLUSKEY*

ABSTRACT

Unruly passengers aboard commercial flights have become a critical issue for consumer airliners, federal agencies, and other key commercial aviation stakeholders. In the past few years, unruly passenger confrontations rose exponentially. Through a patchwork of Federal Aviation Administration (FAA) regulatory fines, civil penalties, and criminal sanctions, there are enforcement measures available to combat unruly passengers. However, this complex mix of regulations and statutes fails to clearly outline which agencies will be responsible for which types of conduct and what the appropriate penalty will be. Not only does this tangle of enforcement measures confuse and hinder prosecution of unruly passengers, it fails to provide fair notice to airline passengers of what constitutes prohibited unruly conduct and the corresponding penalty for violations.

This Comment puts these issues at the forefront by examining the current state of the FAA and Department of Justice (DOJ) enforcement framework, and it proposes a more streamlined model as an alternative. The current FAA enforcement process is outlined in FAA Order Number 2150.3C and requires FAA enforcement counsel to use multiple matrices to determine the appropriate violation and sanction to impose. This complicated

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procedure is subject to a great deal of discretion by FAA enforcement counsel and accounts for a wide range of prohibited behaviors. Similarly, the statutes often used by the DOJ in unruly passenger enforcement cases include a broad range of available sanctions from civil penalties to incarceration. However, DOJ enforcement, triggered by an FAA referral, largely follows normal litigation proceedings rather than the agency adjudication proceedings used by the FAA. Instead of this complicated overlay of statutes and regulations, the proposed model uses a tiered schedule to identify prohibited unruly passenger behavior, the agency responsible for enforcement, and the appropriate penalty for violations. This proposed model will enhance fair notice to passengers and untangle the confusion amongst federal agencies and commercial aviation stakeholders created by the current unruly passenger enforcement process.

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I. INTRODUCTION

THE BUZZ FROM all the airport drinks still pulsed in his head, keeping him warm and happy, though he felt a twinge of irritation earlier when the flight attendant came by and curtly asked for him to put his mask on over his nose and mouth. When she first asked him, he made a half effort to show his compliance but gave up on actually putting his mask on once she
walked back down the aisle. The interaction happened while they boarded the plane—an hour or so before.

Then, as the drink cart rattled down the aisle, he heard her voice again, “Sir, please put your mask on properly, so it covers your nose and mouth.” Hearing the attendant fuss at him again, something came over him. He snapped. He got up and incoherently yelled in her face. When the others on his row began to pull him back into his seat, he tried to shove them aside and lashed out at the flight attendant, striking her in the face with his open palm. The situation further escalated as more passengers got involved to help restrain him. Someone passed up a roll of duct tape, and the passenger was restrained to the seat. While the passenger seethed with anger, he also began to wonder what would happen to him once the plane landed.

After an hour passed and the plane taxied to the terminal, he was entirely sober and concerned for what lay ahead waiting for him at the gate. He looked again at the flight attendant’s face and saw that she managed to get most of the blood off her face, but her cheeks started to show signs of bruising. He felt the heat on his ears and the back of his neck as another wave of remorse and shame traveled through his body. As he shifted back in his seat, he recalled that before the plane took off, the flight attendants explained a bunch of regulations, fines, and procedures, but he could not remember if they talked at all about this situation. He was not sure if he would face criminal sanctions, civil fines, airline bans, civil suits, or indefinite detention. All he knew was that he was in trouble for creating chaos on the flight.

This unruly passenger has a story similar to far too many others.¹ In 2021, there were 5,981 reports of unruly passengers aboard commercial airlines.² Of these, 4,290 were mask-related incidents.³ Unruly passenger incidents range from simple non-


² This number represents the year-end totals reported by the Federal Aviation Administration (FAA) for 2021. See 2021 Unruly Passenger Data, FAA, https://www.faa.gov/data_research/passengers_cargo/unruly_passengers/2021_archive#:~:text=IN%202021%2C%20the%20FAA%20proposed%20an%20increase%20in%20mask%20requirements%20for%20passengers%20with%20medical%20conditions%2C%20but%20the%20FAA%20also%20reminded%20airlines%20that%20they%20are%20responsible%20for%20ensuring%20that%20all%20passengers%20wear%20masks%20while%20on%20board%2C%20unless%20they%20are%20exempted%2C%20and%20that%20they%20also%20must%20inform%20passengers%20of%20these%20requirements%20as%20they%20board%20the%20aircraft%2C%20and%20the%20procedures%20they%20will%20use%20to%20enforce%20them%2C%20and%20that%20they%20must%20provide%20a%20way%20for%20passengers%20to%20report%20violations%20of%20mask%20requirements%2C%20and%20that%20they%20must%20ensure%20that%20passengers%20are%20not%20harassed%20or%20discriminated%20against%20for%20refusing%20to%20wear%20a%20mask%2C%20[https://perma.cc/Z368-ZHHQ] (Apr. 22, 2022).

³ Id. Mask mandates were imposed by commercial airlines in response to the COVID-19 pandemic, requiring passengers to wear face coverings to prevent the
compliance with crewmember instructions (such as putting on a required face mask) to lashing out and striking a flight attendant. In the past few years, unruly passenger confrontations have risen almost six fold. Considering the statutes and regulations prohibiting unruly passenger behavior, this Comment proceeds by using “unruly passenger behavior” and “unruly behavior” to mean “assaulting, threatening, intimidating, or impeding crewmembers in the execution of their duties.” Interested stakeholders have suggested the increase may be attributed to any number of factors such as the politicization of mask-wearing as a COVID-19 prevention measure or even the rise of take-out alcohol containers in airports. Regardless of the myriad potential causes for the increase in unruly passenger behavior, this Comment argues that a key part of the problem stems from inadequate enforcement of statutes and regulations designed to protect airline crewmembers and passengers. Well-designed enforcement mechanisms serve as powerful deterrents to prohibited behavior because potential violators are well aware of the spread of the COVID-19 virus. See, e.g., Delta Expands Safety Commitment By Requiring All Customers to Wear Face Coverings Across Travel, Delta News Hub (Apr. 30, 2020, 5:13 PM), https://news.delta.com/facecoverings?src=facemasksnewshub1 [https://perma.cc/9ZLF-234N]; American Airlines Announces Enhanced Cleaning Procedures and New Personal Protective Equipment for Customers, Am. Airlines Newsroom, https://news.aa.com/news/news-details/2020/American-Airlines-Announces-Enhanced-Cleaning-Procedures-and-New-Personal-Protective-Equipment-for-Customers-OPS-DIS-04/ [https://perma.cc/BLM4-SEJL] (Apr. 27, 2020, 9:25 PM). Once President Joe Biden took office, an Executive Order was signed instituting a federal mask mandate for airlines and other transportation hubs. See Promoting COVID-19 Safety in Domestic and International Travel, 86 Fed. Reg. 7205 (Jan. 26, 2021).


6 See generally 14 C.F.R. §§ 91.11, 121.580, 135.120, 125.328 (2022) (providing similar definitions); 49 U.S.C. §§ 46318, 46504 (respectively setting out civil and criminal violations for similar conduct to that defined above).

7 Leo H. Kahane, Politicizing the Mask: Political, Economic and Demographic Factors Affecting Mask Wearing Behavior in the USA, 47 E. Econ. J. 163, 165 (Jan. 5, 2021), https://doi.org/10.1057/s41302-020-00186-0 [https://perma.cc/YF34-EQGL].

penalties they will incur.\textsuperscript{9} Without a doubt, the people who are investigated as unruly passengers are generally not the sort of individuals who normally would be associated with aggressive criminal activity. Generally, they are well-intentioned passengers who think too highly of themselves in the moment and lash out at others around them.\textsuperscript{10} Nevertheless, these unruly passengers pose a threat to the crewmembers, fellow passengers, and themselves; therefore, they should be punished accordingly. The problem is that most of these people could be effectively deterred if they were aware of the punishment they would face as a result of their actions.\textsuperscript{11} However, the current notice process, post-incident investigation, and subsequent prosecution is all dependent on a system ill-designed for the influx of unruly passengers that the system is currently experiencing.\textsuperscript{12}

This Comment argues that the current unruly passenger enforcement scheme is ineffective due to its over-complexity and lack of fair notice. Instead, it argues for the adoption of a tiered enforcement schedule that more clearly delineates prohibited unruly passenger behavior, the agency responsible for enforcement, and the appropriate penalty for violations. The Comment proceeds in Part II by first examining the roles of key commercial aviation stakeholders in unruly passenger enforcement and the current crisis. Also considered in Part II are the statutes and Federal Aviation Administration (FAA) regulations that make up the unruly passenger enforcement provisions and the prevalent due process issues related to fair notice in the current enforcement regime. Part II concludes with an analysis of the unruly passenger crisis from 30,000 feet, where the need for a

\textsuperscript{9} This is largely the position of traditional deterrence theory. See Daniel S. Nagin, \textit{Deterrence in the Twenty-First Century}, 42 CRIME \& JUST. AM. 199, 201–02 (2013). Under deterrence theory, certainty of punishment has been cited as the most important factor in deterrence—more specifically, certainty of apprehension. \textit{Id.} at 202. Thus, when examining enforcement regimes, it is critical for the enforcement process to carry with it a certainty that violators will be apprehended. \textit{See id.}

\textsuperscript{10} \textit{See, e.g.,} Claire Gillespie, \textit{Why Are So Many Passengers Acting Out on Airlines Right Now? Experts Share Some Fascinating Insight}, HEALTH.COM (Aug. 16, 2021), https://www.health.com/mind-body/bad-behavior-passengers-airlines [https://perma.cc/X7RH-FJUJ] ("Experts say [the recent increase in unruly passenger incidents] isn’t entirely unexpected considering the lockdowns millions of people have abided by, and it’s not limited to airplanes . . . [A]ccepting the new reality of traveling by plane, like mask mandates, versus what flying was pre-pandemic can be challenging for some people.")

\textsuperscript{11} \textit{Id.} at 201.

\textsuperscript{12} \textit{See discussion infra} Section III.A.2.
solution is most evident due to overlapping enforcement jurisdiction and cries for help from key commercial aviation stakeholders. Part III begins by analyzing the unruly passenger enforcement responsibilities of the two principal enforcement agencies: the FAA and the Department of Justice (DOJ). Part III makes clear that the current unruly passenger enforcement regime is unclear and overly complex. However, Part IV offers a solution to clear up the murky state of unruly passenger enforcement by proposing a tiered enforcement schedule to identify prohibited unruly passenger behavior, the agency responsible for enforcement, and the appropriate penalty for violations. Part IV further argues that this proposed tiered enforcement schedule resolves the due process concerns over fair notice and the prosecutorial confusion present in the current unruly passenger enforcement regime.

II. CURRENT PROCESS

A. Stakeholders

The current unruly passenger enforcement process involves multiple federal agencies, private entities including the air carriers and airports, and state and local law enforcement. This amalgam of overlapping jurisdiction creates confusion not only amongst passengers who are curious about where they may be prosecuted, but also amongst the stakeholders themselves because proper jurisdiction appears to be a first-on-the-scene issue much of the time.

1. Agencies

There are five federal agencies with jurisdiction in unruly passenger situations. The FAA has authority to impose civil fines against unruly passengers who violate regulations protecting flight crews in the administration of their duties.\(^\text{13}\) The FAA is part of the Department of Transportation (DOT).\(^\text{14}\) Additionally, the Transportation Security Administration (TSA) has authority to investigate and handle infractions that amount to security violations.\(^\text{15}\) Unlike the FAA, TSA is not part of DOT.\(^\text{16}\)

\(^\text{13}\) See 14 C.F.R. §§ 91.11, 121.580, 135.120, 125.328 (2022).
\(^\text{15}\) See Transp. Sec. Admin., Enforcement Sanction Guidance Policy (2021), https://www.tsa.gov/sites/default/files/enforcement_sanction_guidance_policy.pdf [https://perma.cc/XJ47-GDWF]. TSA security violations relating to individuals include possessing a firearm, sharp object,
While TSA was originally created under DOT following the terrorist attacks of September 11, 2001, TSA was moved to the Department of Homeland Security in 2003. Neither the FAA nor the TSA has criminal prosecution authority; thus, any unruly passenger cases deserving of criminal prosecution must be referred to the Federal Bureau of Investigation (FBI) for criminal investigation and the DOJ for criminal prosecution. Within the DOJ, the referred cases are prosecuted by Assistant U.S. Attorneys in the proper jurisdiction where the case originated. Currently, there is no published protocol for when the FBI or local law enforcement will meet a flight. Presumably, law enforcement will be present when someone is injured aboard the flight, but it is difficult to predict whether local law enforcement or the FBI will take the lead.

2. Private Actors

In addition to federal agencies, private entities including the air carriers and airports have a role in the unruly passenger process. Air carriers such as American, Delta, Southwest, and United (to name a few) have primary responsibility for training their flight crews and ticketing passengers in the first place.
While much of flight-crew training is regulated by TSA and the FAA, the training is still conducted by air carrier training professionals who instruct crewmembers in deploying safety measures while maintaining the first-rate service associated with major air carriers. This is no easy task—as proven by reports showing that becoming a flight attendant for a major carrier can be more difficult than getting into Harvard. In addition to their responsibilities for drink service and safety instruction, flight attendants are the first line of defense against unruly passengers and often the target of unruly passengers’ outbursts. It was reported that roughly 85% of flight attendants experienced an unruly passenger during 2021. In fact, the TSA recently resumed training flight attendants in self-defense because they are so often involved in subduing unruly passengers.

Moreover, air carriers maintain private no-fly lists as a measure against unruly passengers. Delta recently reported roughly 1,900 passengers on its own no-fly list. Although these lists are internal to each air carrier, there has been discussion among the air carriers to share the lists because, as a Delta senior executive stated, “A list of banned customers doesn’t work

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25 See AM. AIRLINES, supra note 22.
28 Id.
30 See, e.g., Leslie Josephs, Delta Asks the Justice Department To Put Unruly Travelers on a ‘No-Fly’ List, CNBC (Feb. 5, 2022, 9:34 PM), https://www.cnbc.com/2022/02/05/delta-asks-the-justice-department-to-put-unruly-travelers-on-a-no-fly-list.html [https://perma.cc/H2RQ-7HR4].
31 Id.
as well if that customer can fly with another airline.”32 Delta further reported that passengers are added to the airline’s no-fly list “[a]nytime a customer physically engages with intent to harm, whether in a lobby, at a gate or onboard.”33 However, there is neither any indication of uniformity across the major air carriers in administering their internal no-fly lists nor any sign that the air carriers have agreed to share their lists with one another.

3. Local and State Enforcement

Local law enforcement is also a concern for unruly passengers. Local law enforcement mostly comes in the form of airport police.34 Upon arriving at the landing gate, airport police may detain unruly passengers.35 However, airport police may detain passengers only if a crewmember reports the incident to airport police to press charges.36

Additionally, local and state law enforcement is an important stakeholder in the unruly passenger crisis because local and state law governs the distribution of alcohol-service certificates.37 Overconsumption of alcohol remains a commonly cited contributor to unruly passenger behavior, and in an effort to mitigate alcohol’s influence over unruly passengers, many stakeholders have called for greater oversight by airport alcohol providers to not overserve passengers prior to their flights.38 During the height of the COVID-19 pandemic, many airport alcohol provid-

33 Id.
36 See id.
37 Disruption in the Skies, supra note 34, at 3.
ers and airports adopted to-go-cup programs allowing passengers to take their drinks with them to be consumed in a safe distance from other passengers—promoting social distancing and making their businesses more attractive to the few travelers who continued flying.\textsuperscript{39} However, the to-go-cup programs had unintended consequences: Passengers began taking their to-go cups of alcoholic beverages onboard the aircraft.\textsuperscript{40} FAA regulations prohibit the consumption of alcohol onboard the aircraft if it is not provided by the flight attendants.\textsuperscript{41}

B. Regulatory Framework

There are four regulations and two statutes governing unruly passenger behavior: 14 C.F.R. §§ 91.11, 121.580, 135.120, 125.328; and 49 U.S.C. §§ 46318, 46504.\textsuperscript{42} This Comment will address these provisions as the “unruly passenger enforcement provisions.” The regulations each dictate that “[n]o person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember’s duties aboard an aircraft being operated.”\textsuperscript{43} These provisions are held in different parts of FAA authority: 14 C.F.R. § 91.11 falls in a list of provisions under “General Operating and Flight Rules”;\textsuperscript{44} 14 C.F.R. § 121.580 is under “Operating Requirements: Domestic, Flag, and Supplemental Operations”;\textsuperscript{45} 14 C.F.R. § 125.328 falls under “Certification and Operations: Airplanes Having a Seating Capacity of 20 or More Passengers or a Maximum Payload Capacity of 6,000 Pounds or More; and Rules Governing Persons on Board Such Aircraft”;\textsuperscript{46} 14. C.F.R. § 135.120 is under “Operating Requirements: Commuter and on Demand Operations and Rules Governing Persons on Board Such Aircraft.”\textsuperscript{47} The statutes, 49 U.S.C. §§ 46318 and 46504, provide for different penalties prosecuted by the DOJ. Section 46318 imposes civil fines of no more than $35,000 when

\begin{footnotesize}
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\item[\textsuperscript{39}] See Dickson, supra note 8.
\item[\textsuperscript{40}] Id.
\item[\textsuperscript{41}] See 14 C.F.R. § 121.575 (2022).
\item[\textsuperscript{42}] 14 C.F.R. §§ 91.11, 121.580, 135.120, 125.328 (2022); 49 U.S.C. §§ 46318, 46504.
\item[\textsuperscript{43}] See regulations cited supra note 42.
\item[\textsuperscript{44}] See 14 C.F.R. § 91.11 (2022).
\item[\textsuperscript{45}] See 14 C.F.R. § 121.580 (2022).
\item[\textsuperscript{46}] See 14 C.F.R. § 125.328 (2022).
\item[\textsuperscript{47}] See 14 C.F.R. § 135.120 (2022).
\end{itemize}
\end{footnotesize}
[a]n individual . . . physically or sexually assaults or threatens to
physically or sexually assault a member of the flight crew or cabin
crew of a civil aircraft or any other individual on the aircraft, or
takes any action that poses an imminent threat to the safety of
the aircraft or other individuals on the aircraft.48

Section 46504 provides criminal sanctions, including fines
and imprisonment of no more than twenty years, for

[a]n individual on an aircraft in the special aircraft jurisdiction
of the United States49 who, by assaulting or intimidating a flight
crew member or flight attendant of the aircraft, interferes with
the performance of the duties of the member or attendant or
lessens the ability of the member or attendant to perform those
duties, or attempts or conspires to do such an act . . . However, if
a dangerous weapon is used in assaulting or intimidating the
member or attendant, the individual shall be imprisoned for any
term of years or for life.50

Notably, each of these prohibitions are strikingly similar, with
very little distinction between the statutes and regulations
rooted in the text. There are two subtle distinctions between
civil fines and criminal penalties: (1) whether the unruly passen-
ger acts rather than threatens (“threatens to physically or sexu-
ally assault”51 versus “intimidating”52), and (2) whether the
unruly passenger’s behavior “interferes with the performance of
the duties”53 of the crewmember. There is overlap between the

49 “[S]pecial aircraft jurisdiction of the United States” is defined by statute to
include any of the following aircraft in flight: (A) a civil aircraft of the United
States[,] (B) an aircraft of the armed forces of the United States[,] (C) another
aircraft in the United States[,] (D) another aircraft outside the United States—
i) that has its next scheduled destination or last place of departure in the United
States, if the aircraft next lands in the United States; (ii) on which an individual
commits an offense (as defined in the Convention for the Suppression of Unlaw-
ful Seizure of Aircraft) if the aircraft lands in the United States with the individ-
ual still on the aircraft; or (iii) against which an individual commits an offense (as
defined in subsection (d) or (e) of article I, section I of the Convention for the
Suppression of Unlawful Acts against the Safety of Civil Aviation) if the aircraft
lands in the United States with the individual still on the aircraft[,] (E) any other
aircraft leased without crew to a lessee whose principal place of business is in the
United States or, if the lessee does not have a principal place of business, whose
permanent residence is in the United States.
53 See id.; see also 14 C.F.R. §§ 91.11, 121.580, 135.120, 125.328 (2022) (similar
language).
statutes and the regulations because threats are prohibited by 14 C.F.R. §§ 91.11, 121.580, 135.120, and 125.328, in addition to 49 U.S.C. § 46318.\textsuperscript{54} Similarly, assaults, intimidation, and interference with crewmember duties are prohibited by 14 C.F.R. §§ 91.11, 121.580, 135.120, and 125.328, as well as 49 U.S.C. § 46504.\textsuperscript{55} Thus, an unruly passenger simultaneously could be exposed to liability for the same activity under the regulations and statutes. In fact, the FAA has clarified that “[o]ne incident can result in multiple violations.”\textsuperscript{56}

C. Due Process Concerns

There is a critical due process issue with the complex overlay of statutes and regulations prohibiting unruly passenger behavior. Due process requires notice, an opportunity to be heard, and an impartial tribunal.\textsuperscript{57} The civil and criminal regulations relating to unruly passenger behavior offer mechanisms that satisfy the final two requirements of due process; however, they fall short in providing fair notice.\textsuperscript{58}

In requiring notice to satisfy due process, the Supreme Court “assume[s] that man is free to steer between lawful and unlawful conduct, [and it] insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”\textsuperscript{59} Notice can be either constructive or actual.\textsuperscript{60} These principles of due process have been “incorporated into administrative law [to] preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”\textsuperscript{61} Courts have probed this issue by “ask[ing] whether by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which

\textsuperscript{54} See 49 U.S.C. § 46318; 14 C.F.R. §§ 91.11, 121.580, 135.120, 125.328 (2022).
\textsuperscript{55} See 49 U.S.C. § 46504; 14 C.F.R. §§ 91.11, 121.580, 135.120, 125.328 (2022).
\textsuperscript{56} FAA, supra note 5.
\textsuperscript{60} Earle v. McVeigh, 91 U.S. 503, 504 (1875).
\textsuperscript{61} Affum v. United States, 566 F.3d 1150, 1163 (D.C. Cir. 2009) (internal quotations omitted) (quoting PMD Produce Brokerage Corp. v. USDA, 234 F.3d 48, 52 (D.C. Cir. 2000)).
the agency expects parties to conform." Applied here, there is an expectation that air carrier passengers, acting in good faith, identify with ascertainable certainty, the FAA and DOJ’s standards for their behavior while aboard the aircraft. While it may seem common sense that a passenger should avoid lashing out with unruly behavior, it is not as clear that these agencies have met their burden of ensuring passengers have ascertainable certainty about what enforcement provisions passengers may have violated. For example, as we will see later, it is not always clear where a passenger’s unruly behavior may fall within the enforcement provisions. Yet, a critical part of the underlying policy of fair notice is the prevention of arbitrary enforcement. Additionally, it is not clear that agencies have met their burden of ensuring passengers have ascertainable certainty about what penalties will result from their unruly behavior.

Notice of the potential penalties for a violation is also required under due process. The Court has previously held that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” Thus, there are two components required of unruly passenger enforcement provisions: (1) a clear prohibition of unruly passenger behavior, and (2) a clear assessment of what penalty will be imposed if the prohibition is violated. There is a bit of inherent logic to this because it seems fundamentally unfair to punish someone who fails to understand either what is expected of themselves or what the consequences are for violating that expectation.

While passengers are given actual notice of many regulations during flight attendants’ preflight instructions, unruly behavior is not among them. Thus, passengers are expected to have done independent research ahead of the flight and know not only what behavior is proscribed by unruly passenger statutes

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62 Id. (internal quotations omitted) (quoting Trinity Broad. of Fla., Inc. v. FCC, 211 F.3d 618, 628 (D.C. Cir. 2000)).
63 See id.
64 See discussion infra Section III.A.2.
67 Id.
68 See id.
69 See Am. Airlines, supra note 58.
and regulations, but also which agencies and authorities will have jurisdiction over any subsequent proceedings. A passenger’s unruly behavior may be subject to adjudication by the FAA, criminal investigation by the FBI, criminal prosecution by the DOJ, civil sanctions by the airline, civil suit by anyone injured by the unruly passenger, and criminal proceedings by local law enforcement.70

D. THE ISSUE FROM 30,000 FEET

Despite all of these stakeholders’ interests in resolving the unruly passenger crisis, they all continue to turn to one another for a solution. The flight attendants and airlines have turned to the FAA,71 the FAA has turned to the DOJ and airports,72 Congress has turned to the DOJ,73 and the White House has turned to the DOJ.74 Further, it appears that the complex overlay of responsibilities clouds who holds responsibility for leading investigations and prosecutions because so many stakeholders are equipped with remedial tools. This Comment recommends the creation of a single streamlined process with clearly defined responsibilities and an easy-to-follow procedure to ensure that the process is effectively implemented. To effectively lay the groundwork, it is important to next look at the main actors who would hold responsibility under the proposed process: The FAA and DOJ.

70 See discussion infra Part III.
72 See Dickson, supra note 8.
III. THE ACTORS

Each of the proposed actors, the FAA and the DOJ, currently hold important roles in the resolution of unruly passenger cases. The FAA, especially with the implementation of the “Zero Tolerance” campaign,\(^75\) has the ability to do some investigation, notify unruly passengers of their violations, and provide agency adjudications for violators who choose to appear before an administrative law judge (ALJ).\(^76\) The outcome of an FAA violation includes a civil fine to be paid by the passenger.\(^77\) Under the FAA Reauthorization Act of 2018, the maximum fine amount increased to $37,000 per violation (the same unruly passenger can commit multiple violations in a single incident).\(^78\) Similarly, the DOJ can use federal investigators—FBI agents—to investigate violations of two unruly passenger statutes (49 U.S.C. §§ 46318, 46504) and bring criminal charges against unruly passenger defendants through the normal litigation process.\(^79\) Importantly, the DOJ is the only body in the unruly passenger enforcement domain capable of bringing criminal charges.\(^80\) Both of these actors will play a critical role in the proposed process because of their current abilities: The FAA can handle less severe cases through its agency adjudication proceedings while the DOJ can prosecute criminal cases against egregious violators.

This Comment’s proposed process would remove local law enforcement from the unruly passenger enforcement protocol. This is principally because local law enforcement practices will vary from jurisdiction to jurisdiction, yet flights operate in a consistent manner across the country. Since this process requires partnerships with the flight crews onboard the aircraft to initiate

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\(^76\) Legal Enforcement Actions, FAA, https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/enforcement/enforcement_actions [https://perma.cc/S565-FJA7].

\(^77\) Id.


\(^80\) See Munean, supra note 19.
the procedure, it is imperative that the flight crews know what to expect when they arrive on the ground and be greeted with the same resources—no matter where they land. Flight crews looking to report unruly passenger behavior aboard their flight should not be concerned about whether they are working with FBI agents or local law enforcement: flight crews should know that the FBI will be present at the gate to take the unruly passenger into custody and collect statements from the crewmembers.

Additionally, because this Comment designates a responsible agency for different types of unruly passenger behavior, the proposed process will promote subject-matter expertise among the enforcement agencies themselves. For example, this Comment proposes that the FAA take the lead in enforcing unruly passenger offenses when the unruly passenger continually ignores flight attendant instructions relating to cabin safety. When a passenger chooses to not wear a mask, not fasten their seat belt, and linger in the aisle when the seatbelt light is illuminated, the crewmembers can report the passenger to the extent the passenger interferes with their duties. Because the FAA will be assigned all cases of this type, FAA enforcement counsel will develop an expertise in prosecuting these cases. FAA enforcement counsel will be able to develop key indicators and patterns to look for in bringing these enforcement cases, and they will be able to do this more effectively without also needing to understand the nuances of prosecuting cases where an unruly passenger has intentionally assaulted another passenger: these will be assigned to the DOJ.

Furthermore, this Comment’s proposed enforcement schedule ensures that the caseload does not overwhelm either the FAA or the DOJ. Most enforcement cases will come from proposed Tier 1 and Tier 2 offenses because the behavior is more common. The DOJ will be responsible for more types of offenses; however, its caseload should be lighter because these types of offenses are less common. The result will give both agencies a fairly equal workload so that both will be able to work through enforcement cases efficiently.

81 See discussion infra Section III.A.
82 Later, this Comment will designate this as a Tier 1 offense. See discussion infra Section IV.A. The regulatory authority for Tier 1 offenses derives from 14 C.F.R. §§ 91.111, 125.580, 125.328, 135.120 (2022).
83 See discussion infra Section III.A.
84 See discussion infra Section III.A.
85 See discussion infra Section III.A.
A. Federal Aviation Administration

1. Enforcement Actions

The FAA adjudication process begins when the FAA sends unruly passengers a “notice of proposed civil penalty” through the mail. The notice of proposed penalty includes “a statement of the charges and the amount of the proposed civil penalty.” After the notice is issued, the unruly passenger respondent has an opportunity to request a hearing to present evidence on their behalf, initiate conversation with the FAA enforcement team for informal measures, or pay the fine as charged. The request is then received by one of the FAA enforcement teams. The FAA has five regional enforcement divisions, including the Midwest, Northeast, Southern, Southwest, and Western Teams. These Teams have the primary responsibility of representing FAA interests in enforcement actions. The FAA may follow up with a “[f]inal notice of proposed civil penalty.” The final notice may be issued if the alleged violator fails to respond to the notice of proposed penalty or if enforcement counsel and the alleged violator fail to reach a compromise during their negotiations. The final notice will include the charges, proposed penalty amount, and any modifications to the penalty as a result of evidence brought to enforcement counsel’s attention during negotiations. If the unruly passenger decides to move forward with a hearing, the FAA enforcement Team will prepare a complaint to be filed in the FAA adjudication docket, where an ALJ will be assigned.

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86 14 C.F.R. § 13.16(f) (2022); FAA, supra note 76.
89 See 14 C.F.R. § 13.16(f) (2)(iii).
90 See id. § 13.16(f)(1).
91 See FAA, supra note 76.
93 FAA, supra note 76.
94 See 14 C.F.R. § 13.16(g).
95 See id. § 13.16(g)(1).
96 Id. § 13.16(g).
The complaint contains a brief overview of the prior communications and actions taken by the FAA.98 Then, the complaint lists the factual allegations that the FAA enforcement Team plans to bring before the ALJ.99 Following the facts section, the complaint specifically lists the violated regulations and statutes and assigns a civil penalty to the alleged violations.100 In addition to being filed with the FAA docket, the complaint is served upon the unruly passenger through the mail.101

Within thirty days of receiving the complaint, the unruly passenger can file an answer admitting, denying, or stipulating to lacking sufficient knowledge to admit or deny the allegations.102 Then, during the adjudication proceedings, the flow somewhat follows normal litigation: there is a discovery process, the opportunity to bring witnesses, and an opportunity to make statements.103 These proceedings are not governed by the Federal Rules of Evidence or the Federal Rules of Civil Procedure; instead, the applicable procedural rules are promulgated by the FAA.104 Following the proceeding, the ALJ will draft an order of initial decision with the penalty amount.105 The ALJ can follow the FAA enforcement team’s proposed penalty, it can decrease the penalty, or it can find in favor of the respondent.106 The ALJ’s decision may be appealed to the FAA Administrator,107 and the FAA Administrator’s decision may be appealed to a U.S. court of appeals.108 When the FAA Administrator, or “FAA decisionmaker,”109 reviews the decision of an ALJ, the Administrator

99 See, e.g., id.; see also 14 C.F.R. § 13.208(c).
100 14 C.F.R. § 13.208(c).
102 14 C.F.R. § 13.209(a), (e) (2022); see, e.g., Raul Labarca, FAA Docket No.
www.regulations.gov/document/FAA-2021-0407-0003 [https://perma.cc/LN2L-
CEWC].
104 See generally Rules of Practice in FAA Civil Penalty Actions, 14 C.F.R.
106 See id. § 13.232(c).
107 14 C.F.R. § 13.233; FAA, supra note 76.
108 14 C.F.R. § 13.235(c); FAA, supra note 76.
109 “FAA decisionmaker” is defined as
the Administrator of the Federal Aviation Administration, acting in
the capacity of the decisionmaker on appeal, or any person to
whom the Administrator has delegated the Administrator’s deci-
sion-making authority in a civil penalty action. As used in this sub-
only considers “(1) whether each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence; (2) whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and (3) whether the administrative law judge committed any prejudicial errors.”110 If the Administrator’s final decision is appealed to a U.S. court of appeals, the court “will uphold the agency’s decision unless it is arbitrary and capricious, an abuse of discretion, or otherwise contrary to law.”111

Importantly, there are other informal proceedings that an unruly passenger can engage in following their notice of proposed civil penalties.112 Rather than engage in the adjudication process, unruly passengers can negotiate the penalty with the enforcement team and enter into a compromise.113 Compromises can be reached either by submitting a written request outlining reasons for reductions114 or by scheduling an informal conference to discuss the matter.115 Compromises can include a reduction in the penalty amount or payment of the penalty without a finding of a violation.116 A key advantage to these latter compromise agreements is that “[t]he compromise order will not be used as evidence of a prior violation in any subsequent civil proceeding.”117 However, if the compromise order states that the FAA has found a violation, it assesses a civil penalty.118

2. Enforcement Schedule

The FAA currently has a scheduling system in place as a part of its compliance and enforcement program.119 Administrator Dickson signed an Order on January 13, 2021, to “direct[ ] a stricter legal enforcement policy against unruly airline passen-

112 FAA, supra note 76.
114 Id. § 13.16(f)(ii).
115 Id. § 13.16(f)(iii).
116 Id. § 13.16(n)(2).
117 See id. § 13.16(n)(2)(iii).
118 See id. § 13.16(n)(1).
119 See FAA Compliance and Enforcement Program, FAA Order No. 2150.3C (Sept. 18, 2018).
gers.”\(^{120}\) This enforcement program under the Zero Tolerance policy limits the ability of FAA enforcers to pursue alternatives such as warnings or counseling.\(^{121}\)

Earlier in this Comment, it was noted that the lack of fair notice presents severe due process concerns.\(^{122}\) In an effort to provide notice of the FAA’s Zero Tolerance policy, the FAA commissioned a number of memes and other infographics to warn passengers that there are consequences for acting out.\(^{123}\) These promotional materials are intended to be placed around airports and posted on social media to give passengers warnings about the more vigorous prosecution of unruly passenger behavior.\(^{124}\) However, despite the novelty of these notices as an advertising campaign, they fail to explain the nuances of the FAA’s enforcement program or even that there is an enforcement program underlying violations.

Additionally, there are several lingering issues with the FAA’s current enforcement program. Even if there were better notice of the FAA’s current enforcement program, the current program is unnecessarily complex and unclear when dealing with unruly passenger issues. Further, this enforcement framework is only limited to the FAA’s enforcement process and does not include the criminal side of unruly passenger enforcement administered by the DOJ. The only processes relating to the DOJ include protocols for referring cases to the DOJ when they exceed the FAA’s enforcement authority.\(^{125}\)

The FAA’s current enforcement program involves four steps.\(^{126}\) First, FAA enforcement counsel is instructed to “[u]se the Table of Violations . . . to identify the severity level of the violation.”\(^{127}\) Second, counsel needs to “[i]dentify the culpability of the violator.”\(^{128}\) Third, counsel needs to “[u]se the Sanction Matrix . . . to identify a general sanction range (Low, Moderate, High, or Maximum) using the severity level of the violation and

\(^{120}\) FAA, supra note 75; FAA Compliance and Enforcement Program, FAA Order No. 2150.3C CHG 4 (Jan. 13, 2021).

\(^{121}\) FAA, supra note 75.

\(^{122}\) See discussion supra Section II.C.

\(^{123}\) See id.

\(^{124}\) See id.

\(^{125}\) See FAA Compliance and Enforcement Program, FAA Order No. 2150.3C, at 8-26 (Sept. 18, 2018).

\(^{126}\) Id. at 9-2 to -3.

\(^{127}\) Id. at 9-2.

\(^{128}\) Id. at 9-3.
the culpability of the violator.” 129 Finally, counsel should “use the Sanction Ranges Table . . . to determine the specific sanction range using the general sanction range and the type of violator.” 130 Three of these steps involve different table matrices to help decide where to look in the next step. 131 The process requires substantial cross-referencing to determine what action is appropriate.

With all the chaos in this enforcement program, it would be helpful to walk through an example. For these purposes, consider an unruly passenger who has recklessly interfered with a crewmember by lashing out while intoxicated and knocking over a flight attendant. The passenger did not intend to contact the flight attendant, but he was conducting himself in such a reckless manner that it was seemingly inevitable. We know this is a violation of the FAA regulation framework that prohibits interference with crewmembers performing their duties, so we now turn to how FAA enforcement counsel would figure out the penalty range.

First, we need to use the Table of Violations to “identify the severity level of the violation.” 132 The Table of Violations is included in the Order as Figure 9.9 and comprises roughly sixteen pages of offenses categorized by type. 133 Passenger violations, including “[i]nterference with crewmember,” are found in Figure 9-9-i. 134 This offense is listed as a “Severity 2” offense. 135 Then, we need to determine the culpability level of the violator. 136 The culpability levels include “careless,” 137 “reckless,” 138 and “intentional.” 139 Per our example, the violator acted recklessly, so we can label it as “reckless” culpability. Next, we need to cross-reference the severity level we found during step one with the culpa-

129 Id.
130 Id.
131 Steps one, three, and four require cross-reference to a table matrix. See id.
132 Id. at 9-2.
133 Id. at 9-19 to -36.
134 Id. at 9-28.
135 Id. at 9-3.
136 Id. at 9-3.
137 A careless violation occurs “when the violator’s conduct falls below the standard of care expected of a reasonable person . . . but is not reckless or intentional.” Id.
138 A reckless violation occurs “when the violator’s conduct demonstrates a gross disregard for or deliberate indifference to safety or a safety standard.” Id.
139 An intentional violation occurs “when the violator’s conduct is deliberate and the violator knows that the conduct is contrary to statute or regulation, or is otherwise prohibited.” Id.
bility we found in step two using the “Sanction Matrix.” \footnote{See id.} The Sanction Matrix is labeled as Figure 9-1; combining a severity level 2 with a reckless culpability results in a “High” sanction range. \footnote{Id. at 9-4.} Finally, to put the High sanction range in context, we turn to the Sanction Ranges table. \footnote{Id. at 9-3.} The Sanction Ranges Table is found in Figure 9-2, and we need to again find the appropriate type of offense to cross-reference with our determined sanction range. \footnote{See id. at 9-4 to -5.} Here, it appears that there could be a couple of applicable offenses: “Individual Interfering with a Crewmember” or “Passengers (other violations).” \footnote{See id. at 9-5.} For our purposes, we will continue with this as an “Individual Interfering with a Crewmember,” which offers sanctions of $7,500–$10,500 if the High penalty range applies. \footnote{Id.}

As demonstrated, the FAA’s current enforcement program schedule is rather confusing, especially if it should be accessible by everyday passengers. The current schedule presents other issues as well. To begin, there is a seeming overlap in the schedule because it includes both “passenger” offenses and “individual” offenses. \footnote{See id. at 9-4 to -5.} Individual is defined as “someone who is neither an Individual Certificate Holder nor an Individual Acting as an Airman, and includes passengers, flight attendants, and visual observers.” \footnote{Id. at 9-6.} While there is no direct conflict between these two terms, it creates another need for cross-reference as a passenger needs to figure out that they are also responsible for individual violations. \footnote{See id.} Further, as seen in the example, there are times where unruly behavior could fit into two offenses based on the loose offense definitions. While the FAA provides that “[w]hen an act resulting in a violation would be covered by more than one row in the Sanction Ranges Table . . . whichever row would produce the higher sanction range for that act applies,” \footnote{Id.} this hardly seems like appropriate notice for a passenger who is unsure of what the offenses are even related to. It seems unfair that a passenger is exposed to greater penalties without clear notice.

\begin{itemize}
\item \footnote{See id.}
\item \footnote{Id. at 9-4.}
\item \footnote{See id. at 9-3.}
\item \footnote{See id. at 9-4 to -5.}
\item \footnote{See id. at 9-5.}
\item \footnote{Id.}
\item \footnote{See id. at 9-6.}
\item \footnote{See id.}
\item \footnote{Id.}
\end{itemize}
Continuing with this theme, the enforcement program provides for consideration of aggravating and mitigating factors. These factors that are relevant to unruly passengers include “Degree of Hazard,” “Violation History,” “Compliance Disposition of Violator,” “Systemic/Isolated Violations,” “Corrective Action,” “Inadvertence,” “Voluntary Reporting of Violations,” and “Criminal Conviction.” Notably, the program’s consideration of criminal conviction as a mitigating factor concludes that “[t]he FAA generally takes remedial action if warranted despite the criminal prosecution.” Although inclusion of these aggravating and mitigating factors helps to give enforcement counsel some leeway when assessing the appropriate penalties, the factors also obscure the notice to violators of what penalties they face.

Additionally, the enforcement program’s Sanction Matrix undermines the distinction between reckless culpability and intentional culpability by grouping the two standards together when considering the appropriate sanction range. While there is certainly a strong argument behind distinguishing between offenses committed recklessly and offenses committed intentionally, the need for this distinction immediately vanishes if the offenses will be treated the same way in the end. Although the FAA may argue that reckless violations receive the lower end of the range as compared to intentional violations, this is a tautological explanation because the penalty ranges are otherwise broken up by their egregiousness. This begs the question—why does culpability matter less than severity?

B. Department of Justice

DOJ involvement with unruly passenger cases primarily comes in one of two ways: (1) investigation by the FBI followed by prosecution by a U.S. Attorney’s Office in federal criminal proceedings, or (2) referral by the FAA to a U.S. Attorney’s Office when the case is beyond the reach of the FAA.

Under 49 U.S.C. § 46504, the penalties include a term of imprisonment “for not more than 20 years.” Imprisonment is only available for criminal offenses, so unruly passenger cases

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150 See id.
151 Id. at 9-7 to -9 (alteration in original).
152 Id. at 9-9 (emphasis added).
153 See id. at 9-4.
154 Id. at 8-26; see Turner v. United States, Crim. No. 16-00207 SOM, 2021 WL 4302645, at *2 (D. Haw. Sept. 21, 2021), appeal filed.
under this statute require prosecution by the DOJ.\textsuperscript{156} These cases often include initial investigation by the FBI, where the FBI case agent will then work with the appropriate U.S. Attorney’s Office to prosecute the case.\textsuperscript{157}

As noted before, the DOJ may also take over cases from the FAA “[w]hen enforcement counsel is unable to settle a case in which the FAA seeks a civil penalty in excess of the Administrator’s assessment authority.”\textsuperscript{158} When the FAA Administrator pursues a referral under this Section, there is not typically an agency assessment.\textsuperscript{159} These referrals come to a U.S. Attorney’s Office, which must decide whether or not to take the case.\textsuperscript{160} The FAA sends a “Letter of Referral” that includes a summary of the case facts, the alleged violations, the action taken before referral, the targeted settlement amount, and the evidentiary support for the penalty.\textsuperscript{161} The FAA also sends along a drafted complaint with the Letter of Referral.\textsuperscript{162}

\section*{IV. THE SOLUTION}

The two key problems present in the current enforcement process are (1) a lack of adequate notice to satisfy due process and (2) confusion amongst the stakeholders regarding who will solve the problem. Both problems could be resolved by a schedule of violations that catalogues common unruly behavior, assigns a penalty range, and designates an enforcement agency broken into a tiered structured of offenses. The current enforcement schedule promulgated by the FAA lacks clarity and fails to assign responsibility for the infractions between the two agencies. Instead, the FAA enforcement policy punts responsibility to the DOJ when the FAA wants to seek fines in excess of what is permitted.\textsuperscript{163} The recommended schedule better identifies passenger’s unruly behavior, directly assigns an appropriate penalty range consistent with regulatory and statutory provisions, and assigns responsibility to one of the agencies.

\textsuperscript{156} See Muntean, supra note 19.
\textsuperscript{157} See, e.g., Turner, 2021 WL 4302645, at *2.
\textsuperscript{158} FAA Compliance and Enforcement Program, FAA Order No. 2150.3C, at 8-26 (Sept. 18, 2018); see also 14 C.F.R. § 13.16(b) (2022).
\textsuperscript{159} See 14 C.F.R. § 13.16.
\textsuperscript{160} FAA Compliance and Enforcement Program, FAA Order No. 2150.3C, at 8-26 (Sept. 18, 2018).
\textsuperscript{161} Id.
\textsuperscript{162} Id. at 8-27.
\textsuperscript{163} 14 C.F.R. § 13.16(b).
A. The Schedule

The proposed tiered schedule breaks down unruly passenger offenses, penalty ranges, and agency assignments by scheduling them into six tiers. Recall that the unruly passenger regulations require that “[n]o person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember’s duties aboard an aircraft being operated.”164 Within this language, the most inconsequential infraction would include a passenger interfering with a crewmember. Largely, these violations are an inconvenience for the crewmembers; however, they do not egregiously compromise the safety of the aircraft or other passengers. In this Comment’s proposed schedule, this offense would be scheduled as a Tier 1 offense. Tier 1 violations would be handled by the FAA’s violation process and initiated by a notice of proposed fines. Violators would have an opportunity to request a formal hearing. These offenses would then be discharged with fines ranging up to $15,000 depending on the effects of the interference. For example, if the interference merely includes verbal harassment requiring a flight attendant to issue a verbal reprimand to the passenger, the fine should be less than the fine for a passenger’s harassment that requires the attendant’s constant supervision and attention. The FAA’s enforcement measures for proposed Tier 1 correspond with its authority under 14 C.F.R. §§ 91.111, 125.580, 125.328, and 135.120.165

Tier 1 would also make simple noncompliance with crewmember instructions an offense. While noncompliance is something of a subset of different regulations, the thrust of the noncompliance offense would be failure to abide by crewmember instructions issued during the preflight safety instructions. As will be mentioned later, these safety instructions should be amended to include the unruly passenger enforcement schedule and penalties.166 Noncompliance is similar in many ways to interference, with the caveat that interference draws crewmembers away from their duties. For example, a passenger engages in noncompliance by ignoring a crewmember’s instruction to take his seat when the captain has turned on the seatbelt sign as the plane hits turbulence. Importantly, proposed Tier 1 noncompliance offenses should not necessarily stand for

164 14 C.F.R. §§ 91.11, 121.580, 135.120, 125.328 (2022).
165 See 14 C.F.R. §§ 91.111, 125.580, 125.328, 135.120.
166 See discussion infra Section IV.B.
the idea that a single act of noncompliance should constitute grounds for a penalty. In practice, Tier 1 noncompliance offenses should be enforced when a passenger repeatedly fails to comply with crewmember instructions. Continuing with the example from before, consider that the same passenger who ignored the fasten seat belt sign is now refusing to put on their mask. If a crewmember has repeatedly issued instructions to a passenger, and that passenger has ignored them, then the crewmember may refer the case as a Tier 1 offense. Note also that noncompliance is the basis for many other unruly passenger offenses, since unruly passengers are often warned by crewmembers to stop their unruly behavior before the behavior escalates to something more severe. Thus, noncompliance should be considered implicitly incorporated into the later tiers.

Tier 2 offenses would include threats made to crewmembers and intimidation targeting crewmembers. Also included in Tier 2 would be threats of sexual assault by an unruly passenger. These are more serious than off-handed interference because here a passenger has expressed a willingness to harm a crewmember. For example, on Frontier Airlines flight 1335, an unruly passenger had just woken up from a nap, claimed he was from the Native American tribe “Slapahoe,” and began threatening to slap and beat people, including crewmembers, to death—this would constitute a Tier 2 offense. An important exception would apply if the passenger uses a weapon to intimidate a crewmember; then the offense would be escalated to a Tier 6 for prosecution by the DOJ pursuant to 49 U.S.C. § 46504. Tier 2 offenses would still be governed by the FAA, and those offenders could be fined $15,000–$37,000 under 14 C.F.R. §§ 91.111, 125.580, 125.328, and 135.120.

Tier 3 begins a new type of offense: assault. While assault is listed by FAA regulations as a proscribed behavior, assault-like offenses should instead be handled exclusively by the DOJ. While this might contradict the language of the FAA regulations, the reality is that having two agencies attempt to distinguish between an assault meriting only a fine versus an assault deserving of criminal prosecution will leave the agencies in their

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169 See 14 C.F.R. §§ 91.111, 125.580, 125.328, 135.120.
current state of confusion. Instead, it would be better to have DOJ take the lead because it has the greatest range of available remedies.

Therefore, Tier 3 would include assaults caused by incidental contact by the unruly passenger to another passenger. This could be a result of the unruly passenger thrashing about in their seat or arguing with someone else where they accidentally contact the other passenger. The assault requires actual contact to be made, not the threat of contact or near contact. Incidental contact may be difficult to distinguish from intentional contact, but incident reporters (such as flight attendants) should use their best judgment to discern between the two. The DOJ’s purview of Tier 3 stems from its authority under 49 U.S.C. § 46318. Currently, the maximum penalty permitted under this statute is a civil fine of $35,000; however, this should be increased to at least $5,000 more than the $37,000 maximum-allowed FAA fine. Thus, this penalty range would cover civil penalties of $37,000–$42,000. This would ensure that the criminal penalty is given the appropriate weight it deserves within the schedule.

Tier 4 takes it the next step up and covers assaults caused by intentional contact by an unruly passenger to another passenger. Intentional contact includes any situation where it is the violator’s conscious objective to strike someone else and the violator successfully does so. For example, where an unruly passenger is yelling at another passenger who has refused to put on his mask and punches the passenger as he yelled back at her. Similar to Tier 2 incidental contact, there should be no violation in this Tier if the violator fails to actually contact the other passenger. Tier 4 also stems from 49 U.S.C. § 46318, which has a maximum penalty of $35,000 in civil fines. If, as recommended, this is increased, then the maximum fine would reach upwards of $40,000. Ideally, the penalty range would be increased such that Tier 4 violations may be punished in the range of $42,000–$50,000. Further, because this is a level above Tier 3

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171 FAA, supra note 5.
penalties due to the intentional nature of the conduct, Tier 4 offenses deserve greater penalties than those in Tier 3.

Tier 5 and Tier 6 both cover assaults against crewmembers. While it is true that everyone aboard the plane is deserving of protection from assault by unruly passengers, the current unruly passenger framework emphasizes protection of crewmembers. The proposed schedule should also emphasize the same protections, which is why the greatest penalties would be associated with assaults against crewmembers.

Tier 5 covers assaults caused by incidental contact to a crewmember. Crewmembers are defined by regulation as “a person assigned to perform [a] duty in an aircraft during flight time.” Similar to the Tier 3 offenses, Tier 5 would prohibit incidental contact. This would cover an instance where an unruly passenger, while standing in the aisle, accidentally elbows a flight attendant in the nose as she angrily shakes her fist in the face of another passenger. Though the unruly passenger did not intend to strike the flight attendant, the incidental contact to a crewmember would designate this conduct as a Tier 5 offense. As a means of balancing the statutory policy of emphasizing protection of crewmembers while still recognizing the gravity of the Tier 4 intentional assault offenses, the penalty range for Tier 5 offenses should also be $42,000–$50,000.

Tier 6 would include assault by intentional contact against a crewmember or intimidation of a crewmember with a weapon. Tier 6 would also prohibit sexual assault by unruly passengers against crewmembers or other passengers. A Tier 6 offense would occur where an unruly passenger, who has repeatedly ignored flight attendant instructions, punches a flight attendant, knocking out two of their teeth. Additionally, a Tier 6 offense would occur where an unruly passenger tries to break a champagne bottle and brandishes a plastic fork against a flight attendant. These offenses are the most severe unruly passenger

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174 See 14 C.F.R. §§ 91.11, 121.580, 135.120, 125.328; 49 U.S.C. § 46504.
behavior, and the DOJ should pursue incarceration, maximum fines, or no-fly-list remedies.

In addition to this tiered structure of offenses, regulators should include a “plus penalty” when an offense is committed while a passenger is intoxicated. This could be included as a way of putting the influence of alcohol in check because many stakeholders have flagged alcohol usage as a key catalyst for unruly passenger behavior. The alcohol plus penalty would be an additional fine to be levied on top of any violation. Charging alcohol usage as a plus penalty would ensure that fines remain below the current ceiling of $37,000 because the ceiling limits the fines levied per offense. In effect, charging alcohol as a separate offense would allow for the regulators to seek maximum fines for the offense and tack on additional fines for the intoxication. Importantly, regulators will need to clearly define “intoxication” to ensure the plus penalty is not too broad. One drink surely does not lead to intoxication, and it would be inappropriate for a Tier 1 unruly passenger who has had a single drink to be subject to both the offense fines and the plus penalty fines.

Further, it is critical to note that nothing within this schedule prevents enforcement teams from engaging in negotiations with violators to work out deals. The schedule does not require that an FAA enforcement team impose the maximum fine for a given tier when the passenger has agreed to pay the fine rather than pursue adjudication, and it does not prohibit the DOJ from imposing a fine rather than seeking incarceration.

### B. Due Process and Reporting

The creation and enactment of this proposed enforcement schedule is not enough to solve the problems mentioned above. In addition to the schedule’s implementation, it needs to be widely published to passengers to ensure proper notice of the proscribed behavior, penalties, and enforcement agency. Three channels immediately stand out as important media for their exposure to passengers: air carrier carriage agreements, flight attendant preflight instructions, and safety materials in seatback pockets.

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Air carrier carriage contracts govern all ticket sales for commercial flights. In these carriage contracts, the carriers state relevant policies governing cancellations, fares, baggage, and most importantly, passenger behavior. Current carriage contracts include proscribed behavior even beyond that of statutes and FAA regulations: If passengers violate the rules of conduct, the air carriers reserve the right to refuse to transport those passengers or remove them from the aircraft.

Flight attendant preflight instructions are required by 14 C.F.R. § 121.571. While the airlines themselves provide supplemental information about services specific to their flights, regulations prescribe certain statements that must be included in flight attendants’ preflight instructions, such as the following: “Federal law prohibits tampering with, disabling, or destroying any smoke detector in an airplane lavatory; smoking in lavatories;” and smoking in the cabin. These instructions are the most direct form of communication between the stakeholders and passengers. Flight attendants explain governing policies, including FAA regulations, criminal statutes, and air carrier policies all within one monologue. It would be most appropriate then to incorporate notice about penalties for unruly passenger behavior into flight attendants’ preflight instructions.

As a means of further supplementing flight attendants’ preflight instructions, air carriers should include pamphlets along with the seatback safety-information card and drink menu containing the schedule of unruly passenger offenses. Passengers would then have the opportunity to review, in a single, convenient place, the rules governing liability for unruly passenger behavior and which agency is expected to bring enforcement actions.

In a final note, this proposed process would require close partnership with flight crews, specifically flight attendants. The system would be most successful if a consistent reporting proce-

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180 See, e.g., Delta, supra note 179.

181 Id.

182 14 C.F.R. § 121.571 (2022).

183 See id. § 121.571(a)(1)(i).

184 See id. § 121.571(a).

185 See id. § 121.571(b).
Pursuant to the implementation of the previously outlined protocol, a reporting system was implemented aboard all aircraft. The reporting system could be built into software accessible by crewmembers during the flight, where they could easily identify the applicable tiered offense and report a narrative of what happened on board. The reporting system would ideally be able to communicate with FBI enforcement on the ground, so they would be ready to meet the plane at the gate. Implementation of this reporting process would require additional training for crewmembers; however, this would be an invaluable tool for crewmembers as they begin to fight back against the unruly passenger crisis.

V. CONCLUSION

There have been recent advances in the prosecution of unruly passenger cases. The DOJ has announced its intention to focus on prosecuting unruly passenger cases. Additionally, the FAA and DOJ have developed an information sharing protocol to fast-track cases to the FBI for investigation (though there is little information about this process). However, these measures alone are not enough. Currently, there are critical deficiencies in due process attributable to the lack of fair notice that passengers receive about the prohibition against unruly behavior. The little bit of information that exists about unruly passenger enforcement does not adequately explain to passengers the type of behavior that is considered unruly, the enforcement agency that will be responsible for issuing a violation, or the civil and criminal penalties associated with different types of behavior. The best means to remedy this inadequacy is (1) to adopt a schedule that clearly outlines the types of prohibited behavior, the responsible enforcement agency, and the expected penalties associated with different prohibited behaviors; and (2) to publish this schedule in multiple, high-visibility places for passengers to find. The implementation of this two-part strategy will help to provide adequate notice of the law for passengers, streamline prosecutions due to the clear delegation of enforcement responsibilities, and clarify the penalties beyond the current four-step enforcement process.


187 See Villegas, supra note 79.
In conjunction with this proposed enforcement protocol, Congress will need to ensure the FAA and DOJ have the appropriate resources they need to prosecute unruly passenger cases. Though the proposed enforcement protocol will help remove some of the roadblocks in the current system, the influx of cases still means that agency resources are spread thin. An increase in appropriations may help agencies acquire additional enforcement personnel and equipment to further improve enforcement. Additionally, as noted in the discussion on the proposed Tier 5 and Tier 6 offenses, Congress needs to amend 49 U.S.C. §§ 46504 and 46318 to make the maximum penalty for these statutes at least $40,000.\textsuperscript{188} As it stands, the current maximum criminal penalty is less than the new maximum civil penalty imposed by the FAA.\textsuperscript{189} Because these are criminal statutes, their maximum penalties should be higher than the mere civil penalties imposed by the FAA.

As a final note, while the current influx of unruly passenger cases can be largely attributed to COVID-19 precautions, the influx has merely shown that the current system is not prepared to sustain a high volume of unruly passenger cases. Although the COVID-19 pandemic will eventually abate,\textsuperscript{190} there is the likelihood that some other catalyst will once again prompt an influx of unruly passenger behavior. Thus, it is critical for the relevant unruly passenger enforcement agencies to devise an efficient enforcement framework now to prepare for future influxes.

\textsuperscript{188} See discussion supra Section IV.A; see also 49 U.S.C. §§ 46318, 46504.

\textsuperscript{189} See 49 U.S.C. §§ 46318, 46504.

## APPENDIX A – PROPOSED SCHEDULE

<table>
<thead>
<tr>
<th>Tier</th>
<th>Behavior</th>
<th>Penalty</th>
<th>Agency</th>
<th>Statute/Regulation</th>
</tr>
</thead>
</table>
| Tier 1 | Noncompliance  
OR Interference                                           | $0–$15,000       | FAA          | 14 C.F.R. § 91.11  
14 C.F.R. § 125.580  
14 C.F.R. § 125.328  
14 C.F.R. § 135.120 |
| Tier 2 | Threat or  
Intimidation                                                  | $15,000–$37,000  | FAA          | 14 C.F.R. § 91.11  
14 C.F.R. § 125.580  
14 C.F.R. § 125.328  
14 C.F.R. § 135.120 |
| Tier 3 | Incidental  
Assault of a  
Passenger                                                   | $37,000–$42,000  | DOJ          | 49 U.S.C. § 46318 |
| Tier 4 | Intentional  
Assault of a  
Passenger                                                   | $42,000–$50,000  | DOJ          | 49 U.S.C. § 46318 |
| Tier 5 | Incidental  
Assault of a  
Crewmember                                                  | $42,000–$50,000  | DOJ          | 49 U.S.C. § 46504 |
| Tier 6 | Intentional  
Assault of  
Crewmember  
OR Sexual  
Assault Against  
Crewmember or  
Passenger  
OR Intimidation of  
Crewmember  
with a Weapon    | $50,000 +  
Incarceration +  
Federal No-Fly  
List                                                       | DOJ          | 49 U.S.C. § 46504 |
## Table of Violations

<table>
<thead>
<tr>
<th><strong>Interference with Crewmembers and Passenger Violations</strong></th>
<th><strong>Severity</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Using a laser to interfere with a crewmember</td>
<td>Severity 3</td>
</tr>
<tr>
<td>(2) Interference with a crewmember</td>
<td>Severity 2</td>
</tr>
<tr>
<td>(3) Physical assault of or threat to physically assault a flight or cabin crewmember under 49 U.S.C. § 46318</td>
<td>Severity 3</td>
</tr>
<tr>
<td>(4) Physical assault of or threat to physically assault a person assigned to perform a law enforcement function on a flight under 49 U.S.C. § 46318</td>
<td>Severity 3</td>
</tr>
<tr>
<td>(5) Physical assault or threat to physically assault individual other than a crewmember under 49 U.S.C. § 46318</td>
<td>Severity 2</td>
</tr>
<tr>
<td>(6) Acting in a manner that poses imminent threat to safety of aircraft or collective safety of other individuals on aircraft under 49 U.S.C. § 46318</td>
<td>Severity 3</td>
</tr>
<tr>
<td>(7) Smoking on aircraft</td>
<td>Severity 3</td>
</tr>
<tr>
<td>(8) Tampering with smoke detector</td>
<td>FAA Order No. 2150.3C, at 9-29 (Sept. 18, 2018).</td>
</tr>
<tr>
<td>(9) Failure to fasten seat belt/harness or failure to occupy approved seat or berth when required</td>
<td>Severity 2</td>
</tr>
<tr>
<td>(10) Unauthorized operation of a portable electronic device</td>
<td>Severity 1</td>
</tr>
<tr>
<td>(11) Drinking alcoholic beverage not served by carrier</td>
<td>Severity 1</td>
</tr>
</tbody>
</table>
### Culpability Level

<table>
<thead>
<tr>
<th>Culpability</th>
<th>Definition</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Careless</em></td>
<td>A violation is careless when the violator’s conduct falls below the standard of care expected of a reasonable person or certificate holder in the same or similar circumstances, but is not reckless or intentional. The statutes and regulations enforced by the FAA set the minimum acceptable level of conduct. Accordingly, all violations are at least careless.</td>
<td>FAA Order No. 2150.3C, at 9-3 (Sept. 18, 2018).</td>
</tr>
<tr>
<td><em>Reckless</em></td>
<td>A violation is reckless when the violator’s conduct demonstrates a gross disregard for or deliberate indifference to safety or a safety standard.</td>
<td>FAA Order No. 2150.3C, at 9-3 (Sept. 18, 2018).</td>
</tr>
<tr>
<td><em>Intentional</em></td>
<td>A violation is intentional when the violator’s conduct is deliberate and the violator knows that the conduct is contrary to statute or regulation, or is otherwise prohibited.</td>
<td>FAA Order No. 2150.3C, at 9-3 (Sept. 18, 2018).</td>
</tr>
</tbody>
</table>

### Sanction Matrix

<table>
<thead>
<tr>
<th>Severity Level</th>
<th><em>Careless</em></th>
<th><em>Reckless or Intentional</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>Severity Level 1</td>
<td>Low</td>
<td>Moderate</td>
</tr>
<tr>
<td>Severity Level 2</td>
<td>Moderate</td>
<td>High</td>
</tr>
<tr>
<td>Severity Level 3</td>
<td>High</td>
<td>Maximum</td>
</tr>
</tbody>
</table>
### Sanction Ranges Table

<table>
<thead>
<tr>
<th>Violation</th>
<th>Low</th>
<th>Moderate</th>
<th>High</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual (violations under 49 U.S.C. § 46301(a)(5)(A))</td>
<td>$1,000–$2,500</td>
<td>$2,500–$5,500</td>
<td>$5,500–$8,000</td>
<td>$8,000–$13,066</td>
</tr>
<tr>
<td>Individual Interfering with a Crewmember</td>
<td>$1,000–$4,500</td>
<td>$4,500–$7,500</td>
<td>$7,500–$10,500</td>
<td>$10,500–$13,066</td>
</tr>
<tr>
<td>Passenger (posing imminent threat to safety of aircraft or the collective safety of other individuals under 49 U.S.C. § 46318)</td>
<td>N/A</td>
<td>N/A</td>
<td>$10,000–$20,000</td>
<td>$20,000–$34,731</td>
</tr>
<tr>
<td>Passenger (physical assault or threat of physical assault of crew member or other individual on aircraft under 49 U.S.C. § 46318)</td>
<td>N/A</td>
<td>$1,000–$5,000</td>
<td>$5,000–$10,000</td>
<td>$10,000–$20,000</td>
</tr>
<tr>
<td>Passengers (other violations)</td>
<td>$1,000–$3,500</td>
<td>$3,500–$6,500</td>
<td>$6,500–$9,500</td>
<td>$9,500–$13,066</td>
</tr>
</tbody>
</table>